***Uniformed Fire Officers Ass'n*, 59 OCB 46 (BCB 1997) [Decision No. B-46-97 (Arb)], *rev'd*, *City of New York v. DeCosta*, 176 Misc.2d 936, 675 N.Y.S.2d 517, (Sup. Ct. N.Y. Co. 1998), *aff'd sub nom*, *City of New York v. Uniformed Fire Officers Ass'n*, 263 A.D.2d 3, 699 N.Y.S.2d 355 (1st Dept. 1999), *aff'd*, 95 N.Y.2d 273, 716 N.Y.S.2d 353 (2000).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration -between- THE CITY OF NEW YORK, Petitioner, -and- UNIFORMED FIRE OFFICERS ASSOCIATION, Respondent.	Decision No. B-46-97 Docket No. BCB-1830-96 (A-6284-96)

DECISION AND ORDER

On or about April 30, 1996, the Uniformed Fire Officers Association ("UFOA" or "the Union") served the Office of Labor Relations ("OLR") and filed with the Office of Collective Bargaining ("OCB") a request for arbitration of a grievance alleging a violation of Articles I and XVII of the collective bargaining agreement ("the Agreement") between the Union and the City of New York. The request for arbitration alleges that the Agreement was violated when the City's Department of Investigation ("DOI") refused to comply with the requirements of the Agreement when noticing and conducting investigations involving members of the UFOA bargaining unit.

On May 16, 1996, the City of New York, appearing by OLR, filed a petition challenging the arbitrability of the UFOA's request for

arbitration. The UFOA filed an answer to the petition on June 10, 1996, and the City filed a reply on July 10, 1996.

After reviewing the pleadings, the General Counsel of the OCB wrote the parties and requested a clarification of the issues before the Board of Collective Bargaining ("Board") for adjudication. The UFOA submitted its response to this letter on February 12, 1997 and the City submitted its response on February 21, 1997. On April 18, 1997, the UFOA submitted an arbitrator's Opinion and Award for the Board's consideration.[1] The City's objection to this submission followed on April 23, 1997. On July 21, 1997, the UFOA submitted a letter alleging additional facts[2] bearing on an issue in the instant matter and requested that it be made a part of the record. The City's objection to the letter's consideration was received on July 30, 1997.

RELEVANT CONTRACTUAL AND STATUTORY PROVISIONS

COLLECTIVE BARGAINING AGREEMENT
ARTICLE XVII - INDIVIDUAL RIGHTS[3]

> It is the policy of the Employer to secure for all employees their rights and privileges as citizens in a democratic society, consistent with their duties and obligations as

[1] This pleading was submitted without the City's consent. The UFOA claims that it attempted to attain the consent of the City but was unable to do so.

[2] The UFOA's letter contained Notices of Interview from the Fire Department's Bureau of Investigations and Trials ("BITS"), addressed to two of four officers already interviewed by DOI in February, 1996.

[3] The parties have agreed that Article I of the Agreement, which is a basic recognition provision, and the following sections of Article XVII are at issue in the instant matter.

employees of the Fire Department and the City of New York. To further the administration of this policy, the following guidelines are established:

Section 1.
Interrogations, interviews, trials, and hearings conducted by duly authorized representatives of the Employer shall be conducted during reasonable hours, preferably when an employee is on duty. If an interrogation, interview, or hearing takes place when an employee is not on duty, that employee shall be compensated by cash payment for time spent, including two hours of travel time, at the rate of time and one-half. If a trial takes place when an employee who is a witness is not on duty, that employee shall be compensated by cash payment for the time spent including two hours of travel time, at the rate of time and one-half. If a trial takes place when an employee who is an accused is not on duty, that employee shall be compensated by cash payment for time spent, including two hours of travel time, at the rate of straight time, unless the trial was postponed by the accused for the employee's convenience of counsel and/or the union representative, in which the accused shall receive no compensation.

Section 2.
At the time an employee is notified to appear for interrogation, interview, trial or hearing the Employer shall advise the employee either in writing, when practicable, or orally to be later confirmed in writing of (1) the specific subject matter of such interrogation, interview, trial or hearing. If an interrogation or interview may lead to disciplinary action, the employee may be accompanied by counsel and/or a union representative at such interrogation or interview.

Section 3.
Notice of trial shall be in writing at least ten (10) days in advance of such trial, unless the employee waives such notice or unless that employee applies or has applied for a service retirement.

Section 4.
The employee who is the subject of interrogation, interview, trial or hearing shall be advised of the name, rank, and unit of the officer in charge of the interrogation, interview, trial or hearing and the name, rank and unit or other identification of all persons present connected with the interrogation, interview or hearing. The questioning of employees shall be of reasonable duration and the employee shall be allowed time for personal needs, meals and necessary telephone calls. Offensive of profane language shall not be

used nor shall the employee be threatened for failure to answer questions or promised anything if that employee does answer questions.

Section 5.

When an employee is a suspect in a departmental investigation or trial, the officer in charge of the investigation or trial shall give the employee the following warning before that employee is questioned:

> I wish to advise you that you have all the rights and privileges guaranteed by the law of the State of New York and the Constitution of this State and of the United States, including the right not to be compelled to incriminate yourself. You have the right to have an attorney present if you wish. I wish further to advise you that if you refuse to answer any questions relating to the performance of your duties, you will be subject to dismissal from your employment with the City. However, if you do answer questions, neither your answer nor any information or evidence which is gained by reason of such answers can be used against you in any criminal proceeding. You are advised, however, that if you knowingly make an false answers or deceptive statements, you may be subject to criminal prosecution and disciplinary action by reason thereof.

Such employee shall also be advised of the right to union representation. When the interrogating officer is advised by the employee that that employee desires the aid of counsel and/or a union representative, the interrogation shall be suspended and the employee shall be granted a reasonable time to obtain counsel and/or a union representative, which time shall be at least two working days.

If it appears that the investigation may result in a disciplinary proceeding based on the Employee's answer to questions or on the refusal to answer, a stenographic or electronic record of the questioning of the employee shall be made unless the exigencies of the situation prevent such recording.

In the event that an employee is subject to charges by the Department, any such record shall be made available to the employee or the representative. The cost of the recording shall be shared equally by the parties.

Section 6.

A. An employee shall not be questioned by the Employer on personal behavior while off duty and out of uniform except that the Employer shall continue to have the right to question an employee about personal behavior while off duty and out of uniform in the following areas:

i. matters pertaining to official department routine or business;
ii. extra departmental employment;
iii. conflict of interest;
iv. injuries or illnesses;
v. residency;
vi. performance as volunteer firefighter;
vii. loss or improper use of department property.

B. If an employee alleges a breach of subdivision (a) of Section 6., that employee has the right to a hearing and determination by the Impartial Chair within 24 hours following the claimed breach. To exercise the right, the employee must request such arbitration at the time when an official of the Employer asks questions in an area which is disputed under subdivision (a) of this section. If the employee requests such arbitration, that employee shall not be required to answer such questions until the arbitrator makes the award.

* * *

Section 8.

In the course of an investigation or interrogation, an employee who is not a suspect is required to cooperate in the investigation of a complaint. Statements the employee has made in the course thereof may not be used against that employee in a subsequent proceeding in which that employee becomes a suspect.

* * *

Section 10.

If the Employer fails to comply with the provisions of this Article, any questions put to the employee shall be deemed withdrawn and the refusal to answer any such questions shall not be prejudicial to the employee. Withdrawal as herein described shall not preclude the Department from proceeding anew in the manner prescribed herein.

* * *

Section 12.

If an employee is subpoenaed to testify before a governmental body up to a maximum of two employees "per day" in a proceeding, the employee shall be compensated by cash payment for the time spent testifying, plus two hours travel time, provided that no compensation shall be paid unless the employee notifies the Department that that employee has received a subpoena within 72 hours after receipt of it; or as

that employee has received it if the return date is within 72 hours thereafter. Any amounts received by the employee as witness fees shall be deducted from compensation received by the employee from the Department pursuant to this Section.

NEW YORK CITY CHARTER
CHAPTER 34
DEPARTMENT OF INVESTIGATION

§803. **Powers and duties.** a. The commissioner shall make any investigation directed by the mayor or the council.
b. The commissioner is authorized and empowered to make any study or investigation which in his opinion may be in the best interest of the City, including, but not limited to, investigations of the affairs, functions, accounts, methods, personnel, or efficiency of any agency.
c. For any investigation made pursuant to this section, the commissioner shall prepare a written report or statement of findings and shall forward a copy of such report or statement to the requesting party, if any. In the event that the matter investigated involves or may involve allegations of criminal conduct, the commissioner, upon completion of the investigation, shall also forward a copy of his written report, or statement of findings to the appropriate prosecuting attorney, or, in the event the matter investigated involves or may involve a conflict of interest or unethical conduct, to the board of ethics.
d. The jurisdiction of the commissioner shall extend to any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or receives money from or through the city or agency of the city.'

§805. **Conduct of investigations.** a. For the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter, the commissioner and each deputy shall have full power to compel the attendance of witnesses, to administer oaths, and to examine such persons as he may deem necessary.
b. The commissioner or any agent or employee of the department duly designated in writing by him for such purposes may administer oaths or affirmations, examine witnesses in public or private hearing, receive evidence and preside at or conduct any such study or investigation.

NEW YORK CITY CHARTER
CHAPTER 49
OFFICERS AND EMPLOYEES

> §1128. **Interference with investigation**. a. No person, vent [sic]. seek to prevent, interfere with, obstruct, or otherwise hinder any investigation being conducted pursuant to the charter. Any violation of this section shall constitute cause for suspension or removal from office or employment. b. Full cooperation with the investigation shall be afforded by every officer or employee of the city or other persons.'

Background

The UFOA's request for arbitration seeks to arbitrate "the improper refusal of the New York City Department of Investigation to comply with the requirements of the Agreement when noticing and conducting investigations involving members of the UFOA bargaining unit." The UFOA alleges that this noncompliance was in violation of Article I and Article XVII of the Agreement, the pertinent parts of which are indicated above.

The City's petition challenging arbitrability asserts that arbitration of the UFOA grievance would violate public policy and prevent DOI from carrying out its statutory requirements.

Positions of the Parties

City's Position

The City, in contending that Article XVII does not apply to DOI, asserts that the issue before this Board is one of statutory construction and meaning. It asserts that Chapters 34 and 49 of the New York City Charter "evinces an intent to prevent the type of contract provision at issue here from binding or interfering with the important role played by the Department of Investigation." The City adds that legislative intent as well as "public policy, grant DOI the right to conduct investigations" and that the Charter, the

New York State General City Law and Mayoral Executive Orders, mandate its methods of conducting investigations. Therefore, asserts the City, DOI's investigatory methods are free from any arbitral intervention which may spring from the Agreement.

The City claims that arbitrating grievances concerning DOI's methods would infringe upon its ability to conduct investigations. Specifically, the City contends that the use immunity provision in Article XVII, §5, of the Agreement, prevents DOI from ferreting out corruption. This section gives an employee who is a suspect in a departmental investigation, automatic use immunity, a right that the City contends is not provided in the enabling statutes that govern the DOI. The City claims that "[i]f the CBA provisions are held to apply to DOI criminal investigations, it will effectively eviscerate the broad grant of authority provided DOI by the legislative and executive branches of government, and indeed, constitute a de facto amendment of the pertinent statutes."

Similarly, continues the City, allowing an employee to be accompanied by a union representative as well as counsel, as required by Article XVII, §5 of the Agreement, jeopardizes the secrecy of the proceeding and may inhibit a person from testifying freely. The City adds that Article XVII, §§ 1-5 and 12, which provide the employees with rights concerning notification, mode of interview, compensation and transcription of interviews, should not apply to DOI and that "the manner of initiation and conducting investigations must be within [its] discretion as an independent

investigatory agency."

The City contends that the Agreement interferes with DOI's statutory responsibilities and claims that these statutory responsibilities "must be exercised free of restrictions imposed by arbitration." The City cites City of New York v. MacDonald[4], as its authority for that position, noting that there, the court found that arbitration may not be imposed upon the Police Commissioner since §434 of the New York City Charter allows the Commissioner to determine and impose discipline. The City analogizes MacDonald with the instant matter, claiming that here, DOI has the right to conduct investigations and "[a]rbitration of the instant grievance would infringe upon DOI's ability to conduct such investigations."

In response to the UFOA's argument that DOI is obliged, just as BITS is obliged, to comply with the Agreement, since both departments address similar and sometimes identical issues, the City asserts that the functions of DOI do not overlap with those of BITS. It contends that DOI is responsible for criminal investigations while "BITS is the Fire Department's disciplinary unit, and is not responsible for criminal investigation."

The City notes several other distinctions between itself and BITS:

> Where DOI finds criminal wrongdoing, ... it is obligated to refer such wrongdoing to prosecutors under Chapter 34 of the New York City Charter. BITS is not under this obligation. DOI regularly works with state and

[4] N.Y. Co. Supreme Court 4/14/92; Modified 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dep't 1994); Appeal Denied 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994). (Annulling Decision No. B-42-91).

> federal prosecutors, federal law enforcement agents, New York City Police Detectives and employs special investigators who are peace officers under applicable statute. BITS does not conduct such joint investigations nor does it employ such law enforcement personnel. DOI personnel prepare, obtain, and execute search warrants. BITS does not go to such lengths. DOI personnel monitor state and federal wiretaps, BITS cannot do so. DOI investigates criminal matters culminating in its own arrests where criminal activity is evident. DOI averages more than two hundred (200) arrests per year. DOI and BITS do not conduct 'joint' criminal investigations as alleged by Respondents.

With regard to the UFOA's July 21st submission of additional facts for the Board's consideration, the City objects. The city argues that the submission is without merit, it fails to address the Petitioner's arguments in it's petition, and it does "not serve to establish any connection between the FDNY and the DOI."

UFOA's Position

The UFOA contends that the City has failed to state any public policy violations in its petition and has overstated the breadth of the City's managerial prerogative. The Union submits that the City, therefore, should not receive a stay of arbitration in this case.

According to the UFOA, there is no dispute that DOI has the right to conduct investigations and there is no conflict between the Agreement and any provision of the Charter. The UFOA contends that "[t]he immunity and representation provisions of the Agreement in no way preclude the DOI from conducting investigations, including compelling attendance of witnesses, administering oaths and examining such persons as the Commissioner deems necessary." The UFOA asserts that the use immunity provision simply reconciles

an employee's "compelled self-incrimination, pursuant to Executive Order 16," with his/her right against self-incrimination under the Fifth Amendment to the U.S. Constitution. This, according to the UFOA, should present no conflict when, as the City has conceded, the employee is still required to answer all questions during DOI's investigation. The UFOA also posits that the statutes that govern the DOI do not prohibit the inclusion of provisions in a collective bargaining agreement that ensure protections such as notice, immunity and representation by a union representative.

With regard to the City's reliance on City of New York v. Malcolm MacDonald, the UFOA asserts that the MacDonald decision did not sweepingly prohibit arbitration of matters which are merely *related to* the City's statutory authority to conduct investigations, but instead, prohibited the arbitration of matters which are in conflict with that authority. The UFOA also contends that whereas the City has already negotiated over the procedural protections at issue here, it has waived any challenges to the procedural protections and may not now "challenge the viability of those protections on public policy grounds."

The UFOA posits that the City has failed to demonstrate that public policy prohibits the arbitration of the grievance at issue. According to the UFOA, the City has not shown that "the challenged contract provisions conflict with some express provision of the City Charter governing DOI's conduct of investigations."

UFOA argues that DOI's functions "overlap significantly" with

those of the Fire Department's BITS. In fact, contends UFOA, DOI and BITS have such similar functions that they have divided interviews between themselves in the past. In support of this position, the UFOA submitted BITS Notices of Interview, addressed to two of four officers already interviewed by DOI in February, 1996. The UFOA asserts that the Notices of Interview dated July 7, 1997, demonstrate that the City's contentions are untrue.

According to the UFOA, "the subject matter of the interview before BITS for which [the officers] are ordered to appear is identical to that which they were interviewed about by DOI ..." The UFOA adds that "[t]he two agencies are clearly coordinating and the statements made by the two Fire Officers before DOI may be used against them by the Fire Department absent the immunity which we believe is provided by the contract." The UFOA continues, contending that "[t]here is no identifiable distinction of the subject matter of the investigations undertaken by DOI as opposed to BITS."

Since BITS and DOI perform similar and sometimes, identical, functions, contends the UFOA, the City should not be able to argue "that when investigations are delegated to [BITS], UFOA members are entitled to their contractually bargained-for protections but when the same investigation is assigned to DOI, UFOA members relinquish those very same rights." According to UFOA, if public policy does not prohibit bargained-for procedural rights when an interview is conducted by BITS then it should not be offended when DOI conducts

the same interview.

In any event, adds the UFOA, "the sole issue here is one of contract interpretation -- whether the articles in question apply to DOI or they do not. That is a question of the parties' intent which is reserved to the Arbitrator."

DISCUSSION

At the outset, it must be noted that the Board allows post-reply submissions only when special circumstances, such as new facts that have a bearing on the issue before us, warrant their inclusion[5]. However, unless that additional information is probative of the issue for which it is submitted, it will not be considered in our determination. The Notices of Interview submitted by the UFOA on July 21, 1997, do not add or detract from our analysis of whether the City is obliged to arbitrate a claimed violation of the Agreement or whether public policy exempts the City from the Agreement's terms, therefore, that submission will be given no weight in our determination.

The City does not dispute that an arguable nexus exists between a claimed failure to provide adequate notice of, and to permit union representation at, investigatory interviews, and the cited provisions of the Individual Rights section of Article XVII of the parties' Agreement. Further, there is no dispute that the DOI is an agent of the City and that the City is bound by the terms of the Agreement. Instead, the City asserts that "[a]rbitration of

[5] See Decision No. B-16-83.

the grievance herein would violate public policy and would infringe upon statutorily mandated responsibilities." Hence, the threshold question in our determination of arbitrability is whether public policy relating to the functioning of the DOI precludes the arbitration of a dispute that is otherwise clearly within the scope of the City's and the UFOA's agreement to arbitrate.

In considering challenges to arbitrability, the Board must ascertain whether a prima facie relationship exists between the act complained of and the source of the alleged right to seek redress through arbitration.[6] For arbitration to be stayed on public policy grounds, the Board's inquiry becomes more complex. In following New York court decisions, we have held that "absent clear prohibitions derived from constitution, statute, or controlling decisional law, arbitration under the terms of a collective agreement is a permissible forum for resolving disputes ..."[7] Courts have also noted that the public policy must be strong, identifiable and absolutely prohibit the particular issue from being submitted to arbitration.[8] It follows, then, that the courts have denied arbitration when it has been found that statutory

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[6] E.g., Decision No. B-19-90.

[7] See Decision No. B-10-85 at 23; Port Jefferson Station Teachers Association v. Brookhaven-Comsequa Union Free School District, 411 N.Y.S. 2d 1, 2 (1978).

[8] See, e.g., Board of Education of the Arlington Central School District v. Arlington Teachers Association, 78 N.Y.2d 33, 571 N.Y.S.2d 425 (1991); Enlarged City School District of Troy v. Troy Teachers Association, 69 N.Y.2d 905, 516 N.Y.S.2d 195 (1987).

provisions would be contravened by arbitration.[9]

In accordance with our decisional law and the above noted Court decisions, supervening arbitration on a particular subject matter, even if arbitration was agreed upon and is required by the collective bargaining agreement, is unenforceable as against public policy when a statute clearly grants an entity the exclusive power over that matter. However, unless a statutory provision clearly preempts arbitration on a particular subject matter, arbitration, as required by the party's collective bargaining agreement, is permissible and will not be stayed.

Furthermore, in evaluating the merit of the City's public policy argument, recognition also must be given to the express statutory expression of public policy, set forth in §12-302 of the New York City Collective Bargaining Law, that the "impartial arbitration of grievances between municipal agencies and certified employee organizations" is favored and encouraged. The existence of this policy and the authority of the Board to implement the policy

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[9] See Honeoye Falls - Lima Central School District v. Honeoye Falls - Lima Education Association, 49 N.Y.2d 732 (1980). See also City of New York v. MacDonald, 607 N.Y.S. 2d 24 (1994), where, in a scope of bargaining dispute, the Patrolman's Benevolent Association sought to bargain on establishing arbitral disciplinary procedures for tenured officers and the court found that the PBA's demand was a prohibited subject of bargaining since statutory provisions authorized the Police Commissioner to determine and impose discipline. See also City of New York v. Uniformed Firefighters Association, Local 95, IAFF, AFL-CIO, 450 N.Y.S.2d 829 (App. Div. 1982) (finding that an arbitrator's issuance of an award contravened public policy because the city charter and statute expressly granted the employer the exclusive authority over the issue arbitrated).

in determining questions of arbitrability has been confirmed by the Court of Appeals.[10]

The City cites City of New York v. MacDonald in support of its public policy argument. It argues that the Court's rationale in this decision is applicable to the instant matter; we do not agree. The City noted that the Court of Appeals "denied leave to appeal from the Appellate Division's decision that found it would violate public policy to allow arbitration of discipline of police officers where a local law existed which gave the discretion to discipline employees to the Police Commissioner." In MacDonald, the matter that would have been subject to arbitration was the review of the Police Commissioner's decision to discipline police officers, a matter that according to the Charter, was exclusively within the discretion of the Police Commissioner. In finding that the issue was not arbitrable, the Court rationalized that where a statutory grant of exclusive authority over a particular matter exists, arbitration on that matter must be stayed, since allowing arbitration would contravene the statute and violate public policy.[11]

Since the question in the instant matter is whether a claimed violation of the Individual Rights section of Article XVII of the

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[10] See Dept. of Sanitation v. MacDonald, 87 N.Y.2d 650, 642 N.Y.S.2d 156 (1996)(Affirming Decision No. B-12-93).

[11] City of New York v. MacDonald, N.Y. Co. Supreme Court 4/14/92; Modified 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dep't 1994); Appeal Denied 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994). (Annulling Decision No. B-42-91).

Agreement is a matter expressly precluded or preempted from arbitration by the City Charter,[12] and not whether DOI has the power to investigate, which is expressly granted by the Charter, the matter before us is not analogous to the MacDonald case, as contended by the City.

We disagree with the dissenting Board members that the function, mission, and authority of the DOI are incompatible with the contractual provisions at issue herein. In the instant matter, DOI, which is granted the power to conduct investigations, is not exclusively granted the power to determine the procedural rights of individuals during its investigations. The City Charter grants DOI the power to conduct investigations throughout the City. Under Chapter 34, §805 of the City Charter, the DOI is granted the power "to compel the attendance of witnesses, to administer oaths, and to examine such persons as [it] deems necessary." Chapter 49, § 1128 of the City Charter prevents interference, obstruction or hindrance and requires "full cooperation with the investigation."

The specific sections of Article XVII that are objected to by the City are §1-5 and §12.[13] We disagree with the City's contentions regarding these sections. In reading §§ 805 and 1128 of the City Charter, as well as the other statutes cited by the City,

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[12] The City also states in its pleadings that Mayoral Executive Orders support its contention that arbitration on the instant grievance would interfere with it statutory responsibilities, however, the City fails to identify these Executive Orders in its petition or its reply.

[13] See supra at 2-6.

we find no provisions which, on their face, supervene, or are necessarily inconsistent with, the rights contained in any section of Article XVII of the Agreement.

The use immunity provision in §5 of Article XVII of the Agreement is not inconsistent with the City Charter's requirement that DOI's investigatory powers not be interfered with: DOI may still compel the attendance of witnesses, administer oaths, and examine such persons as it deems necessary. In fact, the City concedes that §5, while it provides use immunity, does not prevent the employees from answering questions during the investigation. Additionally, the City has not persuaded us that an employee's accompaniment by a union representative is clearly prohibited by any of the applicable statutory provisions. Nowhere in the applicable statutory provisions are the procedural safeguards and rights granted UFOA's members, under the Agreement, expressly supervened. In fact, New York courts addressing similar matters, have stated that procedural safeguards such as these do not infringe upon any substantive aspect of an entity's responsibilities or authority and therefore are not violative of public policy.[14] The provisions relied upon by the City grant DOI

[14] See Broadalbin Teachers Association v. Broadalbin, 469 N.Y.S.2d 217, 219 (A.D. 3 Dept. 1983) (involving the evaluation provision of a collective bargaining agreement between the teachers' union and the school district. There, the court found that the provision "does not infringe upon any substantive aspect of the district's responsibility and authority to make tenure decisions. Rather it merely imposes certain procedural requirements which must be complied with...." The Court added that "[s]uch bargained-for supplemental procedural steps ... are

the power to conduct investigations of public employees and protects against the interference with those investigations; they do not, in our view, grant DOI exclusive power over the establishment of procedural safeguards and other rights of employees summoned to be questioned by DOI.

Our dissenting colleagues appear to assume that a finding of arbitrability in this case is the equivalent of upholding the Union's claim. It is not. The issue of whether employees summoned to be examined by DOI were intended, by the parties, to be covered by Article XVII of the Agreement during such examinations, is one of contract interpretation, appropriately decided by an arbitrator. This issue includes the question of the extent of similarities and/or differences between BITS and DOI proceedings and whether the parties intended the contract provision to cover one or both entities. The Board expresses no view as to the merit of the Union's grievance.[15]

We are not persuaded that there is any public policy, explicit or implicit, which would exempt DOI from compliance with the terms of Article XVII of the Agreement. Accordingly, in as much as there is no dispute that a nexus exists between the grievance alleged and the parties' agreement to arbitrate their disputes and the matter of whether the Agreement applies to employees called to be

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not violative of public policy."

[15] *See* Decision No. B-18-80 at 10, where we note that a decision of arbitrability is not a reflection of our view of the merits of an underlying dispute.

questioned by the DOI is one for an arbitrator to decide, we dismiss the City's petition challenging the arbitrability of this matter.

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 herein, by the City of New York be, and the same hereby is, denied, and it is further,

ORDERED, that the request for arbitration filed herein by the Uniformed Fire Officers Association, and the same hereby is, granted.

Dated: October 28, 1997
New York, New York

STEVE C. DeCOSTA
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

ROBERT H. BOGUCKI
MEMBER

DISSENT SAUL G. KRAMER
MEMBER

DISSENT RICHARD A. WILSKER
MEMBER

DISSENT

For the following reasons Board members Richard Wilsker and Saul G. Kramer respectfully dissent.

The Union's grievance should not be arbitrated because public policy demands that criminal investigations remain free from the restraints imposed by the contractual provisions at issue herein. The majority's opinion reflects a fundamental misconception regarding the function, mission and authority of DOI.

DOI is an independently-functioning law enforcement agency with statutorily conferred powers. DOI is mandated to investigate, inter alia, allegations of corrupt or other criminal activity by City agencies, City employees and persons dealing with the City. See generally, Charter § 803; Executive Orders 16, 78 and 105. By its nature, thus, in order to effectively fulfill its mission, DOI must operate independently of the City agencies which it is charged to investigate.[16]

As an independent law enforcement agency, DOI conducts many of its criminal investigations jointly with federal and local prosecutors and law enforcement investigative agencies, as well

[16]Indeed, in 1986, after the notorious City corruption scandals, then Mayor Koch recognized the acute need for independence by the Inspectors General from the agencies which they are charged to investigate, and, by Executive Order 105, brought the Inspectors General within the ambit of DOI, making them DOI employees subject solely to the direction of the DOI Commissioner, rather than the heads of the agencies over which the Inspectors General had investigative authority.

as with the many New York City Police Detectives assigned to DOI as part of DOI's staff.

Requiring DOI to comply with the contractual requirements, some of which confer automatic "use immunity," others which require the presence of potentially interested third-party union representatives at investigative hearings, and still others which seek to restrict the scope of DOI and other law enforcement agencies' authority to investigate, would greatly impede DOI's ability to fulfill its mission and to work with other law enforcement agencies which are not subject to similar contractual restrictions. See Agreement, Article XVII, §§ 5,6 and 8.

For example, requiring the presence of a Union representative at DOI hearings clearly hampers law enforcement in several ways which could adversely impact on the conduct of the investigation. The clearest example occurs in cases where DOI is investigating allegations of corruption within the union. In such cases, the union representative is faced with an insurmountable conflict between his obligation to the member and his loyalties to the union.

In any case, the presence of a Union representative could jeopardize the confidentiality of the proceeding, or inhibit the person from testifying freely. Unlike an attorney, a Union representative is not bound to represent solely the interest of the individual member. Indeed, there are no restraints upon the use that a Union representative may make of the information

conveyed by other members. Accordingly, the union representative could impart any or all of the information gleaned during a DOI hearing to other union members who would be able to tailor their stories to conform with the evidence known. In addition, the union representative might, wittingly or unwittingly, disseminate the information to other persons who might seek to pressure the witness to retract his statement or otherwise obstruct justice.

Finally, the mere presence of a Union representative in some instances, may intimidate and prevent a member from providing information about other corrupt union members. In seeking candid and truthful information from witnesses, law enforcement agents need to be able to offer the assurance that information provided will not be unnecessarily revealed. The presence of third-party union representatives impedes DOI's ability to do so.

As another example, Section 6 of the CBA provides that a member may not be questioned about "personal behavior while off duty and out of uniform." If applied to DOI investigators, this provision would preclude DOI's NYPD detectives from questioning a UFOA member who was committing burglaries off duty and fencing the stolen goods to other UFOA members, about those activities. This circumscription of DOI's authority would clearly violate DOI's statutory mandate which authorizes DOI to conduct any investigation it deems to be "in the best interest of the City . . . ". Charter § 803(b).

In sum, detecting corruption and criminal misconduct is an

area of substantial public interest. To constrain DOI by the contractual provisions at issue here would impede the investigatory process and eviscerate the DOI's statutory obligations to the City of New York and the public at large.

The majority is simply incorrect that public policy may only prevent the arbitrability of a grievance where, "a statutory provision clearly preempts arbitration on a particular matter." See page 15 of majority opinion.

Indeed in Susquehanna Valley Central School District at Conklin and Susquehanna Valley Teachers Association, 376 N.Y.S.2d 427, 429 (1975), the New York Court of Appeals stated that "[p]ublic policy, whether derived from, and whether explicit or implicit in statute or decisional law, or in neither, may also restrict the freedom to arbitrate." Ultimately, the key to the analysis is balancing the freedom to contract against the governmental interests and public concerns that may be involved. Id. The Court of Appeals has repeatedly held that a public policy prohibition on collective bargaining may be derived from the plain and clear implication of the statutory scheme rather than from an explicit prohibition in a statute. Webster Central School District v. PERB, 75 N.Y.2d 619, 627 (1990); Cohoes City School District v. Cohoes Teachers Association, 40 N.Y.2d 774, 778 (1976). Furthermore, in City of New York v. McDonald, 201 AD2d 258, 259-60 (1st Dept.),app denied,83 NY2d 759 (1994), the Appellate Division, First Department held that even rules of the

New York City Personnel Director may establish public policy such that arbitration in an area covered by those rules could not be compelled. In the case before us, there is a clear and compelling public policy implicit in Chapter 34 of the New York City Charter, and embodied in sound law enforcement and prosecutorial principles, that demand arbitration be stayed.

Even more distressing, by its decision, the majority has effectively dictated how DOI, an independent law enforcement agency performs its statutorily prescribed mission. This type of interference was rejected by the Court of Appeals in Honeoye Falls - Lima Central School District v. Honeoye Falls - Lima Education Association, 49 N.Y.2d 732, 734 (1980), when it affirmed a stay of arbitration on public policy grounds after a school board surrendered through collective bargaining a responsibility vested in it to maintain adequate standards in the classrooms. In Honeoye Falls, the contract at issue required layoff in reverse order of seniority in the entire school district in contravention of Education Law, section 2510, subsection 2, which required that the seniority criteria be limited to the tenure area of the position to be abolished. Noting that the purpose of the statute was to maintain teaching proficiency so as to better serve the public need, the Court stated, "[i]t is beyond the power of a school board to surrender through collective bargaining a responsibility vested in the board in the interest of maintaining adequate standards in the

classrooms. . . ." 49 N.Y.2d at 734.

Likewise, placing DOI's investigations in the arbitral forum would circumvent DOI's statutorily conferred investigatory and law enforcement powers pursuant to the New York State General City Law Sec. 20(21), the City Charter and Mayoral Executive Order. Arbitration would also violate public policy because it would enable City agencies to surrender, through collective bargaining, DOI's responsibility to determine and maintain the standards and practices that will best serve the public in completing its statutorily prescribed mission to detect and eliminate corruption in these same City agencies.

Here, DOI unquestionably has statutory responsibilities which must be exercised free of restrictions imposed by arbitration. Not only would it violate public policy to impinge upon such statutory law enforcement responsibilities, but it would also violate public policy to interfere with the substantial public interest in detecting corruption and criminal conduct of public employees and those associated with the City.

Dated: October 28, 1997
New York, New York

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER