Plumbers Local Union No. 1, 49 OCB 27 (BCB 1992) [Decision No. B-27-92 (Arb)], aff'd, City of New York v. Plumbers Local Union No. 1, No. 43764/92 (Sup. Ct. N.Y. Co. Aug. 13, 1993), aff'd, 204 A.D.2d 183, 612 N.Y.S.2d 128 (1st Dep't 1994), leave denied, 85 N.Y.2d 803, 624 N.Y.S.2d 373 (1995).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,
Petitioner,

DECISION NO. B-27-92
DOCKET NO. BCB-1349-90
(A-3612-90)

-and-

PLUMBERS LOCAL UNION NO. 1 OF
BROOKLYN AND QUEENS,
Respondent.
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DECISION AND ORDER

On December 14, 1990, the City of New York ("City") filed a petition challenging the arbitrability of a grievance brought by Plumbers Local Union No. 1 of Brooklyn and Queens ("Union") . The Union filed an answer on May 6, 1991; the City filed a reply on September 12, 1991.

BACKGROUND

Todd Zimmerman, the grievant, is a civil Service plumber employed by the Department of Sanitation ("DOS"). The grievant's title is covered under §220 of the labor law. In a Step II grievance dated November 3, 1989, the Union objected to a provisional employee performing the duties of a Supervisor of Plumbers. In a decision dated February 7, 1990, the Department of Sanitation denied the grievance. By letter dated February 21, 1990, the Union appealed the Step II decision, grieving "the Department's failure to appoint a Civil service Supervisor of Plumbers for the Unit, as well as the Department's improper use of a Provisional Supervisor of Plumbers to perform that supervisory function." By letter dated May 10, 1990, the Union indicated

there had been no response by the Department at Step III and requested a Step IV determination. In an opinion dated August 24, 1990, the review officer denied the grievance, finding that the Rules and Regulations of the Personnel Director are not rules and regulations of the agency by whom the grievant is employed.

On November 7, 1990, the Union filed a request for arbitration alleging the following:

Whether the New York City Department of Sanitation ("the Department") has (1) violated the Labor Law §220 determination covering bargaining unit employees, (2) violated, misinterpreted or misapplied the written rules or regulations of the Department and/or the written rules or regulations of the New York City Department of Personnel, as incorporated by and applied to the Department, and/or (3) assigned a bargaining unit employee to duties substantially different from those stated in his job classification by any of the following acts or omissions: (a) failing to appoint a civil service Supervisor of Plumbers for the Department's Bureau of Waste Disposal, Facility Maintenance Unit, (b) filling the vacant Civil Service Supervisor of Plumbers position with a provisional employee who failed the examination for that position, (c) failing to compensate the aforesaid provisional employee for the higher-rated supervisory duties that he has been performing, and (d) requiring the grievant and other bargaining unit members to work under the supervision of Supervisors of Mechanics rather than a Supervisor of Plumbers.

The Union claims a violation of Rules 4.7.1., 4.7.2., and 4.7.3. of the Rules and Regulations of the New York City Personnel Director[1] and of the consent

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[1] The Department of Personnel **Rules and Regulations at issue are**, as follows:

4.7.1. General Provisions
(a) The provisions of this section shall apply to the certification of eligible lists by the city personnel director or, in the case of classes of positions unique to an agency, the certification of eligible lists for such classes by the agency head.
(b) Appointments or promotions shall be made from the established list most nearly appropriate for the position to be filled, as determined by the city personnel director.
(c) Appointment or promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the city personnel director or the head of the certifying agency, as the case may be, as standing highest on such established list who are qualified and willing to accept such appointment or promotion. Where applicable, such selection shall be made as provided for in paragraph 4.4.12 of these rules.
(d) The rating of each eligible shall be stated in the certification.
(e) The agency head may review the examination application and records of each certified eligible at the office of the department of personnel.

(continued...)

determination of the New York City Comptroller covering Plumbers. As a remedy, the Union requests the appointment of a Civil Service Supervisor of Plumbers to the Department's Bureau of Waste Disposal, Facility Maintenance Unit; the

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[1](...continued)

4.7.2. Existing Eligible Lists

(a) When an eligible list has been in existence for less than one year and contains the names of less than three eligibles willing to accept appointment, and a new list for the same positions or group of positions is established, the names of the eligibles remaining on the old list shall have preference in certification over the new list until such old list is one year old. During such period such names shall be certified along with enough names from the new list to provide a sufficient number of eligibles from which selection may be made.

(b) Where an old list which has been in existence for one year or more is continued upon the establishment of a new list which contains less than three names, the city personnel director may certify or may authorize the head of the certifying agency to certify the names on the old list along with enough names from the new list to provide a sufficient number of eligibles from which selection may be made.

(c) Agency and city-wide promotion eligible lists shall not be certified for an agency until after the promotion unit eligible lists for that agency, if any, have been exhausted.

4.7.3. Additions to Certification

(a) If there be more than one position to be filled, or if the city personnel director or certifying agency head has reason to anticipate declinations, or where the certification is to be completed as set forth in this paragraph, the city personnel director or certifying agency head shall supplement the certification for the selection by the addition of the names of those next in order on the established list. However, selection shall be made singly and in each case from the three highest names remaining qualified and eligible and willing to accept appointment or promotion, or f rom. among those eligibles as provided for in paragraph 4.4.12 of these rules, as the case may be.

(b) On notification from an agency head that one or more eligibles have declined appointment and on receipt by the department of personnel from such officer of any such declination in writing, or of evidence of the failure of any such eligible to respond to a notice properly sent, such certification shall be completed by the addition of the name or names of the eligibles next in order of standing on the list.

(c) Upon receipt by the head of a certifying agency of a written declination of appointment by one or more eligibles named in a certification or of evidence of the failure of any such eligible to respond to a notice properly sent, such certification shall be completed by the addition of the name or names of the eligibles next in order of standing on the list.

(d) Where objection to the certification of- one or more eligibles has been duly made by an agency head **and the** city personnel director sustains such objection, the certification shall be completed by the addition of the name or names of the eligibles next in order of standing on the eligible list.

cessation of the Department's practice of using provisional employees and/or Supervisor Mechanics to supervise plumbing work; and the compensation of a provisional employee who was assigned to perform higher-rated supervisory duties with back pay and benefits.

POSITIONS OF THE PARTIES

City's Position

In its first challenge to arbitrability, the City contends that the Union may not grieve a violation of the Rules and Regulations of the City Personnel Director. Noting that Executive Order No. 83, §5.b defines a grievance as a violation of the written rules or regulations of the mayoral agency by whom the grievant is employed, the City argues that the Rules and Regulations of the Department of Personnel (11DOP11) , which the Union claims have been violated, are not written rules or regulations of the Department of Sanitation, where Mr. Zimmerman is employed. Furthermore, the City contends that the Union has not claimed a violation of any written rule or regulation of the Department of Sanitation. claiming that Decision No. B-42-80 holds that a violation of agency procedures may be preempted by the Rules and Regulations of the City Personnel Director, the City argues that since the Union has not alleged a violation of a Departmental rule or regulation, the "Rules and Regulations of the City **Personnel Director cited** by the Respondent stand alone." Accordingly, the city insists, "these Rules and Regulations are not grievable. 11 Finally, the City argues that "the application of the Rules and Regulations of the City Personnel Director by the Department in no

way transforms or converts them to rules and regulations of the Department."

In its second challenge to arbitrability, the City contends that the "arbitral setting is not the appropriate forum for the redress of violations of the Rules and Regulations of the City Personnel Director." The City claims that "pursuant to Chapter 35 of the New York City Charter and the Rules and Regulations of the city Personnel Director, the City Personnel Director has the jurisdiction and the authority to redress claims alleging violations of its rules."

In its third challenge to arbitrability, the City argues that "there is no connection between the acts complained of and the Comptroller's Determination and/or Executive Order No. 83.11 The City notes that the Union does not claim that a specific provision of the Comptroller's Determination has been violated. Contending that 11[t]he Comptroller's Determination covering Plumbers is merely a compromise and settlement of rates of wages and supplemental benefits, and is silent as to appointments, promotions and outof-title work," the City argues that there is no nexus between it and the instant grievance. Similarly, the City claims that Executive Order No. 83 S 5.b(C) permits only the grievant to bring an out-of-title claim and, accordingly, that "the grievant is precluded from bringing claims of **out-of-title work performed by other** employees."

In its fourth challenge to arbitrability, the City contends that the instant grievance "falls within the scope of management's statutory rights and has not been limited by contract." citing §12-307(b) of the New York City Collective Bargaining Law (11NYCCBL11) and Decision No. B-10-71, the City contends that, in filling a vacancy in the title of Supervisor of Plumbers, it was acting within its managerial prerogative to determine the methods, means and personnel by which its operations are conducted. Moreover, the City notes that "there is nothing in the Comptroller's Determination which, in any way, limits or modifies management's right to utilize supervisors of mechanics

to supervise plumbers or select personnel to fill vacancies such as Supervisors of Plumbers." Accordingly, the City contends that since its right to fill vacancies is not limited by the contract, the Union's request for arbitration should be denied.

In its fifth challenge to arbitrability, the City contends that 11[tjhe grievant does not have a right to be promoted to the position of Civil Service Supervisor of Plumbers." The City argues that the Appellate Division has held that "eligibles on civil service lists do not have a vested right to an appointment [citations omitted]."

In its reply, the City distinguishes Decision No. B-13-77, cited by the Union in its answer for the proposition that DOP Rules and Regulations, like Executive **Orders, may be grieved under** E.O. 83 S5 (b) (B) - According to the City, 11 [s] ince Executive Orders are covered by the NYCCBL and the Board has jurisdiction to interpret the provisions of NYCCBL, the Board, in Decision No. B-13-77, interpreted the definition of grievance to include alleged violations of Executive Orders." The City contends that DOP Rules and Regulations may not be grieved under E.O. 83 §5(b) (B) since DOP Rules and Regulations are not similarly covered by the NYCCBL. Moreover, the City argues that in Decision No. B-13-77, "the Board was concerned that an agency's failure to implement, or comply with mayoral directives would leave grievants without a forum to redress agency violations of such directives." According to the City, however, "this is not the case in the instant matter because the appropriate forum is before the DOP, which has the jurisdiction and authority to redress claims alleging violations of its rules." Similarly, the City distinguishes Decision No. B-7-71, also cited by the Union in support of its claim that DOP Rules and Regulations may be grieved under E. 0. 83 S5 (b) (B) . The City notes that in Decision No. B-7-71 the contract allowed employees to grieve violations of written rules "applicable" to the agency involved, whereas E.O. 83 allows employees to grieve violations of written rules "of" the agency involved. This difference, argues the City, limits the availability of the **grievance**

procedure in the instant case to violations of DOS rules and regulations.

Furthermore, the City argues that the Union's claim that DOS has required bargaining unit members to work under the supervision of employees having no expertise in the plumbing trade does not constitute a grievance within the meaning of E.O. 83 §5(b) (C) . The City contends that the Union is "not claiming that [its members] were assigned duties substantially different from those stated in their job specification" as required by E.O. 83 S5(b)(C). Moreover, the City notes that the request for arbitration does not allege that the grievant is performing duties substantially different from those stated in his job specification. As to the Union's claim that Mr. Gallagher is entitled to compensation under the Comptroller's Determination for working out-of-title, the City argues that since Mr. Gallagher is not the grievant, this claim may
not be submitted to arbitration.

Union's Position:

The Union first explains the essential facts and circumstances surrounding this dispute. The Union explains that the grievant, Todd Zimmerman, is a Civil Service Plumber employed in the Department of Sanitation's Bureau of Waste Disposal, Facility Maintenance Unit. The Union notes that in 1986, the Department of Sanitation appointed Neil Gallagher, a civil Service Plumber, to serve provisionally as Supervisor Plumber for the Facility Maintenance Unit, but that when a subsequent examination was given for the position of Civil Service Supervisor Plumber and a promotional list was certified, Mr. Gallagher had failed. The Union alleges that in early 1989, the Department of Sanitation removed Mr. Gallagher from the provisional Supervisor Plumber position and replaced him with David Hogenson, a Civil Service Plumber who had ranked first on the promotional list for the Civil Service Supervisor Plumber position. However, according to the Union, in June 1989, Mr. Hogenson decided not to keep the Civil Service Supervisor Plumber

position and returned to a Civil Service Plumber position. The Union contends that the Department of Sanitation then declined to appoint a Civil Service Supervisor Plumber from the promotional list, choosing instead to return Mr. Gallagher to the supervisory position in provisional status, even though he had failed the examination. The Union notes that since June 1989, Mr. Gallagher has supervised the work of Mr. Zimmerman, the grievant, and other Civil Service Plumbers in the Facility Maintenance Unit. The Union contends that the promotional list for Civil Service Supervisor Plumbers remains in existence and that Mr. Zimmerman now ranks first on that list. Moreover, the Union contends that the Department of Sanitation has not compensated Mr. Gallagher for performing the higher-rated supervisory duties.

In response to the City's first challenge to arbitrability, the Union contends that the acts complained of constitute grievances within the meaning of E.O. 83 §S(5)(b)(A)(ii), 5(b)(B) and 5(b)(C).[2] The union explains that its request for arbitration contains four acts or omissions by DOS: (1) failing to appoint a Civil Service Supervisor Plumber for the Department of Sanitation's Facility Maintenance Unit; (2) filling the vacant Civil Service Supervisor Plumber position with a provisional who failed the examination for that position; (3) failing to compensate the aforesaid provisional employee for the higher-rated supervisory duties that he has been performing; and (4) requiring the grievant and other bargaining unit members to work under the supervision of Supervisor

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[2] E.O. 83 S5(b) defines a "grievance" as follows:

> (A) a dispute concerning the application [or] interpretation of the terms of (i) a **written, executed collective** bargaining agreement; or (ii) a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment; (B) a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment; and (C) a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification. The term "grievant" shall include all grievants in the case of a group grievance.

Mechanics, rather than a Supervisor Plumber.

The Union contends that DOS's failure to appoint a civil Service Supervisor Plumber and DOS's assignment of an unqualified provisional to perform supervisory duties constitute "a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed," within the meaning of E.O. 83 §5(b)(B). The Union argues that the personnel actions at issue violate several provisions of the Department of Personnel's Rules and Regulations, which are applicable to and binding upon DOS and all other mayoral agencies. Citing Decision Nos. B-13-77 and B-7-71, the Union states that "the Board has held that rules and regulations which apply to a mayoral agency, but which were not promulgated by that agency, constitute 'rules or regulations of the mayoral agency by whom the grievant is employed, I within the meaning of E.0 83 S5(b)(B), and therefore are subject to arbitration." Insisting that the rules and regulations at issue here clearly apply to DOS, the Union quotes DOP Rule II, Section V, 2.5., which states 11[t]hese rules shall apply to all offices and positions in the classified service of the City"[3] and cites Decision No. B-16-71. Accordingly, the Union contends that the DOP Rules and Regulations at issue are "written rules or regulations of the mayoral agency by whom the grievant is employed," within the meaning of E.O. 83 S5(b)(B) and that the dispute over DOS's breach of those rules is arbitrable.

The Union notes that E.O. 83 S5, "unlike the grievancearbitration provisions of certain collective bargaining agreements between labor organizations and the City, does not expressly exclude DOP Rules and Regulations from the definition of 'grievance."' Accordingly, the Union contends that any doubts concerning the arbitrability of DOP Rules and Regulations under E.O. 83 should be resolved in favor of coverage.

The Union dismisses the City's argument that the instant dispute is not

[3] In its answer, the Union mistakenly cites "DOS Rule II, Section IV, 2.511 as the source of the quoted language.

arbitrable because DOP's Rules and Regulations "stand alone" and "preempt" agency procedures and distinguishes Decision No. B-42-80, cited by the City for that proposition. The Union explains that "[it] does not contend, as the grievant did in BCB Decision No. B-42-80, that an agency has violated an internal rule that has been superseded by a DOP rule." Instead, the Union explains, it contends that DOS has violated DOP Rules and Regulations which apply to DOS, and which therefore constitute "written rules or regulations of the mayoral agency by whom the grievant is employed," within the meaning of E.O. 83 §5(b)(B). Similarly, the Union contends that the City's argument that "the application of the Rules and Regulations of the City Personnel Director by the Department in no way transforms or converts them to rules and regulations of the Department" is "simply wrong" and inconsistent with Board precedent.

The Union contends that its claim that DOS has improperly required bargaining unit members to work under the supervision of Supervisor mechanics, not a Supervisor Plumber, constitutes a dispute over "a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification," within the meaning of E. 0. 83 S5 (b) (C) . The Union explains that this is so "because the job classifications for Plumber ... and Supervisor Plumber ... can be fairly read to provide that Plumbers must be supervised by Supervisor Plumbers, not by employees in other trades."

Similarly, the Union contends that its claim that DOS has failed to compensate a provisional employee for performing higher-rated supervisory duties constitutes a dispute over "a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification," within the meaning of E. 0. 8 3 §5 (b) (C) "because the job classification for Plumber ... does not list supervisory duties (except as to Plumbers I Helpers).The Union also argues that this claim constitutes a dispute over the application of the Comptroller's Determinations, within the meaning of E.O. 83 55(b) (A) (ii) , "because those Determinations require

payment of certain wages and fringe benefits to employees performing the work of Supervisor Plumbers" and that, in the instant case, those wages and fringe benefits were not paid to the affected bargaining unit member.

In response to the City's second challenge to arbitrability, the Union contends that the authority of DOP's Personnel Director over such disputes is neither primary nor exclusive. The Union agrees that the New York City Charter and the Department of Personnel Rules and Regulations empower the Director of DOP to address personnel practices of the sort at issue here. However, the Union contends that 11(n]othing in those provisions ... requires that such matters be addressed only by the Director of DOP, or prohibits an arbitrator from addressing them under E.O. 83 S5 or some other appropriate arbitration mechanism." In fact, the Union insists, the Board has held that arbitration is an- appropriate forum to resolve disputes over such personnel practices in Decision Nos. B-13-77 and B-7-71.

In response to the City's third challenge to arbitrability, the Union contends that there is a clear nexus between the acts complained of and any or all of the following: (1) DOP's Rules and Regulations, as applied to DOS, which is grievable under E.O. 83 §5(b)(B); (2) the Comptroller's Determination, which is grievable under E.O. 83 §5(b) (A) (ii) ; (3) the prohibition against out-oftitle assignments, which is grievable under E.O. 83 S5 (b) (C) . The Union explains that there is a nexus between the Department's improper personnel practices and DOP's Rules and Regulations, since the DOP Rules at issue require mayoral agencies to make appointments from Civil Service eligible lists, and the Union claims that DOS breached those rules by failing to use an eligible list and by appointing an unqualified provisional to fill a vacant position. Similarly, the Union contends that there is a nexus between the Union's complaints concerning work assignments and the Comptroller's Determination, since the Comptroller's Determination requires that employees performing Supervisor Plumber duties be paid greater wages and fringe benefits than are paid to employees performing Plumber duties, and the

Union claims that a Plumber performing Supervisor Plumber duties was not paid at the higher supervisory rates. The Union also argues that there is a nexus between its complaints concerning work assignments and the prohibition against out-of-title work stated in E.O. 83 S5(b)(C), since that section allows employees to grieve assignments substantially different from those stated in their job_classifications, and the Union claims that bargaining unit members were given such substantially different assignments when DOS assigned a Plumber to perform Supervisor Plumber duties and assigned Plumbers to work under the supervision of Supervisor Mechanics.

As to the City's argument that the out-of-title issues raised by the *Union are* not arbitrable because the grievant, Mr. Zimmerman, does not have a right to grieve an out-of-title *assignment made* to another employee, Mr. Gallagher, the Union states that 11[t]his argument must fail ... because it ignores the fact that the *Union,* not Mr. Zimmerman, is the *complaining party* in this proceeding." Citing E.O. 83 SS 5(c) and 5(d), the *Union contends that* 11[a]s the certified representative of all employees affected by the acts complained of here, [it] has the right to grieve and arbitrate the instant dispute on behalf those employees."

In response to the City's fourth challenge to arbitrability, the *Union contends* that the City's asserted managerial prerogative is limited and subject to arbitrable challenge. Citing Decision No. B-33-88, the *Union notes* that the Board has held that, notwithstanding the managements rights provision of NYCCBL S123 07 (b) , the City does not have the unfettered right to transfer or assign employees as it sees fit. Moreover, the *Union contends* that Board Decision Nos. B-13-77 and B-16-71 recognize that City-wide rules governing civil service practices limit a mayoral agency's right to transfer or assign employees.

In this respect, the Union contends that the City's reliance on Decision Nos. B-10-71 and B-16-71 is misplaced. The Union clarifies that those decisions rested upon Section 5(c) of E.O. 52, which was repealed and

superseded by E.O. 83. The Union argues that under E.O. 83, it may arbitrate disputes over violations of personnel rules that apply to, but were not promulgated by, a mayoral agency.

In response to the City's fifth challenge to arbitrability, the Union contends that the grievance does not claim that any employee has a right to promotion, but only a right to be treated in accordance with DOP's Rules and Regulations and the Comptroller's Determinations.

DISCUSSION

The Union explains that its request for arbitration relates to four acts or omissions by DOS: (1) failing to appoint a Civil Service supervisor Plumber for the Department of Sanitation's Facility Maintenance Unit; (2) filling the vacant Civil Service Supervisor Plumber position with a provisional who failed the *examination for* that position; (3) failing to compensate the aforesaid provisional employee for the higher-rated supervisory duties that he has been performing; and (4) requiring the grievant and other *bargaining unit* members to work under the supervision of Supervisor Mechanics, rather than a Supervisor Plumber. In its petition challenging arbitrability, the City contends that this dispute is not arbitrable because: DOP's Rules and Regulations are not grievable under E.O. 83; the Director of DOP, not a contract arbitrator, is the proper authority to hear and determine the dispute; no nexus exists between the acts complained of and either E.O. 83 or the Comptroller's Determinations; the acts complained of are protected by management's statutory rights; and the grievant does not have a right to a promotion.

With respect to the Union's claim that DOS has violated E.O. 83 S§5(b)(A)(ii) and 5(b)(C) by failing to compensate a provisional employee for performing higher-rated supervisory duties, we note that the Union is asserting a grievance on behalf of an employee who was not specified in its request for arbitration as the grievant. Accordingly, there is no nexus

between this dispute and E.O. 83 §5(b) (A) (ii) ,which defines a "grievance" as "a dispute concerning the application (or] interpretation of the terms of ... a determination under Section two hundred twenty of the Labor Law affecting terms and conditions of employment," since the Union has not brought a grievance under this provision on behalf of the affected employee. Similarly, E.O. 83 S5(b)(C) defines a "grievance" as "a claimed assignment of a grievant to duties substantially different from those stated in his or her job classification [emphasis added]." Although some collective bargaining agreements broaden this definition to include an assignment of "an employee" to out-of-title work, thereby entitling is a grievant to complain of work given to other employees,[4] a union may not bring a grievance under this provision on behalf of an employee who is not the grievant.

In addition, there is no nexus between the Union's claim that DOS has improperly required bargaining unit members to work under the supervision of Supervisor Mechanics, rather than a Supervisor Plumber, and E.O. 83 §5(b) (C). The Union has not alleged any facts to support a claim that the grievant is performing out-of-title work in violation of E.O. 83 §5(b)(C).

Having found that there is no nexus between the *Union's third* and fourth claims and E.O. 83, we now address the City's challenges to arbitrability only with respect to the Union's first two claims. The Union contends that DOS's failure to appoint a Civil Service Supervisor Plumber and DOS's assignment *of* an unqualified provisional to perform supervisory duties constitute "a claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed," within the meaning of E.O. 83 S5(b)(B). The Union argues that the personnel actions at issue violate several provisions of the DOP's Rules and Regulations, which are applicable to and binding upon DOS and all other mayoral agencies.

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[4] See, for example, Decision No. B-10-92 and the cases cited therein.

In its first challenge to arbitrability the City contends that DOP's Rules and Regulations are not grievable under E.O. 83. In determining whether alleged violations of DOP Rules and Regulations may form the basis of a grievance under E.O. 83 S5(b) (B) , we note that DOP Rule II, Section V, 2.5., itself states that 11[t]hese rules shall apply to all offices and positions in the classified service of the City-" In Decision No. B-13-77, we held that an alleged violation of E.O. 4 may form the basis for a valid grievance under E. 0. 83 S5 (b) (B) . The Board stated that

> We cannot hold that an agency's failure to abide by an Executive Order of the Mayor applicable to it is not arbitrable because an Executive Order is not a rule or regulation of the mayoral agency. On the contrary, if the Mayor issues a rule in the f orm of an Executive Order applicable to all mayoral agencies, such rule becomes a rule of each mayoral agency unless a dif f erent ef f ect is specifically prescribed. It would be inconsistent, for arbitration purposes, to hold that an agency must abide by the rule as set f orth in the Executive Order, but that such rule is not a "rule or regulation of the mayoral agency" so as to preclude arbitration over an alleged violation of it.

Accordingly, we find meritless the City's argument that the Union may not grieve an alleged violation of DOP's Rules and Regulations because they are not "written rules or regulations of the mayoral agency by whom the grievant is employed" under E. 0. 83 §5 (b) (B) . Applying the reasoning of Decision No. B-13-77, we hold that rules and regulations which apply to a mayoral agency, but which were not promulgated by that agency, may constitute "rules or regulations of the mayoral agency by whom the grievant is employed" within the meaning of E.O. 83 S5(b)(B). This holding is further buttressed by Decision No. B-41-90, wherein we held that the parties' agreement to arbitrate alleged violations of "rules, regulations or procedures -of the agency affecting terms and conditions of employment [emphasis added]" arguably encompassed a claim concerning an Executive Order which, by its own terms, was applicable to the agency and its employees.

In accordance with this holding, we find meritless the City's argument that DOS's application of DOP's Rules and Regulations does not "transform or convert" them into rules or regulations of DOS. Similarly, we reject the City's argument that the instant dispute is not arbitrable because DOP's Rules

and Regulations "preempt" agency procedures. We note that Decision No. B-42-80, cited by the City for that proposition, is inapplicable to the instant dispute. The Union does not contend, as the grievant did in that decision, that DOS has violated an internal rule which has been superseded by a DOP rule.

Furthermore, we note, as the Union did, that E.O. 83 §5 does not expressly exclude DOP Rules and Regulations from the definition of the term "grievance," unlike the grievance provisions contained in some collective bargaining agreements.[5] Consistent with our express policy favoring arbitration set forth in the NYCCBL and consistently followed by this Board,[6] we agree with the Union that the omission of this specific exclusion mandates a finding that alleged violations of DOP Rules and Regulations may be grieved under E.O. 83 §5(b)(B).

In its second challenge to arbitrability, the City contends that pursuant to the New York City Charter and the DOP Rules and Regulations themselves, the Director of DOP, not a contract arbitrator, is the proper authority to hear and determine this dispute. The Union contends that as the authority of DOP's Personnel Director to redress this type of dispute is not exclusive, the dispute may be resolved in the arbitration forum. In Decision No. B-31-82, we held that the existence of an internal appeal procedure did not preclude a grievant from challenging in the arbitral forum "the Agency's failure to follow the evaluation procedures delineated in the [Human Resources Administration NonManagerial Employee Performance Evaluation] Manual." We similarly hold that the ability of the Personnel Director to redress this type

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[5] See, Decision No. B-27-84 for an example of a contractual grievance provision which excluded "disputes involvihg the rules and regulations of the OTB Civil Service Commission" from the definition of the term "grievance." See also, Decision No. B-1890 (excluding "disputes involving the rules and regulations of the New York City Personnel Director").

[6] NYCCBL 512-302; Decision Nos. B-40-91; B-31-90; B-25-83.

of dispute does not preclude the grievant in the instant case from challenging in the arbitral forum DOS's failure to act in accordance with DOP's Rules and Regulations.

In its fourth challenge to arbitrability, the City asserts that the acts complained of are protected by management's statutory rights. The Union contends that the City's asserted managerial prerogative is limited and subject to arbitral challenge. While the assignment of employees is a matter within management's discretion,[7] this right may be limited, particularly when adherence to an agency procedure is at issue.[8] In the instant *case* the City's statutory management right is limited by the applicable DOP Rules and Regulations, which require the City to act in accordance with the procedures set forth therein.

Finally, in its fifth challenge to arbitrability the City asserts that the grievant does not have a right to a promotion. The Union asserts that its grievance only claims that the grievant has a right to be treated in accordance with the applicable DOP Rules and Regulations. Inasmuch as the City's challenge questions the appropriateness of an available remedy, it is not a bar to arbitration. We have previously stated that questions of remedy are for an arbitrator to decide.[9]

The dissent argues that because the definition of an arbitrable grievance contained in E.O. 83 §5(b) (B) does not include a violation of law, DOP Rules and Regulations, which have the force and effect of law, may not serve as a basis for arbitration under that provision. As this argument was not raised by the City in its challenge to arbitrability, we need not address it at all. We note, however, that had the City properly raised this argument to arbitration. E.O. 83 §5(b) (B) allows a grievant to bring to arbitration "a

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[7] NYCCBL §12-307 (b) grants **management the right to "direct its** employees" as it sees fit.

[8] Decision Nos. B-75-90; B-59-90; B-13-85.

[9] Decision No. B-15-90.

claimed violation, misinterpretation, or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting the terms and conditions of his or her employment." As we stated earlier in this decision (infra at 20), rules and regulations which apply to a mayoral agency may constitute rules or regulations of that mayoral agency within the meaning of E.O. 83 §5(b)(B). Since DOP Rules and Regulations are rules and regulations within E.O. 83 S5(b)(B), it is irrelevant that DOP Rules and Regulations also have the force and effect of law.[10]

Citing South Colonie Central School District v. South Colonie Teachers Association,[11] the dissent further contends that, in order for arbitration to proceed, the parties' agreement to arbitrate must be "express, direct and unequivocal."[12] Arguing that there is no express, direct or unequivocal agreement to arbitrate DOP Rules and Regulations, the dissent claims the instant case may not proceed to arbitration. We note, however, that in subsequent cases the Court of Appeals has taken a less restrictive view of public sector labor arbitrations.[13] Moreover, we note that even under the

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[10] In Decision No. B-64-91, we determined that a DOP Personnel Policy and Procedure (or "PPP") was a written policy subject to arbitration under a collective bargaining agreement provision which allowed grievants to grieve violations of "written policy." See also, Decision No. B-28-87. As grievants have previously been able to complain of personnel infractions in the grievance arbitration forum, we will allow a grievant to arbitrate a claim that DOS has failed to follow certain DOP Rules and Regulations, where there is no provision excluding DOP Rules and Regulations from the grievance arbitration process.

[11] 46 N.Y.2d 521, 415 N.Y.S.2d 403 (1979).

[12] The "express, direct and unequivocal" standard had been previously applied by the Court of Appeals in Acting Superintendent of Schools of Liverpool Central School District v. United Liverpool Faculty Association, 42 N.Y.2d 509, 399 N.Y.S.2d 189 (1977).

[13] In Board of Education of Lakeland Central School District v. Barni, 49 N.Y.2d 311, 425 N.Y.S.2d 554 (1980), the Court of Appeals stated:

> It begs the question to contend ... that the grievance is not arbitrable because it involves a dispute that is not unambiguously encompassed by an express substantive provision of the contract. The question of the scope of the substantive provisions of the contract is itself a matter ... for resolution by the arbitrator.... There is nothing in our opinion

(continued...)

standard used by the Court of Appeals in Liverpool/South Colonie, the Union has presented an arbitrable dispute. Since the language of E.O. 83 §5(b)(B), which provides for arbitration of alleged violations of rules and regulations, is express, direct and unequivocal, the instant dispute may proceed to arbitration.

Finally, we note that the City made a similar argument in City of New York v. Anderson.[14] In City of New York v. Anderson, the City challenged Decision No. B-1-78, which reconsidered and affirmed Decision No. B-13-77 in light of the Liverpool ruling. In Decision No. B-13-77, the Board found that an alleged violation of E.O. 4 was arbitrable within the definition of the term "grievance" contained in E.O. 83 S5(b)(B). In Decision No. B-1-78, the Board addressed the City's argument that E.O. 83 §5(b)(B) by its terms does not include an Executive Order of the Mayor and that the Board was, in effect, rewriting E.O. 83. The Board, relying on the presumption of arbitrability contained in §1173 2.0 of the NYCCBL (recodified as S12-302), held that Decision No. B-13-77 was unaffected by the Court's ruling in Liverpool. In Cityof New York v. Anderson, the Court affirmed our conclusion. The Court, rejecting the City's argument that the intention to arbitrate must be strictly construed, held that:

> The Court finds that petitioners' argument is strained when applied to the facts in the instant matter. In Liverpool, there was no statement of the public policy of the municipality, as there is in the instant case, that arbitration of disputes is to be favored and encouraged.

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[13](...continued)
in Liverpool ... which permits a court to stay arbitration where, as here, the parties' agreement to arbitrate the dispute is clear and unequivocal but there is some ambiguity as to the coverage of the applicable substantive provision of the contract.

Similarly, in Board of Education of the City of New York v. Glaubman, 53 N-Y.2d 781, 439 N.Y.S.2d 907 (1981), the Court cautioned:

> Although we noted in [Liverpool] ... that the choice of the arbitration forum should be "express" and "unequivocal" we did not mean to suggest that hairsplitting analysis should be used to discourage or delay demands for arbitration in public sector contracts [citations omitted].

[14] Index No. 40532/78 (Sup. Ct. New York Co. July 17, 1978).

Accordingly, the Union's claim that DOS violated DOP Rules and Regulations by failing to appoint a Civil Service supervisor Plumber and by assigning an unqualified provisional to perform supervisory duties may proceed to arbitration.

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 as to the Union's claims that: (1) a provisional employee, who was not the grievant, was not compensated for performing higher rated supervisory duties and (2) bargaining unit members were required to work under the supervision of employees having no expertise in the plumbing trade, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration as to the Union's claims that: (1) DOS failed to appoint a Civil Service Supervisor Plumber for its Facility Maintenance Unit and (2) the vacant position was filled by a provisional who had failed the examination for that position, be, and the same hereby is, granted.

DATED: New York, NY
June 24, 1992

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

I dissent. GEORGE DANIELS
MEMBER

I dissent. STEVEN WRIGHT
MEMBER

NOTE: See dissent appended hereto.

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of

THE CITY OF NEW YORK,

Petitioner,

-and-

PLUMBERS LOCAL UNION NO. 1
OF BROOKLYN AND QUEENS,

Respondent.

DECISION NO. B-xx-92

DOCKET NO. BCB-1349-90
(A-3612-90)

DISSENT OF MEMBERS GEORGE B. DANIELS AND STEVEN H. WRIGHT

We respectfully dissent in part from the decision of the Board in this matter. We dissent from the majority's determination that arbitration is appropriate to resolve the grievant's claims that the Sanitation Department violated Department of Personnel Rules and Regulations by: (1) failing to appoint a Civil Service Supervisor Plumber for the Department of Sanitation's Facility Maintenance Unit and (2) filling the vacant Civil Service Supervisor Plumber position with a provisional who failed the examination for that position.

The definition of a grievance as set forth in Mayoral Executive Order No. 83 is limited by its language to the rules of the agency by which a grievant is employed and does not include the Rules and Regulations of the New York City Dirdotor of Personnel, which are issued pursuant to a legislative grant of power and have the force and effect of law. Executive Order 83 does not include a claimed violation of provisions of law.

While the grievant has a right to seek redress of the alleged violations, arbitration is not the appropriate forum.

This grievant is not covered by a collective bargaining agieement; rather he is covered by a Comptroller's determination pursuant to Labor La"ection 220. The grievant's claim is based solely on the unilateral grant by the Mayor in Executive Order 83 which establishes a city grievance policy. The pertinent portion of the definition of an arbitrable grievance contained within Executive Order 83 is very specific:

> (B) a claimed violation, misinterpretation or misapplication of the written rules or regulations of the mayoral agency by whom the grievant is employed affecting terms and conditions of employment.

This policy establishes a limited right to grieve an agency's action when that action is inconsistent with the written rules and regulations of the grievant's own agency. 9pe, BCB Decision Nos. B-I 5-82; B-1 9-83. By its clear language, Executive Order 83 does not include a right to arbitrate disputes arising from the Rules and Regulations of the Director of Personnel.

The majority of the Board now finds that a right to arbitrate violations of Department of Personnel ("DOP") Rules and Regulations derives from a conclusion that any rule or regulation applicable to mayoral agencies, although inot promulgated by that agency, constitutes a rule or regulation of that mayoral agency emd therefore is arbitrable within the definition of Executive Order 83. aft, BCB Decisions No. B-1 3-77. To find that

the rights in Executive Order 83 extends to Department of Personnel's Rules and Regulations disregards the legislative grant of power and authority given to the Director of the Department of Personnel. See, New York Civil Service Law, Sect. 20. Pursuant to the State's Civil Service Law and the New York City Charter, the Director of Personnel has the power and duty to administer the provisions of the Civil Service Law and to prescribe and enforce rules for implementing those provisions. 'gae, City of New York v. Cily Civil Service Commission 470 N.Y.S.2d 113 (Ct.App. 1983). The Civil Service Law and the New York City Charter grant that the rules promulgated by the Director of Personnel shall have the binding force of a statute and effect of law. 5aa, New York Civil Service Law, Section 20; Uniformed Fireman's Benevolent Association v. Herten, 259 N.Y.S.2d 51 (1965); Cuzzivoglio v. Hamlin, 202 N.Y.S.2d 402. The rules and regulations of an agency do not have this same force and effect.

This Board has previously concluded that claimed violations of laws are not arbitrable under Executive Order 83. See, BCB Decision Nos. B-7-91; B-14-87. In its earlier reviews of Executive Order 83, the Board has found that Executive Order 83 does not permit arbitration of alleged violations of state law. Sea, BCB Decision Nos. B-19-83; B-18-83. The majority's decision herein ignores these prior decisions by permitting rules of law to proceed to arbitration.

The Department of Personnel provides a specific procedure forreview of alleged violations of its Rules and Regulations. This administrative process guarantees the

consistent application and interpretation of DOP Rules and Regulations. By granting the right to arbitrate claims arising out of Department of Personnel Rules and Regulations, the Board invites inconsistent application and interpretation within each agency. Such a right would allow arbitration of alleged violations of rules that establish classification of titles, examination procedures, veterans preferences, eligibility lists, appointments and promotions, to name just a few. The Director of Personnel has the power to decide the manner in which DOP Rules and Regulations are to be applied. See, City of New York v. City Civil Service Commission 470 N.Y.S.2d 113 (Ct.App. 1983).

Although public policy favors broad application of arbitration clauses, arbitration is not appropriate where the parties never intended arbitration. Moreover, there is no right to grieve a claimed violation of the New York Civil Service Law or any other law. Before directing that arbitration must proceed, it must first be concluded that the parties' agreement to arbitrate the dispute at issue is "express. direct and unequivocal." See, South Colonie y. So. Colonie Tchrs. Assn, 415 N.Y.S.2d 403 (citations omitted),(Ct.App., 1979). In this case, there is no express, direct or unequivocal agreement to arbitrate DOP Rules and Regulations. Alleged violations of rules of law, absent an express agreement between the parties, may not be submitted to arbitration. See, BCB Decision Nos. B-791; B-14-87; B-28-85.

This Board has previously interpreted Executive Order 83(B) to include city-wide rules applicable to all city agencies. See, BCB Decision No. B-13-77. It now further expands that interpretation to include rules of law. There is no basis to conclude that Executive Order 83 expresses an intent to allow arbitration of such disputes.

DETERMINATION

There is no duty to arbitrate either (1) the claimed failure by the agency to appoint a Civil Service Supervisor Plumber or (2) the claim that the agency appointed a provisional employee who failed the examination for that position. Therefore, the Petition Challenging Arbitrability should be granted in its entirety and each request for arbitration should be dismissed.

DATED: New York, New York
May 13, 1992

George B. Daniels

Steven H. Wright