

***Uniformed Firefighters Ass’n, 75 OCB 19 (BCB 2005)***

[Decision No. B-19-2005] (Docket No. BCB-2455-05) (A-10885-05).

***Summary of Decision:*** The City challenged the arbitrability of a UFA claim that FDNY violated existing policies when it issued a memorandum directing the response of units with fewer than four firefighters during a tour. The City argued that the memorandum clarified existing policies and that the UFA, in a Stipulation known as the Roster Staffing Agreement, waived the right to grieve specific staffing issues. The Board found that the UFA established a nexus between the language in the memorandum and the cited policies and that the waiver clause in the Stipulation did not address this issue. Therefore, the petition was denied and arbitration granted. (***Official decision follows.***)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Arbitration**

***-between-***

**CITY OF NEW YORK &  
THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,**

***Petitioner,***

***- and -***

**UNIFORMED FIREFIGHTERS ASSOCIATION  
OF GREATER NEW YORK,**

***Respondents.***

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**DECISION AND ORDER**

On February 2, 2005, the City of New York and the Fire Department of the City of New York (“City” or “FDNY” or “Department”) filed a petition challenging the arbitrability of a grievance brought by the Uniformed Firefighters Association of Greater New York (“UFA” or “Union”). Requesting arbitration, the Union alleges that the Department violated its own

policies and the parties' collective bargaining agreement ("CBA") when, on December 1, 2004, the Chief of Operations issued a memorandum ("Memorandum") that directed ladder and engine companies to respond to calls with less than the complement of four firefighters per company. The City argues that the Memorandum did not change existing policies but clarified them and that the Union, in a Stipulation of Settlement between the parties, known as the Roster Staffing Agreement ("Stipulation"), waived the right to grieve specific staffing issues, including, as here, policies concerning deploying companies. The Union asserts that the language in the Memorandum conflicts with, and thereby violates, existing policy concerning units of fewer than four firefighters and that the waiver provision in the Stipulation is not in issue. This Board finds that since the Union has established a nexus between the action complained of and the cited FDNY policies, this case should be sent to arbitration.

### **BACKGROUND**

During negotiations for a successor agreement to the FDNY and UFA's 1984-1987 CBA, the City announced its intent to delete from the CBA a requirement that engine companies be staffed by no fewer than five firefighters per tour. After several months of safety impact hearings before this Board, on January 31, 1990, the Department implemented a Roster Staffing Program. On March 26, 1990, approximately two months later, the UFA filed a scope of bargaining petition (docketed as BCB-1265-90), alleging that the program as implemented differed from the proposal the Board had ruled upon and created a threat to the safety of firefighters and an unduly burdensome workload. After more hearings were held but before the Board issued a decision,

the parties entered into the Stipulation on January 30, 1996.<sup>1</sup>

Under the Stipulation, the UFA agreed to withdraw its scope of bargaining petition, and the Department agreed to designate 60 engine companies (C + 60) to be staffed with five firefighters at the outset of each tour, with the rest of the engine companies staffed with four firefighters at the outset. Further, under the Stipulation, if the average rate of absent firefighters during the previous 365 days is greater than 7.5% at the beginning of a month, the Commissioner of FDNY has the discretion to reduce the number of five-firefighter engines from C + 60 to C + 11 until the average is again determined the next month.<sup>2</sup>

The Stipulation includes a waiver provision in paragraph 11, which states:

By entering into this Stipulation of Settlement, the Union agrees to waive its right to file any litigation or grievance regarding the Department Roster Staffing program as set forth in the case docketed with the Office of Collective Bargaining as BCB-1265-90, or with regard to the practical impact of this agreement until January 31, 2006. Should a court of competent jurisdiction or any other administrative entity, except for enforcement purposes, grant the right to initiate any such litigation or grievance within that time, this agreement will be terminated immediately. Should litigation or a grievance commence, this agreement or any portion thereof shall not be admissible in any court proceeding or other administrative forum. . . .

A provision concerning Roster Staffing overtime is also included. The parties agreed that the

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<sup>1</sup> Previous cases connected to the Roster Staffing Program include: *Uniformed Firefighters Ass'n*, Decision No. B-41-91; *Uniformed Firefighters Ass'n*, Decision No. B-39-90; *Uniformed Firefighters Ass'n*, Decision No. B-70-89, *aff'd*, *Unif. Firefighters Ass'n v. Office of Collective Bargaining*, No. 1065/90 (Sup. Ct. N.Y. Co. Nov. 26, 1990); *Uniformed Firefighters Ass'n*, Decision No. B-4-89, *aff'd*, *Unif. Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1<sup>st</sup> Dep't 1990).

<sup>2</sup> "C" refers to all engine companies that have four firefighters at the start of a tour. The term "C + 60" means that 60 engine companies have five firefighters at the start of the tour, and "C + 11" means that 11 engine companies have five firefighters at the start.

terms of the Stipulation are effective from January 31, 1996, until January 31, 2006.

On December 1, 2004, Chief of Operations, Salvatore J. Cassano, issued the Memorandum directing that citywide staffing levels of firefighters be reduced from C + 60 to C + 11 because, according to the City, the Department found that the absence rate had risen to above the designated rate of 7.5%, specifically to 7.5022%. The order became effective on December 2, 2004. In addition to mandating the basic reduction of five-firefighter companies at the start of a tour, the Memorandum includes policies and procedures for deployment of firefighters when, during a tour, staffing levels in a company go below four firefighters in a unit available for action. The Union objects to the Memorandum's language in the following provisions concerning deployment of units with fewer than four firefighters:

For any reduction below level C in a Division after the start of a tour the following shall apply:

Company Officer Responsibilities

1) All ladder companies responding to alarms and staffed with less than 5 firefighters shall transmit to the dispatcher "we are responding with (state the number of firefighters)."

2) All engine companies responding to alarms and staffed with less than 4 firefighters shall transmit to the dispatcher "we are responding with (state the number of firefighters)." Engine companies staffed with 4 firefighters shall respond using the 10-14 signal as per current policy.

\* \* \*

5) Units staffed with an officer and 2 firefighters shall respond to all alarms.

6) Provided an officer and a chauffeur are available, units shall respond to reports of structural fires and any verbal alarms received while in quarters.

7) When an engine company with an officer and 3 firefighters is the only unit on the scene they shall take a defensive position. However, if a known life hazard is found and immediate action could prevent the loss of life, appropriate action (rescue activity) may be taken by an individual member. . . .

8) When a ladder company with an officer and 2 firefighters is the only unit on the scene they shall not enter the IDLH [immediately dangerous to life or health]. However, if a known life hazard is found and immediate action could prevent the loss of life, appropriate action (rescue activity) may be taken by an individual member.

The Memorandum includes two separate notes. The first one reads:

This is a guide. Command chiefs shall have the discretion of detailing the 5<sup>th</sup> firefighter from ladder companies in other boroughs at any time based on citywide staffing levels. In addition the option of closing units for the remainder of the tour may be considered. This decision shall be based on the time of day, fire activity in the division, fire activity in the city, amount of previous reductions, and any other relevant information.

The second note, at the end of the Memorandum, states:

The above modifications should in no way be interpreted as a policy change. Ladder company procedures will continue to be based on a staffing level of five firefighters unless circumstances dictate otherwise.

The Union asserts that the Memorandum violates two Department policies that set forth the manner in which FDNY deploys firefighters – All Units Circular (“AUC”) 287, entitled “Roster Staffing,” and Personnel Administrative Informational Directive (“PA/ID”) 5-74, entitled “Firefighters Minimum Manning Policy Guidelines.” The Union points to various sections which it claims to have been violated.

Section 1 of AUC 287 provides:

1. ROSTER STAFFING

Roster Staffing will govern the allocation and assignment of Firefighters to a Division. The assigned units will be placed in five groups to provide the following levels of Staffing:

1.1 GROUP 1:

All Ladder Companies, Rescue Companies, and Squad Companies are designated as five Firefighter companies and shall be staffed with five Firefighters at the beginning of each tour.

1.2 GROUP 2:

Those Engine Companies that the Department has designated to start each tour with five Firefighters as part of the agreement with the U.F.A. There will be 54 Engine Companies spread throughout the City in this group.

1.3 GROUP 3:

That group of 11 Engine Companies that will start each tour with five Firefighters when the staffing level is Level B. (C + 11).

1.4 GROUP 4:

Those Engine Companies that are not part of Group 2 or Group 3 Engine Companies.

1.5 GROUP 5:

Special units that will be staffed as follows:

1.5.1 Haz-Mat Companies shall be designated and staffed as seven Firefighter companies.

1.5.2 Marine Companies shall be designated and staffed as two Firefighter companies.

AUC 287, § 3.3, under “Staffing Needs and Details,” reads:

If no Firefighters are available under these circumstances, then at the discretion of the Chief of Operations, Firefighters may be hired on an overtime basis to bring these units up to four or five Firefighters. As an alternative, a unit may be temporarily removed from service and their staffing reassigned to other companies.

The parties do not dispute that this section refers to actions taken concerning staffing levels at the start of a tour. On the other hand, AUC 287, § 11, “Staffing Levels and Terminology,” refers to

staffing throughout the tour. It reads:

- 11.1 **Full Strength Unit** – Units responding with indicated number of Firefighters.
  - 11.1.1 Group 4 Engine Company – 4 Firefighters
  - 11.1.2 Group 2 & 3 Engine Company – 5 Firefighters
  - 11.1.3 Group 1 Company – 5 Firefighters
- 11.2 **10-14 Engine**
  - 11.2.1 Groups 2, 3, or 4 Engines responding with four Firefighters to a reported incident requiring a structural response.
    - A. The unit shall acknowledge receipt of alarm by transmitting a 10-14 signal. . . .
- 11.3 **Reduced Staff Unit**
  - 11.3.1 A Company in Group 1 responding with four Firefighters.
    - A. Officer of unit shall notify dispatcher via radio. They are to identify unit and state, “We are responding with four Firefighters.”
- 11.4 **Under Staffed Unit**
  - 11.4.1 A Group 1, 2, 3, or 4 unit responding with less than four Firefighters.
    - A. Must notify dispatcher via Department radio that they are responding “Under Staffed.” (See PA/ID Sec.1.5)
- 11.5 No other terminology shall be used to describe staffing levels over Department radio. Misunderstanding may cause dispatcher problems that can delay the response of needed units.

PA/ID 5-74, § 1.5, “Less than Minimum Manning Level,” provides:

- 1.5.1 Where a provision of this circular allows for less than MML [Minimum Manning Level], it shall be understood that an effective unit must be

maintained. As a guide, only one Firefighter less than MML shall be permitted (does not apply to MML of four Firefighter units or less).

- 1.5.2 Other than at the start of a tour, when a company is reduced by more than one Firefighter (that is, to three Firefighters or less) the Battalion shall arrange a detail to bring the manpower in that unit up to four, forthwith. If any delay in providing the required manpower will be incurred, the Officer-on-Duty shall notify the dispatcher, Battalion, and Division. In the event a response is received to which the unit is assigned, notify the dispatcher that the unit is responding "Under Staffed." The dispatcher, when notified, shall special call another unit (Engine for Engine, etc.) to respond in addition to the under staffed unit. The unit shall only operate if the Officer-in-Command at the scene determines that the members will not be endangered by the reduced manpower.

The Union has also introduced three memoranda, one each from 1993, 1987, and 1981.

The 1993 memorandum, issued by then Chief of Operations, Donald J. Burns, is a directive concerning "understaffed" units which may have to respond to a call during a tour. It reads, in part:

- A. An undermanned unit is a unit responding with less than four men.
  1. When units become undermanned during a tour, the Division shall obtain firefighter details in the following order of priority. . . .
  2. Under manned units will continue to respond while awaiting details as per section 1.5.2 of PA/ID 5/74.
  3. If unit(s) drop below four firefighters and it has been determined that no replacement manpower is forthcoming, unit(s) shall be placed OOS [out of service] after consultation with Sector Commander/CWCC [Citywide Command Chief]. Proceed as follows:
    - 3.1 Detail remaining members, if any, to unit(s) with less than four firefighters.
    - 3.2 If all units have at least four firefighters, use the remaining members to bring ladder companies up to five, etc. . . .
    - 3.3 Contact supervising dispatcher regarding the need for relocations.



Note: The aforementioned is intended to be a guide. Deputy Chiefs are afforded the widest latitude in the exercise of their judgment.

The 1987 memorandum from a Deputy Chief to the Chief of Training describes the results of training tests with four-firefighter compared to five-firefighter teams. In the 1981 memorandum the Chief of Department requests from the Fire Commissioner increased staffing from four to five firefighters for several engine companies. Included is a lengthy analysis of safety issues.

The UFA originally filed the grievance in this case at Step III on December 14, 2004. At the same time, the UFA filed another grievance, which is based on the same December 1, 2004, memorandum but which has distinct issues and is addressed by the Board separately. *See Uniformed Firefighters Ass'n*, Decision No. B-18-2005 (finding the issue whether the Commissioner of FDNY abused his discretion under the Stipulation when the Department reduced the number of five-firefighter engines at the start of a tour from 60 to 11 is not arbitrable). On December 29, 2004, the Union filed a request for injunctive relief at the Supreme Court, Kings County. The Union sought an Order enjoining FDNY both from implementing procedures concerning units with fewer than four firefighters and from removing the fifth firefighter from 49 engine companies pending the determination of the grievances filed, the subject of the companion case.

On January 3, 2005, the Union filed a request for arbitration alleging that the Department violated AUC 287, PA/ID 5-74, and the Stipulation by directing ladder and engine companies to respond to calls with fewer than four firefighters.<sup>3</sup> On February 1, 2005, the Department issued

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<sup>3</sup> The Union cites to the parties' CBA regarding grievance and arbitration procedures. Article XVIII, § 1, defines a grievance as "a complaint arising out of a claimed violation,

Order No. 10, directing that the staffing levels increase to C + 60, as per AUC 287, effective February 2, 2005, because the medical leave average was “no longer in excess of 7.5%.” It is undisputed that the policies enunciated in the Memorandum are still in effect even though the citywide staffing level is at present C + 60. Also on February 2, 2005, the City filed its challenge to arbitrability.

The Supreme Court, in a decision issued on February 3, 2005, analyzed the waiver clause in the Stipulation and determined that the parties did not intend to give up “the right to argue” over the enforcement of the Stipulation “in the venue where labor disputes are usually resolved.” *Cassidy v. Scoppetta*, No. 41983/04, slip op. at 3 (Sup. Ct. Kings Co. Feb. 3, 2005) (Douglass, J.).<sup>4</sup> The Court granted the Union’s application to “restore and retain the ladder companies to five firefighters to respond to alarms pending the resolution of the grievance . . . .” *Id.* Furthermore, in an Order dated February 28, 2005, the Court directed that pending arbitration of the instant grievances, FDNY is enjoined from invoking the Stipulation in order to reduce the number of five-firefighter engines from the 60 to 11. On March 4, 2005, the City appealed the Supreme Court’s February 3 Decision to the Appellate Division, Second Department, and invoked its statutory right to stay the judgment and maintain the status quo. The Union cross-appealed. (Docket No. 2005/02283.) On March 24, 2005, the City similarly appealed the Supreme Court’s February 28 Order (Docket No. 2005/03062.) These cases have been consolidated, and the Supreme Court decision is stayed pending appeal.

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misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting the terms and conditions of employment.”

<sup>4</sup> Both the Union and the City have provided the Board with the court records.

As a remedy, the Union asks that the Board permit an arbitrator to decide whether a violation of minimum staffing levels under AUC 287 and PA/ID 5-74 has occurred and, if so, to fashion a remedy.

### **POSITIONS OF THE PARTIES**

#### **City's Position**

The City argues that the Memorandum is directly related to the Stipulation because the decision to reduce the number of five-firefighter engines from C + 60 to C + 11 was based on the provisions of the Stipulation. Even though in parts of its pleadings the Union asserts that the issue is not connected to the Stipulation, the Union's request for arbitration and other parts its pleadings refer to the Stipulation as directly related to the issue. The City contends that by paragraph 11 of the Stipulation, the Union waived its right to litigation and to the grievance and arbitration mechanism on any of the issues concerning the Roster Staffing Program except for enforcement. Here, the City asserts, the Union has not claimed that the City has refused to enforce the Stipulation.

The Memorandum is an operational directive to Company Officers, Battalion Chiefs, and Deputy Chiefs to clarify their responsibilities when deploying firefighters. FDNY has the managerial right to direct its workforce and thus make decisions regarding staffing. Furthermore, to say that the Memorandum is a new order to direct ladder and engine companies to respond to calls with fewer than the minimum number of firefighters is to mischaracterize the Memorandum. It was written as a guide, not a policy change, when the Department reduced the number of five-firefighter engine companies to 11 and was issued to ensure compliance with the

Stipulation, AUC 287, and PA/ID 5-74.

Finally, the Memorandum itself cannot be grieved under the CBA because it is not a policy or regulation but confirms policies. Similarly, the 1993 memorandum by Burns as well as the other two memoranda are not “existing policy,” and, therefore, are not sources of right for grievance and arbitration procedures.

**Union’s Position**

The Union argues that the Memorandum’s provisions requiring ladders and engines with fewer than four firefighters to respond to alarms violates the Department’s policies and procedures, specifically, AUC 287, §§ 1, 3.3, and 11, and PA/ID 5-74, § 1.5.1 and 1.5.2. These policies are mirrored in or implemented by the 1993 Burns memorandum and the other two. Although AUC 287 does not require that units with fewer than four firefighters be taken out of service, and PA/ID 5-74 permits “understaffed” units to respond, the interplay of these policies with the protocols of the memoranda of 1993, 1987, and 1981, and the manner in which the Department implemented these, show that the Memorandum issued on December 1, 2004, is at odds with the prior policies. For example, PA/ID 5-74, § 1.5.1, states that only one firefighter less than minimum staffing is permitted, but that statement does not apply to units of four or fewer. In addition, § 1.5.2 does provide that three firefighters can respond, but that section also (1) requires the Battalion to arrange to get another firefighter to bring the number up to four, and (2) prohibits “understaffed” units at the fire scene unless the Officer-in-Command at the scene has determined that the members will not be endangered by reduced staff.

According to the Union, prior to the Memorandum, FDNY policy was to deploy a company with fewer than four firefighters only in extreme circumstances, for these units were

removed and the firefighters deployed elsewhere. Since the Memorandum, the Department has routinely deployed units with fewer than four firefighters, and such standard operating procedure violates the existing policies. FDNY has not conducted research, pilot programs, or training on the new procedures. The policy creates a safety risk to firefighters and the public. And the statement in the Memorandum that calls for firefighters to take a defensive position goes against the nature of firefighters, who, more likely, will act at great risk to themselves and others.

The Union states that although it referred to the Stipulation in certain papers, the Union is not contending that the Stipulation was violated. Even if the Union did allege a violation of the Stipulation, the UFA has not waived the right to challenge the Memorandum because the parties, during the litigation leading to the Stipulation, did not discuss the issue of deploying “understaffed” units during a tour, and this subject is not addressed in the Stipulation itself.

### **DISCUSSION**

In this case, the Union seeks arbitration on the question whether the language in the December 1, 2004, Memorandum concerning deployment of units of fewer than four firefighters during a tour of duty violates or misinterprets Department policies. This Board finds that since the action complained of bears a reasonable relationship to the cited policies, an arbitrator should hear this grievance.

Under the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-302, the policy of New York City is to favor and encourage arbitration to resolve grievances. Doubtful issues of arbitrability are resolved in favor of arbitration. *Correction Officers Benevolent Ass’n*, Decision No. B-12-94 at 10. To determine

arbitrability, this Board decides first whether the parties are contractually obligated to arbitrate a controversy, absent court-enunciated public policy, statutory, or constitutional restrictions, and, if so, whether “the obligation is broad enough in its scope to include the particular controversy presented,” *Social Service Employment Union*, Decision No. B-2-69; *see also District Council 37, AFSCME*, Decision No. B-47-99, or, in other words, “whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter” of the agreement. *New York State Nurses Ass’n*, Decision No. B-21-2002 at 8.

Here, there is no dispute that the parties’ CBA provides for grievance and arbitration procedures. Article XVIII, § 1, of the CBA defines the term “grievance” as “a complaint arising out of a claimed violation, misinterpretation or inequitable application of the provisions of this contract or of existing policy or regulations of the Fire Department affecting terms and conditions of employment.” Thus, the question is whether a reasonable relationship exists between the Memorandum’s language concerning the deployment of units of fewer than four firefighters and AUC 287 and PA/ID 5-74.

In *Local 30, International Union of Operating Engineers*, Decision No. B-2-92, the New York City Health and Hospitals Corporation challenged the arbitrability of a grievance concerning minimum staffing levels, a subject that the employer claimed was a management right. This Board found that a statement concerning staffing was a written policy under the parties’ CBA and stated that, “. . . once an employer unilaterally adopts a written policy concerning a managerial prerogative, that subject, to the extent so covered, becomes arbitrable under contracts which render employer non-compliance with written policies grievable and arbitrable.” *Id.* at 16-17. Similarly, in *Uniformed Fire Officers Ass’n*, Decision No. B-29-85 at

7, the Board found that the employer, having promulgated a policy concerning staffing levels of Supervising Fire Marshals, was limited by that policy in exercising its managerial rights and was required under its CBA to arbitrate claimed violations of its own existing policy. *See also Uniformed Firefighters Ass'n*, Decision No. B-7-91 at 10; *Social Service Employees Union, Local 371*, Decision No. B-3-83 at 8.

AUC 287 and PA/ID 5-74, setting forth guidelines for deploying firefighters both at the start of a tour and during a tour, are, without dispute, existing policies of FDNY. *See Civil Service Bar Ass'n*, Decision No. B-5-2005 at 10-11. The Union claims that insofar as the Memorandum addresses understaffed companies during a tour, it is inconsistent with these policies and violates them.<sup>5</sup> For example, § 1.5.2 of PA/ID 5-74 directs that when a company is reduced to three firefighters or fewer during a tour, the Battalion “shall arrange a detail to bring the manpower in that unit up to four, forthwith.” According to the Union, nothing is wrong with the understaffed unit’s responding to an alarm so long as another firefighter is on the way. But the Memorandum does not include such language, and, thus, there could be a question whether a fourth firefighter would be called immediately for the unit. Furthermore, PA/ID 5-74, § 1.5.2, mandates that if a unit of three or fewer is assigned to respond to a call, the Officer-in-Command must notify the dispatcher that the unit is responding “Under Staffed.” Similarly, AUC 287, § 11.4, entitled “Under Staffed Unit,” also requires that a ladder or engine company responding with *fewer than four* firefighters notify the dispatcher that the unit is “Under Staffed.” Such a unit is contrasted, in § 11.3, entitled “Reduced Staff Unit,” which directs a ladder company with

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<sup>5</sup> We need not reach the question whether the Memorandum or the 1993 Burns memorandum are themselves “existing policies” under the CBA.

four (instead of the usual 5) firefighters to notify: “We are responding with four Firefighters.”

Section 11.5 orders: “No other terminology shall be used to describe staffing levels over Department radio. Misunderstanding may cause dispatcher problems that can delay the response of needed units.” Paragraphs 1 and 2 of the Memorandum, however, do not require units of fewer than four firefighters to notify with the words, “Under Staffed,” but use the terminology for what the AUC denominates “Reduced Staff,” that is, “we are responding with (state the number of firefighters).”

Another question is whether the Memorandum removes some discretion from the Officer-in-Command concerning what actions a three-person unit will perform at the scene. PA/ID 5-74, § 1.5.2, directs that an “understaffed” unit shall operate only if the “Officer-in-Command at the scene determines that the members will not be endangered by the reduced manpower.”

Paragraph 7 of the Memorandum states that when an engine company with an officer and three firefighters is the only unit on the scene, “they shall take a defensive position.” However, an individual firefighter may take immediate action to prevent loss of life. Similarly, an officer and two firefighters of a ladder company may not enter the IDLH unless an individual member could prevent loss of life.

The Union asserts that unlike the 2004 Memorandum from the current Chief of Operations, the 1993 memorandum from then Chief of Operations Burns is consistent with the AUC and PA/ID. Under the Burns directive, an “understaffed” company may respond while waiting for replacements; however, if no replacement is forthcoming, members “shall be placed” out of service and deployed elsewhere. While the 2004 Memorandum has a “Note” that the option of closing units “may be considered,” according to the Union, the Memorandum’s central



provisions misinterpret the AUC's and PA/ID's deployment policies.

Under the CBA, policies promulgated by the Department are arbitrable. The directives in the Memorandum may be inconsistent with AUC 287 and PA/ID 5-74 and thus may misinterpret or violate these policies. Therefore, we find that the Union has established a nexus between the language in the 2004 Memorandum and the cited policies. We make no judgment on the merits of the issue whether the change in wording is a change in effect.

As to the question of the waiver clause in the Stipulation, we agree with the UFA that the Stipulation, on its face, does not address the deployment of units with fewer than four firefighters. Therefore, the Union did not waive the filing of grievances based on that issue.

The Supreme Court in *Cassidy v. Scoppetta* stayed FDNY's actions until the arbitration procedures could be completed. As the Union has established a nexus between the language in the Memorandum concerning deployment of "understaffed" units during a tour and the policies invoked, we deny the petition challenging arbitrability and send this grievance to arbitration.

**ORDER**

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

ORDERED, that the petition challenging arbitrability filed by the Fire Department of the City of New York and docketed as BCB No. 2455-05, hereby is denied; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association and docketed as A-10885-05, hereby is granted.

Dated: June 20, 2005  
New York, New York

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

GABRIELLE SEMEL  
MEMBER

I dissent. M. DAVID ZURNDORFER  
MEMBER