City & DDC V. DC37, L 1407, 75 OCB 7 (BCB 2005) [Decision No.B-7-05 (Arb)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Arbitration

-between-

Decision No. B-7-2005
Docket No. BCB-2372-03
(A-10223-03)

THE CITY OF NEW YORK and the DEPARTMENT OF DESIGN AND CONSTRUCTION,

Petitioners,

-and-

DISTRICT COUNCIL 37, LOCAL 1407, AFSCME, AFL-CIO,

Respondent.

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DECISION AND ORDER

On December 9, 2003, the City of New York and the Department of Design and Construction ("City" or "DDC") filed a petition challenging the arbitrability of a grievance brought by District Council 37, Local 1407 ("Union").[1] The grievance asserts that DDC wrongfully terminated David Sandborn ("Grievant") in violation of Article VI of the Accounting and Electronic Data Processing Agreement ("Agreement"). The City alleges that the grievance is

[1] On May 24, 2004, the City withdrew the instant petition in light of *Felix v. City of New York Dep't of Citywide Administrative Services*, No. 40284/02 (Sup. Ct. N.Y. Co. Oct. 16, 2002), *aff'd*, 309 A.D.2d 626 (1st Dep't 2003) (City employee terminated for failure to maintain residency entitled to a pre-termination hearing). By letter dated December 20, 2004, the Office of Collective Bargaining granted the City's request to renew the petition challenging arbitrability so that the Board could consider the matter based on *Felix v. City of New York Dep't of Citywide Administrative Services*, 3 N.Y.3d 498 (2004). There, the Court of Appeals overturned the lower courts and held that the failure to establish and maintain residency is a violation of the City's residency requirement that results in forfeiture of employment, and is not misconduct that would entitle the employee to a pre-removal hearing. The parties filed briefs in the instant matter on January 27, 2005.

not arbitrable because the Union cannot establish a nexus between the termination, which was due to Grievant's failure to maintain City residency, a qualification of employment, and the Agreement's grievance provisions. The Union argues that violations of both Article VI, § 1(f), of the Agreement, which provides for arbitration when the employer fails to serve charges pursuant to Civil Service Law ("CSL") § 75, and Article VI, § 1(b), which provides for arbitration of a misapplication of the agency's own rules, are reasonably related to the grievance it seeks to arbitrate. This Board finds no nexus between Grievant's termination and Article VI, § 1(f), because DDC was not required to serve Grievant with written charges. However, we find a reasonable relationship between Grievant's termination and Article VI, § 1(b), because a question exists whether DDC violated its own rule on residency. Therefore, we grant the City's petition challenging arbitrability on the Article VI, § 1(f), claim and refer the Union's grievance to arbitration on the Article VI, § 1(b), claim only.

BACKGROUND

Grievant was appointed to the title of Accountant by DDC on April 20, 1998. In 2000, he was promoted to the title of Associate Accountant and was a tenured employee within the meaning of CSL § 75.[2] At the time of his initial appointment, Grievant resided in Glendale, New York, Queens County.

Pursuant to New York City Administrative Code ("Admin. Code") §§ 12-119 to 12-121,

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[2] CSL § 75(1) provides in pertinent part:
A person . . . shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

the Department of Citywide Personnel Services ("DCAS") issued Personnel Services Bulletin 100-8, dated June 30, 1997 ("Bulletin"). The Bulletin sets forth the policy and law of the City's residency requirement, the time limitations for establishing residency, and the procedures for complying with and requesting exemptions to the requirement. Both Admin. Code § 12-119 and the Bulletin define residency as "domicile." Moreover, the Code and the Bulletin provide that the failure to establish or maintain residency shall result in forfeiture of employment but that prior to dismissal, an employee shall be given notice and an opportunity to contest the charge.[3]

In July 2001, DDC issued an Employee Manual/Rules and Procedures, which summarizes the City's residency requirement. DDC's rule specifically provides:

> City residency must [ ] be maintained as a condition of employment. Failure to maintain City residency will result in loss of employment. The employee must be given notice, in writing, and an opportunity to be heard and offer an appeal, in a non-disciplinary setting, prior to any possible termination. An employee may

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[3] Admin. Code § 12-120 provides:
Except as otherwise provided in section 12-121, any person who enters city service on or after September first, nineteen hundred eighty-six (i) shall be a resident of the city on the date that he or she enters city service or shall establish city residence within ninety days after such date and (ii) shall thereafter maintain city residence as a condition of employment. Failure to establish or maintain city residence as required by this section shall constitute a forfeiture of employment; provided, however, that prior to dismissal for failure to establish or maintain city residence an employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the city.

Section VI of the Bulletin provides:
Failure to establish or maintain City residence as required by Section 12-119 et seq. of the Administrative Code shall result in a forfeiture of employment. However, prior to dismissal for failure to establish or maintain City residence, an employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the City. The notice should be in writing, but should not resemble a disciplinary charge. An employee may respond to this allegation of non-residency by providing a written response and relevant documents in support of a claim of residence. . . . Under no circumstances should an employee be subject to disciplinary charges when the sole allegation is one of non-residence.

respond to an allegation of non-residency by providing a written response and providing relevant documents in support of a claim of residence.

According to the Union, Grievant's mother, Leonore Sandborn, was 89 years old at the time the petition was filed. She resides in Baldwin, New York, Nassau County. Grievant is Ms. Sandborn's sole means of support. Her other son, Grievant's brother, passed away on October 30, 1998. In March 1999, Ms. Sandborn was hospitalized and diagnosed with arteriosclerotic heart disease and cerebral arteriolosclerosis. She was discharged and temporarily released into a nursing home located in Nassau County. Ms. Sandborn requires continuous medical care from her doctors, all of whom are located in Nassau County. While Ms. Sandborn was in the nursing home, Grievant continued to reside in Queens and would visit his mother a few evenings per week.

On June 23, 1999, Grievant sent a letter to DCAS on letterhead with the Queens address requesting an exemption to the residency requirement. Grievant explained his mother's medical situation and stated that due to financial hardship, he could no longer provide her with 24-hour paid care and needed to live at her home. Grievant requested that he be granted either a waiver or a change in title so that he could care for his mother while he continued working for the City. Grievant also provided medical documentation regarding his mother's condition and the need that Grievant care for her. The City states that it never received Grievant's request and that in any event, pursuant to the Bulletin, the agency, not the employee, must request residency waivers from DCAS.

According to the Union, due to financial hardship, Grievant gave up his apartment in Queens and rented a room from his uncle who lives in Manhattan. Nothing in the record

indicates when this move occurred.

On April 11, 2000, DDC Assistant Commissioner Marisa Allard advised Grievant that she believed he was living in Baldwin, New York, and that he should provide documentation within ten days demonstrating that he was in compliance with the City's residency requirement or else he would forfeit his employment. In a letter dated April 13, 2000, addressed "To Whom It May Concern," Grievant's uncle stated that Grievant was renting a room from him in Manhattan for $100 a month.

On May 7, 2000, Grievant sent a letter to Eric MacFarlane at DDC on letterhead with the Manhattan address, stating:

> I have an elderly family member whom I have been doing my best to take care of. She is in the need of 24 hour care. Together, we cannot afford to provide 24 hour care -- it is not momentarily possible. My Brother passed away on October 30, 1998. I am the sole provider of care at this point and the monies we live on come from a small pension, Social Security and my salary. It is not feasible to move her to the city for her Dr's are a relatively short distance from her in Baldwin, Long Island. I am the only immediate family member who cares for her. Attached is a letter from her GP as to her condition and the necessity for care. Attached is her Dr's letter.

The record is devoid of any further facts regarding Grievant's residency over the next three years.

On April 9, 2003, Allard wrote to Grievant stating:

> The Department of Design and Construction has information that indicates that you reside outside of the City of New York. As you know, **New York City residency is a condition of continued employment**. Section 12-120 of the Administrative Code provides that any person who enters City service on or after September 1, 1986, shall be a resident of the City on the date that he or she enters City service or shall establish City residence within ninety days after such date and shall thereafter maintain City residence as a condition of employment.
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> In a letter dated October 23, 2003 [sic], you indicated that you spend **at least 3**

> **days a week** at 109 West 69th Street, #4C, New York, NY 10023. While you are allowed to have multiple residences, **you are required to reside within the City of New York at least 183 days per year**. The City expects employees to strictly adhere to this guideline.
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> Therefore, within 10 business days, you must submit to me an annual schedule that details how you will meet the minimum NYC residency requirement of at least 183 days per year. In addition, each month beginning May 1, 2003, you will be required to submit a detailed monthly schedule (due no later that the 1st of each month) in advance of the month. Should any City investigation reveal that you are in fact not residing within the City limits for at least 183 days per year, you may be subject to termination proceedings.
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> If you do not submit this information within ten business days, or if you present evidence insufficient to meet the minimum requirements, you will be deemed to have forfeited your City employment effective Tuesday, April 22, 2003.

(Emphasis in original.)

On April 22, 2003, Grievant responded in writing and stated:

> Between the time period from 5/1/2003 to and including 4/30/2004, I will spend 15 days each month at 106 West 69th Street Apartment 4C for a total of 180 days. The 3 remaining days will be made up in the months of February, 2004 (1), March, 2004 (1) and April, 2004 (1). Should it become necessary due to my mother's condition that the 15 day total is not met in any one month it will be corrected in the following month such that by 4/30/2004 I will have spent 183 days in the confines of the City limits.

By letter dated April 25, 2003, Grievant was terminated effective immediately based on DDC's determination "that you are not in compliance with the New York City Residency Policy."

On May 20, 2003, Grievant filed a grievance at Step I. By letter dated June 17, 2003, DDC denied the grievance stating that the claim was outside the coverage of the contractual grievance procedure. DDC stated that by violating the City's residency requirement, Grievant forfeited his employment and that the termination was not a penalty imposed following a

disciplinary action. The determination was affirmed at Step II on June 24, 2003.

By Notices mailed July 23, 2003, the New York State Department of Labor ("Labor Department") issued alternate determinations disqualifying Grievant from receiving unemployment on the basis that he voluntarily separated from employment without good cause and that he was discharged for misconduct.

Grievant appealed to the Unemployment Insurance Appeal Board and a hearing was held. By decision filed October 2, 2003, the Administrative Law Judge ("ALJ") found that in late 2002 and early 2003, Grievant informed DDC that he was spending 30% of his time in the City and 70% with his mother in Nassau County because she needed his assistance. Even though DDC alleged that Grievant was discharged after DDC learned that for the past two years, Grievant had been living in Nassau County and had a verbal contract with a local taxi cab company to take him to and from the train station on weekdays, the ALJ found that Grievant had no such agreement but used the taxi service only as needed when staying overnight to provide care for his ill mother whose home had recently been vandalized on several occasions. The ALJ overruled the Labor Department's determinations and stated:

> The credible [sic] establishes that claimant's employment was terminated by the employer on April 25, 2003 for alleged failure by claimant to comply with the employer's residency requirements rule. In point of fact, since the inception of claimant's employment, the employer has had periodic questions about such matter, which it had always determined in the past to let drop. Ultimately after giving claimant every indication that it would work with him with respect to his aged and infirm parent and his current need to reside on Long Island, at times, for his mother's sake, the employer determined to discharge claimant on the basis of a hearsay statement allegedly obtained by one of the employer's investigators from the assistant manager of a taxi cab company located near where claimant resided. Under such circumstances, and given the length of time that the employer has had such issue under consideration as concerns claimant, and given how the employer had always dealt with such matter, and how it appears it, at first, determined to

> continue dealing with such matter, I conclude that the employer effectively condoned the manner in which claimant, at times, had to haphazardly comply with the employer's residency rule. Therefore, I also conclude that claimant should not be disqualified from receiving benefits under such circumstances.

The City appealed. By decision filed November 20, 2003, the Unemployment Insurance Appeal Board affirmed the ALJ's decision.

On November 19, 2003, the Union filed a request for arbitration alleging violations of Article VI. Article VI, § 1, of the Agreement provides, in relevant part, that 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; provided, disputes involving the Personnel Rules and Regulations of the City of New York . . . shall not be subject to the grievance procedure or arbitration;
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> * * *
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> (e) A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75(1) of the Civil Service Law . . . upon whom the agency head has served written charges of incompetency or misconduct while the employee is serving in the employee's permanent title or which affects the employee's permanent status;
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> (f) Failure to serve written charges as required by Section 75 of the Civil Service Law . . . upon a permanent employee covered by Section 75(1) of the Civil Service Law or . . . where any of the penalties (including a fine) set forth in Section 75(3) of the Civil Service Law have been imposed.

The Union stated that the grievance to be arbitrated is:

> Whether the employer, the New York City Department of Design & Construction, has wrongfully terminated the grievant David Sandborn, and whether the agency has failed to serve the grievant with written charges and if so what shall the remedy be?

The Union seeks Grievant's reinstatement, back pay with interest, expungement of all charges, and an order that DDC serve Grievant with written charges.

POSITIONS OF THE PARTIES

City's Position

The City argues that under *Felix v. City of New York Dep't of Citywide Administrative Services*, 3 N.Y.3d 498 (2004), the grievance is not arbitrable because the failure to maintain residency, a qualification of employment, is not misconduct that would entitle an employee to a pre-removal disciplinary hearing. Therefore, there is no nexus between Grievant's termination and Article VI of the Agreement.

The City also argues that the Union's request for arbitration must be dismissed because termination for failure to comply with the City's residency requirement is not arbitrable. Grievant was terminated pursuant to Admin. Code § 12-119 *et seq.* and the Bulletin, which is a DCAS Personnel Rule and Regulation. The Board may not interpret the Code and the Agreement expressly excludes disputes involving the City's Personnel Rules. Moreover, the Board has held that the definition of a grievance, as defined in Article VI of the Agreement, does not include disputes over the City's residency requirement. Because the termination was due to Grievant's failure to maintain his residency, a qualification of employment, and was not disciplinary in nature, DDC did not have to serve charges or hold a hearing.

Union's Position

The Union argues that under *Felix* the grievance is arbitrable. The Court of Appeals mandated due process before a tenured employee could be terminated for alleged residency violations. *Felix* did not involve issues regarding the applicability of collective bargaining agreements and did not preclude voluntary agreements which afford more due process than that provided by law. When an employer fails to adhere to the due process requirements set forth in

Felix and terminates an employee for alleged residency violations, the employee has grievance rights under Article VI, of the Agreement. Here, DDC failed to give Grievant notice and an opportunity to contest the charge of non-residency as required by *Felix*. When genuine issues of fact exist and a *prima facie* case for wrongful discipline has been made, a nexus to the wrongful disciplinary procedures of the Agreement are also made.[4]

The Union also argues that DDC has created an issue of fact which should be decided by an arbitrator, that is, whether Grievant was terminated for failing to maintain City residency or for failing to obey DDC's directives. Failure to obey DDC's directive would constitute misconduct and would require a CSL § 75 hearing under in Article VI, § 1(e), of the Agreement. Moreover, a nexus exists with Article VI, § 1(b), in that Grievant's dismissal is a violation of DDC's own rules which are silent on whether an employee must live within the City for 183 days per year. DDC's unilateral imposition of its own definition of residency without authority from either its own rules, DCAS, or the Admin. Code was a misapplication of its own rules.

DISCUSSION

It is public policy of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") to promote and encourage arbitration as the selected means for the adjudication and resolution of grievances. NYCCBL § 12-302;

[4] In its brief, the Union sets forth a hypothetical in which an employee with a pattern of lateness and insubordination is charged with non-compliance with the residency requirement. The employee is terminated without due process. The Union argues that in this scenario the employee would be entitled to a grievance hearing under Article VI, § 1(e), of the Agreement. Here, since the Grievant was terminated for failure to maintain residency and there are no allegations that DDC's actions were a pretext for disciplining him for other reasons, the Board will not consider this argument.

District Council 37, Local 2507, Decision No. B-18-2002 at 10. However, the Board cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *Social Service Employees Union, Local 371*, Decision No. B-34-2002 at 4.

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, the parties have obligated themselves to arbitrate their controversies through a grievance procedure, and there is no claim that this arbitration would violate public policy or that it is restricted by statute. Thus, the issue is whether there is a reasonable relationship between Grievant's termination and Article VI, § 1(b) and/or (f), of the Agreement, each of which provides grievance rights.[5] We find that the Union has failed to establish a reasonable relationship between the termination and Article VI, § 1(f), which defines a grievance as the failure to serve CSL § 75 charges, but that it has done so with regard to Article VI, § 1(b), which defines a grievance as a misapplication of agency rules.

1. The Grievance Is Not Arbitrable Under Article VI, § 1(f) of the Agreement.

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[5] Since DDC did not serve written charges of incompetency or misconduct on Grievant, we do not consider the Union's argument whether there is a reasonable relationship between Grievant's termination and Article VI, § 1(e), of the Agreement.

The first issue we address is whether termination for failure to satisfy a residency requirement constitutes misconduct which requires the City to follow the contractually recognized CSL § 75 procedures set forth in Article VI, of the Agreement. Based on the Court of Appeals decision in *Felix, supra*, and our decisions in *District Council 37, Local 375*, Decision No. B-14-2001, and *Organization of Staff Analysts*, Decision No. B-41-96, we find that there is no nexus between Article VI, § 1(f), which defines a grievance as the failure to serve CSL § 75 charges, and the claim that DDC terminated Grievant without serving him with such charges.

In *Felix*, Francisco Felix, a DCAS employee, signed an agreement in 1993 that he would maintain residency in New York City. In 2001, DCAS suspected that Felix was living outside the City in violation of Admin. Code § 12-120. DCAS scheduled a meeting at which Felix was afforded the opportunity to be represented by an attorney and a union representative and to present documents supporting his position that he lived in the City. Felix appeared with a union representative but brought no documentation except for a driver's license. Felix claimed that he was not aware that he was required to be a resident. Felix was then given two extra days to gather more information. When he returned with his union representative, Felix provided eight documents, seven of which were found by DCAS to have been created in the past two days for the purpose of establishing residency. The eighth document was a 2000 W-2 form which showed Felix's address to be outside the City. Accordingly, DCAS determined that Felix was not a City resident and terminated him pursuant to Admin. Code § 12-120. Felix appealed in an Article 78 proceeding, alleging that he had been terminated without a pre-removal hearing under CSL § 75(1). The lower court ordered that Felix be reinstated on the grounds that he was improperly denied a CSL § 75 hearing and the First Department affirmed. *Felix v. New York City Dep't of*

Citywide Administrative Services, No. 40284/02 (Sup. Ct. N.Y. Co. Oct. 16, 2002), *aff'd*, 309 A.D.2d 626 (1st Dep't 2003).

The Court of Appeals reversed and found that the failure to establish and to maintain residency is a violation of the City's residency requirement, which results in forfeiture of employment, and is not misconduct that would entitle a City employee to a pre-removal hearing. The Court stated:

> We note at the outset that the act of failing to maintain one's residence within the municipality is separate and distinct from an act of misconduct by a municipal employee in the performance of his or her work. Failure to maintain residence renders an individual ineligible for continued municipal employment under New York City Administrative Code § 12-120, while an act of misconduct invokes Civil Service Law § 75 disciplinary procedures, including a pre-removal hearing if removal of the municipal employee is contemplated (*see e.g., Mandelkern v. City of Buffalo, et al.,* 64 A.D.2d 279 [4th Dep't 1978]).

Felix, 3 N.Y.3d 498, 505 (2004). The Court further found that the City's residency requirement has a different purpose than that underlying CSL § 75(1) and, accordingly, a pre-removal hearing is not required for dismissals pursuant to Admin. Code § 12-120. *Id.* at 505-506. Furthermore, the procedure afforded Felix by DCAS to contest the charges satisfied state and federal due process requirements and DCAS correctly determined that Felix had forfeited his position. *Id.* at 506.

This Board has also considered the issue whether a City employee terminated for failure to maintain residency is entitled to a hearing. In *District Council 37, Local 375*, Decision No. B-14-2001, and *Organization of Staff Analysts*, Decision No. B-41-96, we found that the failure to maintain City residency did not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. In both cases, we relied on *Mandelkern v. City of Buffalo*, 64

A.D.2d 279 (4th Dep't 1978), which held that termination for the failure to maintain residency, a qualification of employment, did not constitute discipline necessitating a pre-termination hearing under CSL § 75.

Here, the grievance procedure available under Article VI, § 1(f), on its face, is applicable only when an employee is entitled to disciplinary charges under CSL § 75 or when a penalty under § 75 has been imposed. Since Grievant was terminated for failure to maintain City residence, the provisions of CSL § 75 are inapplicable under *Felix* and the Board's case law. Consequently, there is no nexus between Grievant's dismissal and the disciplinary procedure in Article VI, § 1(f), of the Agreement.

The Union's argument that the failure to adhere to the due process requirements set forth in *Felix* gives rise to grievance rights under Article VI of the Agreement is without merit. Whether the process afforded Grievant by DDC to challenge the claim of non-residency satisfied state and federal due process does not concern a question of nexus to the parties' contract under the NYCCBL. Rather, this issue raises constitutional questions which are beyond the jurisdiction of this Board. *Smith*, Decision no. B-22-2000 at 7.

2. The Grievance is Arbitrable Under Article VI, § 1(b) of the Agreement.

The second issue is whether the Union has set forth a reasonable relationship between Grievant's dismissal and Article VI, § 1(b), which provides grievance rights for the misapplication of DDC's 2001 Employee Manual/Rules and Procedures. We find that the Union has demonstrated such a nexus.

This Board has repeatedly found arbitrable alleged violations of agency written rules, regulations, or policies when they are incorporated within the definition of a grievance. *Local*

1180, Communications Workers of America, Decision No. B-1-2001*; Local 246, Service Employees International Union*, Decision No. B- 32-99; *District Council 37, AFSCME*, Decision No. B-34-80. In *Social Services Employees Union, Local 371*, Decision No. B-3-83, the Board stated:

> when a public employer unilaterally adopts a rule, regulation, written policy or order as to a subject, that subject, to the extent so covered, becomes arbitrable under most contracts of the City and municipal unions pursuant to standard language such as is set forth in Article VI, Section l(B) of the instant contract rendering employer non-compliance with written policies and regulations grievable and arbitrable.

Id. at 8.

As a preliminary matter, we recognize that Article VI, § 1(b), expressly precludes arbitration of claims concerning the misapplication of DCAS rules, and that claims of violations of the Admin. Code are not within the scope of the parties' Agreement to arbitrate. However, when an agency chooses to adopt its own rules which reflect rules and statutes that are exempt from arbitration, these agency rules may be subject to arbitration under the parties' contractual grievance procedures. *District Council 37, AFSCME*, Decision No. B-28-87 (though contract excludes DCAS rules and regulations from grievance procedures, agency guides impose specific standards and requirements and thus constitute written policies subject to arbitration); *Patrolmen's Benevolent Ass'n*, Decision No. B- 8-78 (even if conflict exists between agency's Patrol Guide and Public Officers Law, misapplication of Patrol Guide is arbitrable under contractual definition of grievance).

We find that the Union has established a reasonable relationship between Grievant's termination and the July 2001 Employee Manual/Rules and Procedures. DDC's rule on

residency requires that all nonexempt employees be residents of the City and sets forth the procedures to be followed when DDC suspects that an employee is not a resident. According to the rule, a DDC employee "must be given notice, in writing, and an opportunity to be heard and offer an appeal, in a non-disciplinary setting, prior to any possible termination." Here, by letter dated April 9, 2003, DDC asked Grievant to provide a written schedule that detailed how *in the future* he would meet the City residency requirement of at least 183 days per year and advised him that his failure to submit sufficient information within ten business days would result in his immediate forfeiture of employment. On April 22, 2003, Grievant provided a schedule which stated how he would reside at his uncle's Manhattan apartment for 183 days during the period May 1, 2003, through April 30, 2004. The next day, Grievant was terminated because DDC determined "that you are not in compliance with the New York City Residency Policy." Based on this record, there is a question whether Grievant was given adequate notice and an opportunity to be heard prior to being terminated for his alleged *existing* non-residency, as provided by DDC's own rule. Therefore, the portion of the City's petition challenging arbitrability based on no nexus between Grievant's termination and Article VI, § 1(b), of the Agreement is denied and the parties are directed to arbitration on this claim only. *District Council 37, Local 2507*, Decision No. 18-2001 at 10-11 (although grievant's termination for failure to maintain certification, a qualification of employment, was not grievable, issue whether employer followed own rules prior to termination was grievable).

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 Department of Design and Construction, docketed as BCB-2372-03, be, and the same hereby is, granted in part and denied in part in accordance with this Decision; and it is further

ORDERED, that the request for arbitration filed by District Council 37, Local 1407, docketed as A-10223-03, be, and the same hereby is, granted in part and denied in part in accordance with this Decision.

Dated: March 2, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER