DC 37, L. 2507, 6 OCB2d 9 (BCB 2013)

(Arb.) (Docket No. BCB-3048-12) (A-14274-12)

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the FDNY violated the terms of the collective bargaining agreement, an agency memorandum, and a grievance determination when it failed to make "gainsharing" payments to the grievants. The City argued that the matter is not arbitrable because none of the alleged sources of right obligates the FDNY to make "gainsharing" payments to the grievants. The Union argued that the petition challenging arbitrability should be denied because the agency memorandum and the FDNY's past practice demonstrate that the parties have agreed to arbitrate disputes over "gainsharing" payments. The Board found that there is no nexus between the Union's grievance and any of the alleged sources of right and, accordingly, granted the City's petition challenging arbitrability. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

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

Petitioners,

-and-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCALS 2507 and 375,

Respondents.

DECISION AND ORDER

On September 14, 2012, the City of New York ("City") and the New York City Fire Department ("FDNY" or "Department") filed a petition challenging the arbitrability of a grievance filed by District Council 37, AFSCME, AFL-CIO, Locals 2507 and 375 ("Union"). In its request for arbitration, the Union claims that the FDNY violated the terms of the collective bargaining

agreement, an agency memorandum, and a Step II grievance determination when it failed to make "gainsharing" payments to six Department employees assigned to the Bulk Fuel Storage Unit ("Grievants"). The City argues that the matter is not arbitrable because none of the alleged sources of right require the FDNY to make "gainsharing" payments to the Grievants. The Union argues that the petition challenging arbitrability should be denied because the agency memorandum and the FDNY's longstanding practice of making "gainsharing" payments and addressing related grievances amount to the implementation of a written policy that the FDNY is bound to follow. This Board finds that there is no nexus between the Union's grievance and any of the alleged sources of right. Accordingly, the City's petition challenging arbitrability is granted.

BACKGROUND

The FDNY is a City agency responsible for protecting the lives and property of New York City residents and visitors as a first responder to fires, public safety, medical emergencies, disasters, and terrorist acts. The Union represents FDNY employees employed in the civil service title of Associate Fire Protection Inspector.[1] The Union and the City are parties to the 2005-2008 Engineering & Scientific Agreement ("Agreement"), which remains in full force and effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

Article VI, § 1(b) of the Agreement defines a grievance to include, in pertinent part:

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[1] Local 375 is currently the duly certified collective bargaining representative for employees in the Associate Fire Protection Inspector titles. In 2007, the Union transferred the internal jurisdiction of those titles from Local 375 to Local 2507; however, Local 2507's petition to amend its bargaining certificate to include these titles is still pending.

> A claimed violation, misinterpretation or misapplication of the rules or regulations, ***written*** policy or orders of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment. . . .

(Pet., Ex. 1) (emphasis in original) Article V of the Agreement, entitled "Productivity and Performance," provides:

> Introduction
> Delivery of municipal services in the most efficient, effective and courteous manner is of paramount importance to the Employer and the Union. Such achievement is recognized to be a mutual obligation of both parties within their respective roles and responsibilities. To achieve and maintain a high level of effectiveness, the parties hereby agree to the following terms:
>
> Section 1. – Performance Levels
>
> a. The Union recognizes the Employer's right under the [NYCCBL] to establish and/or revise performance standards or norms notwithstanding the existence of prior performance levels, norms or standards. Such standards, developed by usual work measurement procedures, may be used to determine acceptable performance levels, to prepare work schedules and to measure the performance of each Employee or group of Employees. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on Employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of performance standards or norms hereunder.
>
> b. Employees who work at less than acceptable levels of performance may be subject to disciplinary measures in accordance with applicable law.
>
> Section 2. – Supervisory Responsibility
>
> a. The Union recognizes the Employer's right under the [NYCCBL] to establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employees for Employees in supervisory positions listed in Article I, Section 1, of this Agreement. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice

> of the establishment and or revision of standards for supervisory responsibility hereunder.
>
> b. Employees who fail to meet such standards may be subject to disciplinary measures in accordance with applicable law.
>
> Section 3. – Performance Compensation
> The Union acknowledges the Employer's right to pay additional compensation for outstanding performance.
>
> The Employer agrees to notify the Union of its intent to pay such additional compensation.

(*Id.*)

The instant dispute concerns the Union's allegation that the FDNY violated its policy and practice by failing to make "gainsharing" payments to the Grievants. In a March 7, 1995 memorandum to the FDNY's Assistant Budget Commissioner ("Agency Memo"), the Department's Chief of Fire Prevention recommended the consolidation of the Bulk Oil and Motor Fuel Safety units, two units within the Bureau of Fire Protection, into a newly created unit called the Bulk Fuel Storage Unit ("BFSU" or "Unit"). As part of the consolidation, the Chief suggested eliminating three of the 14 positions allotted to the two units. He stated:

> The three salaries of the positions eliminated total $105,824.00. We wish to gainshare these salaries with the employees in the proposed unit. We believe that $27,000.00 or 25.5% should be gainshared. This is well within the guideline which specifies that no more than 33.33% of a total salary or salaries should be used for that purpose.[2]

(Pet., Ex. 4) The Agency Memo lists the current duties assigned to each title that would comprise the new Unit, in addition to the proposed additional duties to be incorporated upon consolidation. Exhibit III to the Agency Memo states: "Assuming that the gainsharing proposal below is

[2] The Agency Memo does not define what is meant by "gainshare." Both parties use the term "gainsharing" in their pleadings but do not define it, nor do they clarify whether they are using the term synonymously as it is used in the Agency Memo.

accepted, the final gain in savings to the Fire Department would be $78,284.00. . . . Note below the proposed allocation of this money." (*Id.*) (emphasis in original) The document then lists the names of the 11 affected employees and the proposed distribution each would receive, ranging from $2,000 to $5,000.

Consistent with the Agency Memo, the FDNY created the BFSU in early 1996, and the 11 identified employees were laterally transferred into the Unit. Those 11 employees received a salary increase to compensate them for their new duties.[3] It is undisputed that the Union did not bargain with the City over the increases, nor are they included in the salaries codified in the Agreement.

The Union alleges, and the City denies, that the original group of 11 employees subsequently received annual salary adjustments of $2,000, $3,000, or $5,000 per employee while they remained in the Unit. The Union further alleges, and the City denies, that some of the employees who were assigned to the Unit subsequent to its creation were also provided upon hire with a salary adjustment consistent with the "gainsharing" payment. The Union also asserts that, in 1997, FDNY employee Benjamin Leonen was assigned to the Unit as a Fire Protection Inspector Level II, but did not receive a salary adjustment consistent with the "gainsharing" payment. The Union alleges that Leonen filed a grievance in 2000 seeking the salary adjustment and, consequently, he received a $2,000 annual salary adjustment without backpay. According to the Union, in 2006, he filed another grievance seeking a retroactive adjustment for the years 1997 to 2000 and consequently received it. The City denies the allegations pertaining to Leonen.

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[3] Associate Fire Protection Inspectors Level I and II received a $2,000 salary increase and Associate Fire Protection Inspectors Level III received a $3,000 increase.

All of the Grievants are assigned to the Unit.[4] None of the Grievants were part of the original group of 11 employees assigned to the Unit. Rather, all of them were hired and/or assigned to the Unit subsequent to its creation and, according to the Union, did not receive "gainsharing" payments.

On February 29, 2012, the Union filed a grievance at Step III on behalf of the Grievants. At the Step III hearing, the Union argued that the FDNY violated Article XV of the Citywide Agreement in addition to Article V, § 3 and Article VI of the Agreement when it failed to pay the Grievants "gainsharing" payments.[5] The Union further alleged that the Grievants were entitled to these payments based on the Department's past practice. In support of its past practice argument, the Union relied on a February 1, 2006 determination from a Step II grievance hearing involving Kats and Belenkiy ("Step II Notice"). According to the Step II Notice, the grievance alleged that "all employees in the . . . Unit receive a gainsharing increase by virtue of their assignment in the Unit, and Kats and Belenkiy never received such increase." (Pet., Ex. 2) The Step II Notice further states that "[i]n the interest of sound labor relations, and in an effort to bring about resolution of the grievance without further grievance proceedings, the . . . Department will implement a $2000 . . . salary increase to each of the grievants, effective on the date that each was assigned to the . . . Unit." (*Id.*)

On May 31, 2012, a Review Officer from the New York City Office of Labor Relations ("OLR") denied the instant grievance. On July 13, 2012, the Union filed a request for arbitration,

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[4] The six Grievants are: Simon Belenkiy, Oleg Kats, Manuel Costales, Stanley Provsalov, Adimabua Nwabuoku (a/k/a Philip Nwabuoky), and William Burt. Belenkiy and Kats are Associate Fire Protection Inspectors Level III. The remaining Grievants are Associate Fire Protection Inspectors Level II.

[5] The Union does not allege a violation of Article XV of the Citywide Agreement in its request for arbitration.

describing the nature of the grievance to be arbitrated as:

> Whether the employer, the Fire Department of New York has failed to make gain sharing payments to the grievants in violation of the collective bargaining agreement and its own written policy affecting the terms and conditions of the grievants, and if so, what shall be the remedy?

(Pet., Ex. 2)[6]

POSITIONS OF THE PARTIES

City's Position

The City first argues that the Union failed to put it on notice of the source of right of its claim. It asserts that there is no provision in the Agreement that addresses "gainsharing." Moreover, the Union amended the contractual provision on which it relied on multiple occasions throughout the grievance process.[7] Finally, in its amended request for arbitration, the Union did not cite any contractual provision that had been violated.

The City next argues that the grievance is not arbitrable because the Union failed to establish the requisite nexus between an alleged requirement on the part of the FDNY to make "gainsharing" payments to the Grievants and the sources of right cited by the Union. The City argues that there is no nexus between the FDNY's failure or refusal to make "gainsharing" payments and Article V of the Agreement, because Article V does not address gainsharing. Rather, it "acknowledges the Employer's right to pay additional compensation for outstanding

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[6] On August 8, 2012, the Union filed an amended request for arbitration for the purpose of adding Local 375 as a party.

[7] The City claims that the Union initially alleged violations of Article V of the Agreement and Article VII of the Citywide Agreement. At the Step III conference, the Union orally amended its grievance to allege violations of Article VI of the Agreement and Article XV of the Citywide Agreement. When it filed the request for arbitration, the Union dropped its claim alleging a violation of the Citywide Agreement. The City asserts that the Union subsequently amended its request for arbitration and did not cite to any contractual provision that was allegedly violated.

performance" and obligates the employer to "notify the Union of its intent to pay such additional compensation." (Pet. ¶ 58) However, it does not obligate the employer to make "gainsharing" payments.

The City further contends that the FDNY's Agency Memo is not a grievable written policy of the employer. Citing Board precedent, the City asserts that the Agency Memo was an "internal management document" that did not contain a concrete course of action or plan. (Pet. ¶ 71) Rather, it "suggested a strategy" for the consolidation of two units and the potential use of the resulting savings, recommendations that were subject to acceptance or rejection by the Department. (*Id.*) The City notes that the Union concedes that the Agency Memo is simply a proposal. The Agency Memo neither created any substantive rights nor contained any rules, regulations, explicit directives, or procedures for how or when the recommended changes would be implemented.

For similar reasons, the City argues that the Union has also failed to establish that the Step II Notice is a grievable rule, regulation, written policy, or order of the FDNY. It contends that the Step II Notice resolved a specific grievance and was not addressed generally to the Department. It did not create or establish general agency policy. It also did not create any substantive rights, as the determination was not made on the merits of the grievance but rather was issued "in the interest of sound labor relations." (Pet. ¶ 75) The City also asserts that the Step II Notice is not a grievable policy because it is couched in "precatory language," and other statements of "hope and intent," which are assertions of goals and objectives but not definitive policy. (Pet. ¶ 76)

Union's Position

The Union argues that the City's notice claim should be dismissed. First, it contends that the Board has held that notice arguments must be made before an arbitrator and not in the context

of a challenge to arbitrability. Even if the Board finds that the notice argument is properly before it, the Union argues that Board precedent is clear that as long as the employer has constructive knowledge of the nature of the claim, "minor drafting changes or citations to different but related and comparable" contract provisions will not defeat the strong presumption favoring arbitrability. (Resp. Memo of Law, at 5-6) The Union asserts that its statement of the grievance has remained consistent throughout every stage of the grievance process and notes that it only filed an amended grievance at the City's request to correct the fact that the original grievance did not include Local 375. Moreover, it contends that the most current version of the grievance form available to it omitted the section that seeks the specific source of right that was violated. Finally, the Union asserts that it had many discussions with Petitioners regarding the grievance between July 13, 2012, the date it filed the original request for arbitration, and mid-September 2012, when the City filed the instant petition; thus, the City cannot now contend that it was not on notice of the nature of the dispute.

Next, the Union argues that there is a nexus between the Union's grievance and the cited provisions, and, therefore, it is for an arbitrator to decide whether a contractual violation occurred. Article VI, § 1(b) of the Agreement defines a grievance to include a "written policy . . . of the Employer applicable to the agency which employs the grievant affecting terms and conditions of employment." (Pet., Ex. A) The Union asserts that the Agency Memo is a written FDNY policy applicable to Unit employees that "clearly impacts the terms and conditions of their employment." (Resp. Memo of Law, at 7) The Union stresses that the grievance addresses a dispute over the "payment of wages, supplements, differentials, etc.," which is within the purview of both the Union and the Agreement. (Ans. ¶ 66)

While it concedes that the Agency Memo was intended to be a proposal, the Union argues

that the FDNY's course of conduct over the 17 years following its issuance demonstrates that the Department recognized the terms of the Agency Memo as a source of right. Since the Agency Memo was issued, the FDNY has had a history of making "gainsharing" payments to some Unit employees, at least one of whom was not a Unit employee at the time the Agency Memo was issued. It asserts that both parties have submitted to the grievance procedure "each time there has been a discrepancy" involving the issue. (Resp. Memo of Law, at 10) The FDNY's history of payment in accordance with the Agency Memo created an expectation among the Grievants that they, too, were entitled to a "gainsharing" payment. In short, the Union contends that the fact that the FDNY submitted to the grievance procedure to resolve the Union's claims that it did not make "gainsharing" payments to Unit employees hired after 1996 is the FDNY's acknowledgement that "gainsharing" is applicable to these employees.

The Union contends that the FDNY must be held to the terms of the Agency Memo and its past practice of complying with its terms or agree to bargain in good faith over the changes to these terms and conditions of the Grievants' employment. The Union argues that the only criterion that the Agency Memo set forth for receiving the payment is employment in the Unit. The FDNY did not subsequently limit or alter this criterion. The Union likens the Agency Memo to an employment agreement and asserts that its language should be construed against the drafter, which in this case was the City. It suggests that the Board conclude that the Grievants are entitled to the "gainsharing" payments because they fulfill the only stated criterion of being employees in the Unit.

DISCUSSION

As a threshold matter, we address the City's contention that the Union's failure to cite

specific contractual language in the amended request for arbitration renders its grievance not arbitrable. We have long held that we will "not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." *SSEU, L. 371*, 3 OCB2d 53, at 6-7 (BCB 2010) (citations omitted); *see also DEA*, 43 OCB 73, at 6 (BCB 1989). Thus, "if the party challenging arbitrability had clear notice of the nature of the opposing parties' claim prior to the submission of its request for arbitration, and therefore had an opportunity to attempt to settle the issue at the lower steps of the grievance procedure, the petition challenging arbitrability will be denied." *SSEU, L. 371*, 3 OCB2d 53, at 7.

We find that Petitioners had sufficient notice of the basis for the Union's claims, and that their ability to respond to the grievance was not impaired as a result of the omission of the source of right in the amended request for arbitration. The Union's original request for arbitration identified the source of right alleged to have been violated. The Union amended its request for arbitration--at the request of Respondents--solely for the purpose of clarifying that Local 375 is a party to the grievance. Except for the addition of Local 375 as a party to the amended request for arbitration, the two requests are identical. The amended request for arbitration does not in any way indicate that the alleged sources of right listed in the original request for arbitration were no longer applicable to the Union's grievance. Accordingly, we dismiss Petitioners' notice claim.[8]

We now address the City's substantive arbitrability claims. As provided in NYCCBL §

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[8] Citing *NYSNA*, 69 OCB 21 (BCB 2002), the Union states that the Board has held that allegations of failure to provide proper notice of claims during the grievance process must be determined by an arbitrator. In *NYSNA*, we held that we will refer to an arbitrator "any questions as to whether claims and provisions were properly raised during the step grievance process." *Id.*, at 12. In this instance, however, there is no issue as to whether the provisions were properly raised. It is undisputed that Petitioners were already on notice of the contractual and other provisions at issue in this matter prior to the filing of the request for arbitration, all of which were discussed in a Step III Reply issued by the OLR. (Pet., Ex. 2)

12-302, "[t]he policy of the NYCCBL is to encourage the use of arbitration to resolve grievances." *CEU, L. 2237*, 4 OCB2d 52, at 8 (BCB 2011) (quoting *SSEU, L. 371*, 4 OCB2d 38, at 7 (BCB 2011)).[9] Accordingly, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *Id.* (citations omitted); *see CWA, L. 1180*, 1 OCB 8, at 6 (BCB 1968). However, "[w]e cannot create a duty to arbitrate where none exists, nor can we enlarge a duty to arbitrate beyond the scope established by the parties." *CEU, L. 2237*, 4 OCB2d 52, at 8. (citations omitted)

This Board has established the following two-pronged test to determine whether a matter is arbitrable:

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

NYSNA, 2 OCB2d 6, at 8 (BCB 2009) (citations and internal quotation marks omitted).

The parties have obligated themselves to arbitrate their controversies through a grievance procedure, and there is no claim that arbitration of the grievance at issue would violate public policy or that it is restricted by statute or constitutional restrictions. Thus, the remaining issue is whether there is a reasonable relationship between the FDNY's alleged failure to make

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[9] Section 12-302 of the NYCCBL provides:

> It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

"gainsharing" payments to the Grievants and the alleged sources of right--the Agreement and other documents identified by the Union as well as the FDNY's past practice. For the reasons set forth below, we find that the requisite nexus has not been established.

The principal nexus asserted by the Union is that the Agency Memo is a written policy within the meaning of Article VI, § 1(b) of the Agreement, which effectuated "gainsharing" for all Unit members. We have consistently held that a document issued by an agency will not be accorded the status of a written policy or rule unless it has been "addressed generally to the [agency]" and has "set forth a general policy applicable to affected employees." *CEU*, 5 OCB2d 10, at 10 (BCB 2012) (citations omitted); *see also DC 37*, 49 OCB 9, at 8 (BCB 1992).

Here, the Agency Memo was addressed solely to the Department's Assistant Commissioner, not to the FDNY as a whole or generally to FDNY employees. It is also clear from the face of the document that the "gainsharing" proposal applies specifically to the 11 employees assigned to the Unit upon its consolidation. Indeed, the Agency Memo explicitly named the 11 employees to whom it recommended that the "gainsharing" payments be made and the proposed amounts to be allotted to each person. It does not address potential rights of future Unit employees to "gainsharing" payments.

We have also stated that:

> [w]ritten policy generally consists in a course of action, a method or plan, procedure or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency. The agreement of the union may be sought but is not required. Nevertheless, a policy must be communicated to the union and/or to the employees who are to be governed thereby.

DC 37, L. 1549, 43 OCB 67, at 9 (BCB 1989) (citation omitted). Conversely, we have held that agency documents couched in "general and precatory language" are generally not grievable. *See*

SSEU, L. 371, 61 OCB 7, at 6-7 (BCB 1998); *SSEU, L. 371*, 37 OCB 1, at 14-15 (BCB 1986). For example, in *SSEU, L. 371*, the Board disagreed with the union's contention that an agency procedure was an arbitrable written policy under the parties' collective bargaining agreement, holding instead that the procedure was advisory. 61 OCB 7, at 6-7. The Board found that the purpose of the policy was to inform employees of their rights and urge them to follow certain methods of redress, not to maintain compliance with the law, create independent substantive rights, or establish a departmental course of action. *Id.*

The Agency Memo is similarly couched in language reflecting the drafter's intention to offer a recommendation for the consolidation of two FDNY units, not a plan ordering such an action. The body of the Agency Memo is a proposal reflecting how the drafter believes the consolidation should be implemented. Its suggestive tone contrasts starkly with documents intended to dictate a "course of action, a method or plan, procedure or guidelines which are promulgated by the employer, unilaterally, to further the employer's purposes, to comply with requirements of law, or otherwise to effectuate the mission of an agency." *DC 37, L. 1549*, 43 OCB 67, at 9. In short, we are not persuaded that the Agency Memo is a "written policy" pursuant to the terms of the Agreement.[10] We therefore find that it does not provide the requisite nexus with the Union's grievance.[11]

We are also unpersuaded by the Union's claim that there is a reasonable relationship

[10] Because we find that the Agency Memo is not a "written policy," we need not address the Union's argument that any alleged ambiguities in it should be construed against the City as the drafter of the document.

[11] Even if we were to hold that the Agency Memo constitutes a written policy, we would still find that it provides no nexus to the grievance. There is no plausible interpretation of the document that supports the argument that the Chief intended his "gainsharing" proposal to apply to anyone beyond the original 11 Unit employees or, in other words, that the payments were to be offered to future employees of the Unit.

between the FDNY's alleged failure to make "gainsharing" payments to the Grievants and Article V of the Agreement. Article V addresses standards for employee performance. The Union did not specify any section of Article V which allegedly forms a nexus with its claim. Notwithstanding, we find that there is no language in Article V that can reasonably be interpreted as establishing an obligation by the FDNY to make "gainsharing" payments to the Grievants based on their employment in the Unit or any other criteria. Accordingly, we dismiss this portion of the grievance.

We further find unconvincing the Union's contention that the FDNY's course of conduct subsequent to its issuance of the Agency Memo amounts to a source of right for all employees in the Unit. We have held that "before we can direct a grievance based upon an alleged violation of a past practice to arbitration, the party seeking arbitration must demonstrate that the alleged violation of past practice is within the scope of the definition of the term 'grievance' which is set forth in the parties' collective bargaining agreement." *CEA*, 3 OCB2d 3, at 14-15 (BCB 2010) (citation omitted). Here, as in *CEA*, the definition of "grievance" is limited to alleged violations, misinterpretations or misapplications of the Agreement itself or of the "rules or regulations, ***written*** policy or orders of the Employer." (Pet., Ex. 1) (emphasis in original) The definition does not include claimed violations of past practice. Because it cannot grieve a past practice under the Agreement, the Union cannot establish a nexus between the instant grievance and the FDNY's alleged practice of making "gainsharing" payments to Unit employees hired after 1996. *See CEA*, 3 OCB2d 3, at 15.

Finally, the Union contends that, even if the Agency Memo was intended simply as a proposal, the FDNY's course of conduct after its issuance demonstrates that the Department subsequently recognized its terms as a source of right, and thus it must be considered a written

policy within the meaning of the Agreement. Here, it appears that the Union is arguing that, taken together, the FDNY's proposal and practice form a grievable policy. While the FDNY may indeed have provided some type of salary adjustment to certain Unit employees hired after the Agency Memo was issued, such a practice was neither incorporated into the Agreement nor memorialized in a written policy. Because the Agreement's definition of a grievance does not encompass unwritten policies, the Union's claim does fall within it.[12] (*See* Pet., Ex. 1)

For the reasons discussed, we find that the grounds for arbitration asserted by the Union are insufficient. Accordingly, the petition challenging arbitrability is granted, and the request for arbitration is denied.

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[12] To the extent the Union relies upon the Step II Notice as a written policy that is consistent with the FDNY's alleged past practice, we find that this document also falls outside the Agreement's definition of a grievance. The Step II Notice is not "addressed generally" to the Department nor does it "set forth a general policy applicable to affected employees." *CEU*, 5 OCB2d 10, at 10 (citations omitted). The document was specifically tailored to resolve the grievance of the two employees, not to advance a "course of action, a method or plan, procedure or guidelines" promulgated by the FDNY or the City. *DC 37, L. 1549*, 43 OCB 67, at 9.

ORDER

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

ORDERED, that the petition challenging arbitrability filed by the City of New York and the New York City Fire Department, docketed as BCB-3048-12, is granted; and it is further

ORDERED, that the request for arbitration filed by District Council 37, AFSCME, AFL-CIO, Locals 2507 and 375, is denied.

Dated: April 15, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent. See attached opinion.

CHARLES G. MOERDLER
MEMBER

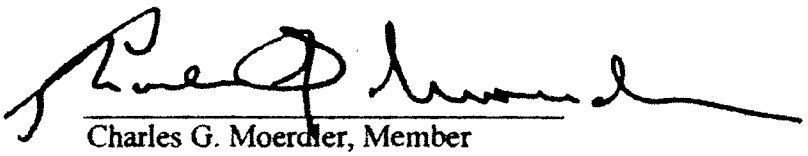
The City of New York and the New York City Fire Department, Petitioners -and- District Council 37, AFSCME, AFL-CIO, Locals 2507 and 375, 60CB 2d --(BCB 2013, (Arb DKT No. BCB-3048-12) (A-14274-12).

I dissent. The majority opens it's the Discussion portion of its opinion with the familiar and apt mantra "We have long held that we will "not dismiss requests for arbitration because of technical omissions when a petitioner's ability to respond to the request or prepare for arbitration was not impaired." The majority, however, then proceeds to do just that.

"Gain sharing," a notable and praiseworthy device designed to benefit both the City and its employees and to encourage productive advances was first devised and implemented in New York City by the late Jack Bigel, acting for the Uniformed Sanitation men's Association and enlightened Municipal officials, and their distinguished counsel, the late Edward Silver. The concept permitted the City to obtain significant "productivity" changes that it desired and, at the same time, working men and women received a negotiated portion of the benefits thus yielded. It was a win-win for both labor and management. However, there are those who lack the foresight and ability to recognize the advances in labor relations thus fashioned decades ago and persist in seeking to undermine such advances. This proceeding arises out of such a short-sighted and irresponsible effort to sabotage one such effort.

For this Board to deny arbitrability under these circumstances is, in my view, wholly unacceptable. Our function is to advance harmonious labor relations. Arbitration fairly and dispositively achieves that result. To deny that right on the grounds here stated is, in my view, inappropriate. I decline to join in that effort and dissent therefrom.

April 15, 2013



Charles G. Moerdler, Member