***SEIU, New York City Local 246*, 77 OCB 9 (BCB 2006)**
[Decision No. B-9-2006(Arb)] (Docket No. BCB-2519-05) (A-11480-05).

Summary of Decision: City challenged a grievance alleging that grievant was wrongfully discharged without a hearing for failure to maintain a driver's license, in violation of the applicable collective bargaining agreement. The Board granted the petition and held that the failure to maintain a driver's license, a qualification of employment, did not give rise to arbitration rights under the parties' grievance procedures. ***(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-

SEIU, NEW YORK CITY LOCAL 246,

Respondent.

DECISION AND ORDER

On November 18, 2005, the City of New York and the New York City Fire Department ("City" or "FDNY") filed a petition challenging the arbitrability of a grievance brought by Service Employees International Union, Local 246 ("SEUI" or "Union"). The grievance asserts that FDNY wrongfully terminated the employment of William Sheehan ("Grievant") in violation of the Auto Mechanics Agreement ("Agreement"). The City alleges that the grievance is not arbitrable because the Union cannot establish a nexus between the termination, which was due to Grievant's failure to

maintain a driver's license, a qualification of employment, and the Agreement. This Board finds that the failure to maintain a qualification of employment, such as a driver's license, does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures and that the Union has not established a reasonable relationship between Grievant's termination and any of the cited provisions.

BACKGROUND

Grievant was employed by FDNY in the civilian title of Auto Machinist on October 26, 1981. According to the relevant job specification, under the section entitled "License Requirements," an Auto Machinist is required to maintain a motor vehicle driver's license valid in the State of New York for the duration of employment. The job specification lists examples of typical tasks for an Auto Machinist including: "Operates motor vehicles or equipment in the performance of assigned duties."

In September 2004, Grievant was arrested while driving off-duty and refused to take a breathalyzer test. As a result, his driver's license was suspended. There is no indication in the record whether Grievant was charged criminally for this conduct, and, if so, how and when these charges were resolved.

On October 5, 2004, FDNY suspended Grievant without pay for approximately one month, based on his arrest. After his suspension, Grievant returned to work but did not have his license.

On February 18, 2005, FDNY served Grievant with charges for conduct unbecoming a Fire Department employee arising out of his September arrest and with charges for excessive lateness (25 occasions) and absenteeism (26 occasions) between January 2004 and September 2005.

Also on February 18, FDNY notified Grievant that he had failed to maintain his driver's license, a job requirement for the position of Auto Machinist. The memorandum stated that if Grievant was unable to obtain reinstatement of his license by March 21, 2005, his employment would be terminated. Grievant did not obtain reinstatement of his license by March 21, 2005.

By letter dated April 8, 2005, FDNY terminated Grievant for failure to maintain a valid driver's license. The letter provided that upon restoration of his license, Grievant could request in writing that he be re-hired.

On April 13, 2005, the Union filed a grievance claiming that FDNY violated Article V, § 1(e), of the Agreement. The stated nature of the grievance is: "A claimed wrongful disciplinary action taken against a permanent employee covered by Section 75 of the Civil Service Law."

On May 11, 2005, the Union filed the grievance at Step II.

On May 19, 2005, Grievant obtained an interim/conditional driver's license.

On June 1, 2005, the grievance was denied at Step II on the grounds that Grievant was terminated for failure to maintain a driver's license, a qualification of employment, and that he was not entitled to a disciplinary hearing.

On June 2, 2005, the Union filed a new grievance at Step II alleging a violation of Article V, § 1(b), of the Agreement. The Union argued that FDNY violated, misinterpreted or misapplied its own rules and policies when it failed to re-hire Grievant upon the restoration of his license. The Union sought Grievant's reinstatement. Although no rule was specified in the grievance, the Union now claims that FDNY's Emergency Medical Services Command Operating Guide Procedure 104-3 ("EMS-OGP 104-3") is the rule or policy that was violated. The stated purpose of EMS-OGP 104-3, is to set forth a guideline for the "maintenance of required certifications and licenses by members

of the FDNY Department of EMS Command." EMS-OGP 104-3, § 1.1. Under this guideline, Emergency Medical Technicians ("EMTs"), EMS Lieutenants, Captains, and Chiefs who are EMTs are required to maintain a driver's license valid in the State of New York. EMS-OGP 104-3, § 3.1.1. If an EMT's licence is revoked, suspended, or expired, the member has "thirty calendar days to get his/her license validated." EMS-OGP 104-3, § 5.8.3(A).

On July 1, 2005, the second grievance was denied at Step II. The Step II hearing officer noted that no specific rule or regulation was identified. Since Grievant had obtained an interim license, the hearing officer stated that Grievant's request to be re-hired was currently under consideration as per FDNY's April 8, 2005, letter.

By letter dated July 27, Grievant formally advised FDNY that his license had been restored effective May 19, 2005, and asked to be reinstated.

On July 29, 2005, the Office of Labor Relations ("OLR") denied, at Step III, the Union's first grievance alleging a violation of Article V, § 1(e), of the Agreement. The grievance was denied on the grounds that Grievant was terminated for failure to maintain a driver's license, a qualification of employment.

By letter dated August 10, 2005, FDNY denied Grievant's request to be reinstated.

On September 1, 2005, a Step III hearing was held by OLR concerning the Union's second grievance alleging a violation of Article V, § 1(b), of the Agreement. By letter dated September 30, 2005, OLR denied the grievance. According to the decision, the Union argued that FDNY's decision not to re-hire Grievant for his off-duty conduct was arbitrary and that the matter should be treated as a disciplinary issue. The hearing officer found that Grievant was terminated for failure to maintain a driver's license, a qualification of employment, and that such action did not constitute

a violation of the Agreement.

On October 7, 2005, the Union filed a Request For Arbitration ("RFA") which states that the grievance to be arbitrated is whether "Grievant was wrongfully terminated in violation of the collective bargaining agreement." The RFA is brought pursuant to Article V, § 1(a), of the Agreement. Attached to the RFA filed with the Office of Collective Bargaining, is the Union's second grievance alleging a violation of Article V, § 1(b), of the Agreement and the Step III September 30, 2005, decision.

Article V, § 1, of the Agreement states in pertinent part:

The term "*Grievance*" shall mean:

(a) A dispute concerning the application or interpretation of the terms of this **Collective Bargaining Agreement**;

(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 the terms and conditions of employment; . . . .

* * *

(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. (Emphasis in original.)

The Union seeks "reversal of the disciplinary action," expungement of the disciplinary charges, and remittance of back pay retroactive to May 19, 2005.

In support of its grievance that Grievant was wrongfully disciplined, the Union alleges that a civilian employee was given a penalty of two days of annual leave and that an EMS Technician lost five days of annual leave for failure to maintain their licenses. The City denies that FDNY treated these incidents as misconduct and claims that the factual situations regarding these employees were

different. Both employees resolved their license situations within the time period provided by FDNY and, therefore, were not terminated. They were assessed penalties because this was the second and third time, respectively, that each employee had an invalid driver's license. The City identifies three other FDNY employees who were recently terminated for failure to maintain their licenses and who, like Grievant, did not resolve their license situation within the allotted time periods. The Union claims that contrary to FDNY's "30-day rule," FDNY gave only one of these employees 30 days to resolve her failure to maintain a valid driver's license.

POSITIONS OF THE PARTIES

City's Position

First, the City argues that there is no nexus between Grievant's termination and Article V, § 1(a), of the Agreement. The Union has failed to identify any dispute concerning the application or interpretation of the terms of the Agreement.

Second, the City argues that there is no nexus between Grievant's termination and Article V, § 1(e), of the Agreement. Grievant's termination, was based on his failure to maintain a valid driver's license, a qualification of employment. Both the courts and the Board have held that failure to maintain a qualification of employment does not give rise to arbitration under an agreement's wrongful discipline procedures.

Third, the City argues that there is no nexus between Grievant's termination and Article V, § 1(b), of the Agreement. FDNY does not have a rule or policy on driver's licenses that is applicable to civilians. The Union's reliance on EMS-OPG 104-03 is misplaced, as this rule applies only to uniformed employees in the EMS command. Therefore, there is no nexus between the termination

and the cited provisions.

Union's Position

The Union argues that there is a nexus between Grievant's termination and Article V, § 1(e), of the Agreement. Grievant is entitled to a pre-termination hearing because he is covered by Civil Service Law ("CSL") § 75. Here, Grievant was served with charges for his arrest on September 29, 2004. There is a dispute whether Grievant was discharged for his arrest or for failure to maintain a license, a discrepancy which should be heard by an arbitrator. The only basis to support the City's position that a driver's license is a qualification of employment is the job specification for an Auto Machinist. The Union claims that the "Qualification Requirements" in the specification, which address educational and employment experience, do not include a driver's license qualification. The specification only notes that a valid driver's license is a "requirement" of employment. Therefore, a driver's licence is not a qualification of employment and interpretation of this job specification is a question for an arbitrator. Furthermore, FDNY has treated the failure to maintain a license as a disciplinary issue, as evidenced by the two employees who were given a penalty of annual leave deductions for this misconduct.

The Union argues that the cases relied upon by the City are distinguishable from the case at bar. The residency requirement, a qualification of employment, is mandated by law and requires that an employee who violates this law forfeits their employment. There is no such provision mandating forfeiture of employment for the failure to maintain a driver's license. Moreover, because the duties performed by an Auto Machinist can be performed in the absence of a driver's license and because they rarely operate a motor vehicle, this qualification is not practical.

The Union also argues that there is a nexus between Grievant's termination and Article V,

§ 1(b), of the Agreement. According to EMS-OPG 104-03, when an employee's driver's license is suspended, the employee is given 30 days to have it restored. Under these rules, failure to maintain a license is not treated as automatic forfeiture. By terminating Grievant without a hearing for failure to maintain his license, FDNY misapplied these rules. The question whether EMS-OPG 104-03 applies only to EMS personnel and not to Grievant should be heard by an arbitrator. The Union claims that FDNY has not applied the "thirty-day rule" in a consistent manner and asks whether the time afforded Grievant was reasonable and whether FDNY is applying this rule in a disparate manner. Moreover, the time limit imposed on Grievant to resolve his license suspension placed him an untenable position of having to either take the time to fight against criminal charges and lose his job in the process or accept a criminal penalty quickly to resolve the matter to keep his job. These circumstances demonstrate that FDNY used the license requirement not as a means to ensure compliance with a job specification but as a measure to discharge, without due process, an employee who was arrested.

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; *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 Services 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 for his failure to maintain a valid driver's license, and the parties' grievance procedures. We find that the Union has failed to establish a reasonable relationship between the termination and Article V, § 1(a), (b), or (e), of the Agreement, because the failure to maintain a qualification of employment, such as a license, does not give rise to arbitration rights under these provisions.

The Board has consistently held that the failure to maintain a qualification of employment, such as residency or a State driver's license or certification, does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. *Social Services Employees Union, Local 371*, Decision No. B-5-2006 (residency); *Social Services Employees Union, Local 371*, Decision No. B-4-2006 (residency); *District Council 37, Local 983*, Decision No. B-24-2005 (driver's license); *District Council 37, Local 1407,* Decision No. B-7-2005 (residency)*; District Council 37, Local 2507,* Decision No. B-18-2001 (certification); *District Council 37, Local 375,* Decision No. B-14-2001 (residency); *Organization of Staff Analysts,* Decision No. B-41-96

(residency).

In *District Council 37, Local 983,* Decision No. B-24-2005, an Assistant City Highway Repairer was terminated for failure to maintain a commercial driver's license as required by his job specification. The Board held that the City had the right to terminate him without a disciplinary hearing because the failure to maintain a driver's license, a qualification of employment, did not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. Similarly, in *District Council 37, Local 2507,* Decision No. B-18-2001 at 12 n.19, the Board found that the City had the right to terminate an EMT for failure to maintain a State certification without a hearing.

The Board's holdings are consistent with rulings from the courts. In *Felix v. City of New York Dep't of Citywide Administrative Services,* 3 N.Y.3d 498 (2004), a City employee was terminated without a hearing under CSL § 75(1) for failure to comply with the residency requirement set forth the New York City Administrative Code § 12-120. The Court found that failure to maintain residency results in forfeiture of employment and is not misconduct that would entitle the 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 at 505; *see also Mandelkern v. City of Buffalo,* 64 A.D.2d 279 (4th Dep't 1978) (failure to maintain residency, a qualification of employment, results in forfeiture of employment).

In *Naliboff v. Davis,* 133 A.D.2d 632 (2d Dep't 1987), *appeal denied,* 71 N.Y.2d 805 (1988),

several Suffolk County emergency service dispatchers were terminated for allowing their certifications to lapse. The Second Department stated:

> Pursuant to Civil Service Law § 75 [employees] are protected from being removed or otherwise subjected to any disciplinary penalty except for misconduct or incompetency shown after a hearing upon stated charges. We conclude under the circumstances of this case that a hearing was not necessary since the petitioners do not deny that their EMT certifications have lapsed, as a consequence of which they were no longer qualified for their positions, and there exists no factual issues [sic] to be explored at a hearing.

133 A.D.2d at 632; s*ee also*, *Moogan v. New York State Dep't of Health*, No. 120608/01 (Sup. Ct. N.Y. Co. Nov. 25, 2002) (no hearing required for termination of EMT for failure to maintain state certification.)

Consistent with this law, we find that FDNY had the right to terminate Grievant because his failure to maintain his driver's license, a qualification of employment, is not misconduct and does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. Accordingly, there is no reasonable relationship between Grievant's termination and Article V, § 1(e), of the Agreement.

Contrary to the Union's claim, it is clear from the relevant job specification that a driver's license is a qualification of employment for the title of Auto Machinist even though it appears in the section entitled "License Requirements" and not the section entitled "Qualification Requirements." The job specification provides that in addition to the various educational and/or experience qualifications, an Auto Machinist is required to maintain a motor vehicle driver's license valid in the State of New York for the duration of employment. In *Uniformed Fire Officers Ass'n*, Decision No. B-7-87 at 19, *aff'd in part*, *modified in part*, *Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120 (1992), the Board recognized an employment qualification to be "a level of achievement or a

special status deemed necessary for optimum on-the-job performance." Here, the operation of a motor vehicle is an express part of the Auto Machinist's job specifications. New York State law requires a driver's license for the operation of such a vehicle. Therefore, an Auto Machinist must maintain a driver's license to perform his job duties.

We also reject the Union's claim that because Auto Machinists rarely operate motor vehicles, this qualification is not practical. The Board has held that management may require that employees be licensed by the State in order to be considered qualified to hold certain positions. The acquisition and retention of a license, like the accumulation of a certain type of experience, constitutes a qualification for employment that management may impose unilaterally on its employees. *Local 1182, Communications Workers of America,* Decision No. B-26-96 at 18; *Uniformed Firefighters Ass'n,* Decision No. B-4-89 at 167, *aff'd*, *Uniformed 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 (1st Dep't 1990). The fact that nothing in the law mandates that City employees who lose their driver's licenses be terminated has no effect on the City's right to impose and enforce a driver's license requirement as a qualification of employment. *District Council 37, Local 983*, Decision No. B-24-2005, *supra*.

The Union's argument that FDNY improperly used the license requirement to discharge Grievant, who was arrested, without due process is also without merit. FDNY had the right to terminate Grievant without a hearing for failure to maintain his driver's license and also had the right to re-hire him and give him a disciplinary hearing on the charges arising out of his September arrest and for his excessive lateness and absenteeism. The fact that FDNY elected to exercise its right to automatically terminate Grievant for failure to maintain his license rather than pursue disciplinary charges and a hearing for his other infractions, does not give rise to a wrongful discipline claim.

To the extent the Union alleges that FDNY's failure to re-hire Grievant was arbitrary, that the time afforded Grievant to restore his driver's license while facing criminal charges was unreasonable, and that FDNY is treating employees in a disparate manner, such claims are not reviewable under the parties' contractual wrongful discipline procedures, which are limited to review of employee incompetence or misconduct. Therefore, dismissal of the grievance is without prejudice to any rights that the Union may have in another forum.

We now turn to whether the Union has set forth a reasonable relationship between Grievant's dismissal and Article V, § 1(b), of the Agreement, which provides grievance rights for the misapplication of FDNY's rules. We find that the Union has not demonstrated such a nexus.

This Board has 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; *Social Services Employees Union, Local 371*, Decision No. B-3-83*; District Council 37, AFSCME*, Decision No. B-34-80.

In *District Council 37, Local 1407,* Decision No. B-7-2005, the Board found that while a grievance alleging wrongful termination for failure to maintain residency was not arbitrable under the parties' contractual wrongful discipline procedures, the union had demonstrated a reasonable relationship between grievant's termination and Article VI, § 1(b), of the parties' agreement, because a question existed whether the agency violated its own rule on residency. *See also 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, the issue whether employer followed its own rules prior to termination was grievable).

Here, the Union has failed to identify any FDNY rule that applies to Auto Machinists when their driver's licences are revoked, suspended, or expired. The Union's reliance on EMS-OGP 104-3 is misplaced. This rule expressly applies to members of FDNY's Department of EMS Command and, in particular, EMTs, EMS Lieutenants, Captains and Chiefs who are EMTs. EMS-OGP 104-3 does not mention Auto Machinists or any other civilian title. In any event, Grievant was given 30 days by FDNY to validate his driver's license, a period equal to that provided in EMS-OGP 104-3, but he failed to do so within that time. Therefore, we find that the Union has not established a reasonable relationship between Grievant's termination and an applicable FDNY rule.

To the extent that the Union alleges that FDNY has not been following an unidentified "30 day rule" with regard to other employees, such action is not reviewable in the context of this grievance, which alleges that Grievant was wrongfully terminated in violation of EMS-OGP 104-3. Therefore, dismissal of the grievance is without prejudice to any grievance that the Union may have for other employees, who may have been wrongfully terminated under applicable rules concerning the maintenance of driver's licenses.

Finally, since the Union has failed to identify a dispute concerning the application or interpretation of the terms of Agreement other than the claims that FDNY violated Article V, § 1(b) and (e), we find that the Union has not established a reasonable relationship between the termination and Article V, § 1(a), of the Agreement. *District Council 37, Local 983,* Decision No. B-24-2005 at 10.

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 City of New York and the New York City Fire Department, docketed as BCB-2519-05, be, and the same hereby is, granted; and it is further

ORDERED, that the request for arbitration filed by SEIU, New York City Local 246, docketed as A-11480-05, be, and the same hereby is, denied.

Dated: February 28, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER