

City & FDNY v. L. 2507, DC 37, 67 OCB 18 (BCB 2001) [Decision No. B-18-2001 (Arb)]

OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

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

Petitioners,

Decision No. B-18-2001  
Docket No. BCB-2129-00  
(A-8014-99)

-and-

DISTRICT COUNCIL 37, LOCAL 2507, AFSCME,  
AFL-CIO,

Respondent.

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**DECISION AND ORDER**

This case involves a challenge by the New York City Fire Department (“Petitioner” or “FDNY”) to the arbitrability of a grievance filed by District Council 37, Local 2507 (“Respondent” or “Union”) asserting that the FDNY violated its own Executive Order and Operating Guide Procedure, as well as a Stipulation of Settlement entered between the Union and the Health and Hospitals Corporation (“HHC”), when it terminated Jeanine Newhouse (“grievant”) from her position as an Emergency Medical Services Paramedic for failure to maintain her certification.<sup>1</sup> The FDNY argues that it cannot be required to arbitrate this issue because there is no nexus between the cited documents and the alleged violation. Because we

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<sup>1</sup> Newhouse began working as a paramedic for HHC on September 14, 1987. On or about March 17, 1996, EMS Paramedics were functionally transferred to the FDNY.

find that a sufficient nexus exists between the departmental procedures relied upon by the Union and the subject of the grievance, we grant the Union's request for arbitration.

### **BACKGROUND**

Jeanine Newhouse began working as an Emergency Medical Services Paramedic ("Paramedic") on September 14, 1987. Newhouse, like all paramedics, was required to maintain a valid driver's license, a valid New York City Medical Advisory Committee Certification, and a valid New York State Department of Health EMT/AEMT-4 Paramedic Certification.<sup>2</sup> She was required to successfully complete a refresher course prior to the expiration of her paramedic certification. After completing the course, Newhouse was required to pass the New York State Paramedic Examination in order to be recertified.

Newhouse's paramedic certification was due to expire on August 31, 1998. She enrolled in a refresher course that was held from March 5 through March 25, 1998. Newhouse did not complete the course. Shortly before the final exams were to be administered, the FDNY discovered that her driver's license was suspended due to a lapse in her automobile insurance. She was instructed to resolve the problem immediately, and missed four class sessions in her efforts to comply with the FDNY's request. Because EMS Academy Policy Rules and Regulations ("EMS Academy Rules") require the release of any participant whose absences exceed two class sessions, the grievant was dropped from the program.<sup>3</sup>

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<sup>2</sup> The abbreviation in this decision for "Petition" is "Pet.," "Answer" is "Ans.," "Exhibit" is "Ex.," "Request for arbitration" is "RFA."

<sup>3</sup> Fire Department Bureau of Training Emergency Medical Service Division, Academy Policy Rules and Regulations, read, in pertinent part:

(continued...)

The grievant enrolled in a second refresher course that was held from May 4 through May 22, 1998. Following an absence, the FDNY declared her absent without leave (“AWOL”) from the program and, as per EMS Academy Rules, released her from the course.<sup>4</sup> Newhouse has contended that she overslept due to medication taken as a result of prior surgery. By letter dated August 26, 1998, the FDNY informed Newhouse that she had been rescheduled for a third refresher course that was to take place between September 8 through September 28, 1998. (Pet. Ex. C.) The grievant withdrew from the course because of an alleged infected laceration on her arm. After she withdrew, Chief Day of the FDNY phoned Newhouse to inform her that she was to be terminated on October 9, 1998. (Pet. McAllan’s letter, attached)

On October 6, 1998, Richard McAllan, Newhouse’s union representative, wrote to Sherry Ann Kavaler, FDNY Director of Personnel, regarding the grievant’s prospective termination. McAllan’s letter provided a detailed explanation regarding Newhouse’s separation from the three refresher courses and alleged that the FDNY’s failure to allow Newhouse “a grace period” in which to resolve the problem with her driver’s license during the first refresher course was improper. (Ans. Ex. B.) In a follow-up letter written on the same day, the union requested that

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<sup>3</sup>(...continued)

III. ATTENDANCE

Each day consists of two sessions.

A. ABSENCE

Absences totaling more than 2 sessions will result in your being released from the program. The established EMS procedure for calling in sick is to be followed. . . . Any student not making the appropriate notifications will be considered Absent Without Leave (AWOL), which will result in being released from the program and subject to disciplinary actions.

<sup>4</sup> *Id.*

Newhouse be afforded a three-month medical leave of absence in order to recuperate from the infection in her arm. (Ans. Ex. A.)

On October 7, 1998, the FDNY sent Newhouse a letter to inform her that she was terminated effective October 9 because of her failure to maintain her paramedic certification. (Pet. Ex. F.) Subsequently, FDNY denied Newhouse's leave of absence request by letter dated October 13, 1998. (Ans. Ex. D.) Shortly after being terminated, Newhouse completed the required refresher course and renewed her certification in December of 1998. She submitted a request for rehire consideration that the FDNY rejected on May 5, 1999. (Pet. Ex. G.)

On December 15, 1998, the Union filed a Step II grievance. On March 17, 1999, Captain Frank P. Mineo, Deputy Director of Labor Relations at FNDY, denied the grievance. His letter, in pertinent part, reads:

The Bureau of Personnel has advised me that Ms. Newhouse was terminated for failure to comply with the terms and conditions of her employment, specifically her failure to maintain a valid paramedic certification. Please note that paragraph 4.5 of EMSC Operating Guide Procedure 104-3, specifically states that terminations due to a failure to maintain minimum qualifications/licenses are not grievable. Therefore, this grievance is denied without a hearing at this step. (Ans. Ex. F.)

A Step III grievance was filed on March 30, 1999 (Ans. Ex. G.) and was denied on October 15, 1999 by Patricia McM. Bartels, OLR's Review Officer, for the same reasons offered by Captain Mineo. (RFA, Step III review, attached) On November 23, 1999, the Union filed a request for arbitration. (Ans. Ex. H.) The Union states the grievance as follows: "Whether the employer, the New York City Fire Department, wrongfully terminated the grievant Jeanine Newhouse without a due process hearing is arbitrary and capricious. If so, what shall the remedy be?"

As the contract provision, rule, or regulation it claims was violated, the Union lists Article VII, §§ 1 (b) and (f), of the collective bargaining agreement (“CBA”), EMS Executive Order 84-04 (“EO 84-04”),<sup>5</sup> BEMS Operating Guide Procedure 104-3 (“BEMS 104-3”)<sup>6</sup> and Stipulation of Settlement dated January 21, 1986 (“Stipulation”). (Ans. Ex. E.) The Union cites Article VII, §2, Step IV of the CBA as the section of the contract under which the demand for arbitration is made.<sup>7</sup> The grievant seeks reinstatement, expungement of the disciplinary charges, and full back pay with interest.

## POSITIONS OF THE PARTIES

### FDNY’s Position

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<sup>5</sup> EO 84-04, issued on April 12, 1985, is entitled “EMS Policy Regarding Maintenance of Required Certifications By Members of the Service.” Effective August 11, 1993, the FDNY issued EO 93-11, “EMS Policy Regarding Maintenance of Required Certifications and Driver’s Licenses By Members of the Service.” Although the Union alleges a violation of EO 84-04 and the FDNY acknowledges the alleged violation of that Order, the FDNY addresses EO 93-11 in its petition. EO 93-11 states that it supersedes and revokes prior directives, procedures or policies.

<sup>6</sup> BEMS 104-3 concerns wearing identification cards at EMS headquarters. The FDNY and the Union concede that this guide is irrelevant to the issues presented in this case. (Pet. ¶ 79; Ans. ¶ 58.) In its answer, the Union argues that EMS Command Operating Guide Procedure 104-3, Maintenance of Certifications and Licenses (“EMSC 104-3”), controls. It is evident from the pleadings that the Union’s reference to BEMS 104-3, rather than EMSC 104-3 in the request for arbitration was merely an oversight and that the FDNY was on notice from the grievance history which operating guide the Union intended to cite.

<sup>7</sup> Article VII, §2, Step IV provides in relevant part:  
An appeal from an unsatisfactory determination at Step III may be brought solely by the Union to the Office of Collective Bargaining for impartial arbitration within fifteen (15) working days of receipt of the Step III determination . . . .

The FDNY argues that the Union has failed to establish a nexus between the FDNY's alleged improper actions and Article VII, § 1(b) of the CBA. The provision reads:

The term "Grievance" shall mean:

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

The FDNY notes that the Union alleges a violation of three documents in its grievance – EO 93-11, EMSC 104-3, and the Stipulation. The FDNY argues that it was Newhouse who violated EO 93-11 when she failed to successfully complete the required courses needed to renew her certification.<sup>8</sup> Since Newhouse, not the FDNY, violated EO 93-11, she may not arbitrate her termination under Article VII, § 1 (b) of the CBA. (Pet. ¶¶ 60-62.)

The FDNY addresses BEMS Operating Guide Procedure 104-3 (which the Union concedes it cited in error) that requires employees to wear identification badges at EMS

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<sup>8</sup> EO 93-11, reads in relevant part:  
[E]mployees who fail to maintain the Certification(s) and/or License(s) required for their job positions are not "whole" and therefore, are unqualified for EMS employment. Therefore, the following policy has been established regarding EMT Refresher programs for members of the Service:

- A. In the event that the employee fails, by their own actions, to successfully satisfy all requirements for Certification, they will be removed from their position and placed on a leave of absence without pay, until such time as appropriate Certification is obtained. . . .
- E. Members of the Service are responsible for maintaining their appropriate Certification, as enumerated in the first paragraph in this Order. It is not EMS' obligation to retain employees in order for them to maintain their required State Certification.

headquarters and argues that there is no nexus between this Operating Guide and Newhouse's failure to maintain her certification. (Pet. ¶¶ 75-82.) The FDNY does not address EMSC Operating Guide Procedure 104-3 (which the Union says is the correct source of the 104-3 reference).<sup>9</sup>

The FDNY argues that the Union has no right to arbitrate an alleged violation of the Stipulation because it is not a rule, regulation, or written policy of the employer and does not fall within the contractual definition of the term grievance. Further, the Stipulation, by its express terms, does not constitute precedent for the determination of any disputes except one to enforce the parties' objections spelled out in the Stipulation itself. (Pet. ¶¶ 66-67.)<sup>10</sup> Moreover, even if the Stipulation were found to be arbitrable, the FDNY claims, its contents dealing with scheduling provide no nexus between the document and the issue to be resolved in this case. (Pet. ¶¶ 69-70.)

Lastly, the FDNY argues that it was not necessary to serve Newhouse with disciplinary charges because her termination was unrelated to discipline. Under Article VII, § 1 (f), a

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<sup>9</sup> At Step II and Step III of the grievance procedure, the FDNY refers to § 4.5 of EMSC 104-3 which reads:  
Terminations for failure to maintain minimum qualifications (certification[s] and/or driver's license) for the specific title are not grievable.

<sup>10</sup> Paragraph nine, reads in relevant part:  
This Stipulation shall not be construed as an admission by the Employer that it violated any provision of the New York City Collective Bargaining Law, nor shall this settlement be offered in evidence in, nor constitute a precedent for, the determination of any other dispute between the Union and the Employer, except for the purposes of enforcing the obligations contained herein.

grievance is defined as a “[f]ailure to serve written charges as required by Section 75 of the Civil Service Law.” Newhouse was not charged with incompetency or misconduct; she was terminated because she was no longer qualified to perform as a paramedic. Therefore, there is no nexus between the grievant’s failure to maintain the appropriate certification and Article VII, §1(f) of the CBA.

### **Union’s Position**

The Union argues that upon discovering that Newhouse’s driver’s license had been suspended for the first time, the FDNY should have given her thirty days in which to resolve the problem. (Ans. ¶ 60.) The FDNY’s failure to do so violated EMSC Operating Guide 104-3. It reads, in relevant part:

- 5.8 Upon notification to the Department, by NYS Department of Motor Vehicles or by the member, that a member’s driver’s license has been suspended, revoked, or expired, the member whose driver’s license has been suspended, revoked or has expired shall:
  - 5.8.3 When restricted from driving for the first time:
    - A. Have thirty calendar days to get his/her license validated.

The Union notes that although its request for arbitration erroneously referred to the BEMS Operating Guide, rather than the EMSC, the FDNY was given adequate prior notice of which Operating Guide was at issue and improperly addressed the BEMS Guide. Not only are the facts of the case obviously related to the maintenance of paramedic certification, rather than wearing identification badges, but FDNY Captain Mineo’s letter denying the Step II grievance correctly refers to the intended EMSC Operating Guide.

In support of the Union’s allegation that the FDNY should have served Newhouse with



disciplinary charges, the Union argues that the FDNY has treated the failure to maintain certification as a disciplinary matter in the past. The Union refers to *Health and Hosp. Corp. Emergency Med. Serv. v. Darocha*<sup>11</sup> in which the respondent was found guilty of disciplinary misconduct when he falsified his EMT certification. (Ans. Ex. K.)

The Union's request for arbitration also alleged violations of EO 93-11 and the Stipulation. However, the Union did not mention either of these documents in its answer.

### **DISCUSSION**

The issue before this Board is whether the Union's claim that the FDNY violated EO 93-11, EMSC 104-3, and the Stipulation when it terminated Newhouse is arbitrable. Because the record establishes the required nexus between the subject of the grievance and EO 93-11 and EMSC 104-3, and because a grievance under the CBA includes claimed violations of "rules, regulations, written policy or orders," we refer the case to an arbitrator to decide.

When a union's request for arbitration is challenged, we must determine whether the parties are obligated to arbitrate their controversies and, if they are, whether the act complained of by the union is arguably related to the source of the right alleged to have been violated.<sup>12</sup>

When arbitrability is challenged, the burden is on the union to establish a nexus between the

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<sup>11</sup> OATH Index No. 318/96 (Christen, ALJ, Dec. 8, 1995).

<sup>12</sup> See *Human Resources Admin. and City of New York v. Social Serv. Employees Union, Local 371*, Decision No. B-7-98 at 5; see also *City of New York v. District Council 37, Local 1795*, Decision No. B-19-89 at 5; *City of New York v. Communication Workers of America, AFL-CIO*, Decision No. B-28-82 at 7.

subject of the grievance and the contract provisions it claims have been breached.<sup>13</sup> If an arguable relationship is shown to exist, this Board will not consider the merits of the case, but will refer the case to an arbitrator to interpret the cited provision of the parties' agreement.<sup>14</sup> The policy of the New York City Collective Bargaining Law ("NYCCBL") is to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances.<sup>15</sup> The parties in this case have agreed to arbitrate unresolved grievances as defined in their collective bargaining agreement.

EMSC 104-3, § 5.8 grants an employee thirty calendar days during which to validate his/her driver's license after it has been suspended for the first time. The Union's claim that the FDNY violated its own procedure when it instructed Newhouse to resolve the problem with her driver's license immediately, necessitating her absence from the refresher course, bears a sufficient nexus to this section. The FDNY's reliance on EMSC 104-3, § 4.5, which states that "[t]erminations for failure to maintain minimum qualifications (certification[s] and/or driver's license) for the specific title are not grievable," does not preclude the arbitration of this claim. We find that even if Newhouse's termination from her position is not grievable, as the FDNY argues, the Union's allegation that the FDNY failed to follow its own procedures under EMSC

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<sup>13</sup> See *City of New York v. Communications Workers of America*, Decision No. B-13-93 at 8; see also *Dep't of Probation and City of New York v. United Probation Officers' Ass'n*, Decision No. B-10-92 at 9.

<sup>14</sup> See *City of New York v. Correction Officers' Benevolent Ass'n*, Decision No. B-12-94 at 9.

<sup>15</sup> See *City of New York and New York City Dep't of Transp. v. United Marine Div., Local 333*, Decision No. B-35-89 at 10; see also *City of New York v. United Bhd. of Carpenters and Joiners of America*, Decision No. B-15-82 at 3.

104-3, § 5.8 when it did not grant Newhouse thirty days to validate her license is a grievable matter. Therefore, the claim based upon the alleged violation of EMSC 104-3 should be submitted to arbitration.

Additionally, EO 93-11 states that employees who fail to satisfy the requirements for certification will “be removed from their position and placed on a leave of absence without pay, until such time as appropriate certification is obtained.”<sup>16</sup> The same order also states that the “expiration, revocation or complete suspension of a member’s driver’s license will subject the member to removal from their job position and placement on a leave of absence without pay, until such time that their license is restored.” The record indicates that the Union requested that Newhouse be placed on a leave of absence in lieu of termination and that her leave request was denied. On this basis, we find that there is a nexus between EO 93-11 and the subject of the grievance. It is for an arbitrator to determine whether the denial violated EO 93-11. We also note that, to the extent that § 4.5 of EMSC 104-3 may conflict with EO 93-11, this raises questions of contract interpretation, which an arbitrator must decide.<sup>17</sup>

The FDNY’s contention that the Stipulation cannot be used as a basis for the Union’s grievance as defined by Article VII, § 1 (b) of the CBA is correct. We have previously held that a Stipulation does not constitute a rule, regulation, written policy or order and therefore does not fall within the parties’ contractual definition of the term “grievance” unless “it is addressed

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<sup>16</sup> Because the FDNY addresses EO 93-11 in its petition which expressly states that it supersedes prior directives, this Board feels that it is appropriate to scrutinize EO 93-11 in making its determination on arbitrability. *See supra* note 5, at 5.

<sup>17</sup> *See City of New York v. Uniformed Firefighters Ass’n of Greater New York*, B-40-93 at 9.

generally to the Department and sets forth a general policy applicable to the affected employees.”<sup>18</sup> Additionally, as the FDNY notes, the Stipulation by its own terms provides that it shall have no precedential effect and cannot be used in any proceeding except one seeking to enforce the Stipulation itself.

Therefore, to the extent that the Union has established a nexus between the FDNY’s actions concerning the grievant and the alleged violations of the conflicting procedures under EMSC 104-3 and EO 93-11, we refer the matter to an arbitrator to decide.<sup>19</sup>

### **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, be and the same hereby is, granted as to the claimed violation of Article VII, § 1 (f) and the Stipulation of Settlement and denied as to the claimed violations of EO 93-11 and EMSC Operating Guide Procedure 104-3, and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 2507, be and the same hereby is, granted as to the claimed violation of EO 93-11 and EMSC Operating Guide Procedure 104-3, and dismissed as to the claimed violation of Article VII, § 1 (f) and the

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<sup>18</sup> *City of New York v. Local 3, Int’l Bhd. of Elec. Workers*, Decision No. B-59-90 at 11-12.

<sup>19</sup> Regarding the Union’s claim that the FDNY should have served Newhouse with written disciplinary charges before it attempted to terminate her position, we find that the grievant’s termination was unrelated to discipline. No nexus exists between Newhouse’s termination and Article VII, § 1 (f) of the CBA.

Decision No. B-18-2001  
Docket No. BCB-2129-00 (A-8014-99)

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Stipulation of Settlement.

Dated: April 30, 2001  
New York, New York

MARLENE A. GOLD  
CHAIR

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GEORGE NICOLAU  
MEMBER

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BRUCE H. SIMON  
MEMBER

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EUGENE MITTELMAN  
MEMBER

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