UFA, 9 OCB2d 25 (BCB 2016)

(Arb.) (Docket No. BCB-4084-14) (A-14738-14 & A-14764-14)

Summary of Decision*:** The City challenged the arbitrability of two grievances alleging that the FDNY violated the Agreement, Department Regulations, the EEO policy, and the First Amendment, when it selectively disciplined Grievant, deprived him of individual rights, and failed to follow proper procedures in connection with a disciplinary interview. The City argued that the Union submitted an invalid waiver because the claims were presented during an OATH trial. The City also argued that the Union failed to establish the requisite nexus between its claims and the Agreement. The Union alleged that its waivers were valid because OATH never considered its claims, and argued that it established the requisite nexus. The Board found that the waiver was invalid as to certain claims that were decided by OATH on their merits. Additionally, the Board found that a nexus existed as to the claims that were not waived. Accordingly, the FDNY's petition challenging arbitrability was granted in part and denied in part, and the Union's requests for arbitration were granted in part and denied in part. ***(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-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO, on behalf of THOMAS BUTTARO,

Respondent.

DECISION AND ORDER

On August 29, 2014 and October 8, 2014, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("Union") filed two separate requests for arbitration on behalf of Thomas Buttaro ("Grievant"). The grievance underlying the August 28, 2014 request alleged that the New

York City Fire Department ("FDNY" or "Department") improperly disciplined Grievant and deprived him of specific individual rights, in violation of Article XVII, §§ 2, 5, and 8 of the Firefighters Agreement ("Agreement"), as well as Chapters 21 and 29 of the Regulations of the Uniformed Force ("Regulations"), the FDNY's Equal Employment Opportunity ("EEO") anti-retaliation policy, and the First Amendment of the United States Constitution. The grievance underlying the October 8, 2014 request for arbitration alleged that the FDNY considered improper evidence at an informal conference concerning Grievant's disciplinary charges, in violation of Article XVII, §§ 2, 5 and 8 of the Agreement, and failed to issue a timely determination of the charges, in violation of Chapter 26.6.3 of the Regulations.

The City asserts that the Union submitted an invalid waiver, because the same claims contained in the two grievances were presented in a disciplinary hearing at the Office of Administrative Trials and Hearings ("OATH").[1] The City also argues that the Union has failed to establish the requisite nexus between its allegations and the contractual provisions it cites. The Union argues that the waivers are valid because none of its claims were presented to or decided by OATH. It further argues that it has established the requisite nexus. The Board finds that the waiver is invalid as to certain claims that were decided by OATH on their merits. Additionally, the Board finds that a nexus exists as to the claims for which a valid waiver has been submitted. Accordingly, the FDNY's petition challenging arbitrability is granted in part and denied in part, and the Union's requests for arbitrability are granted in part and denied in part.

BACKGROUND

Grievant was employed by the FDNY as a Firefighter, a title represented by the Union.

[1] OATH is the independent agency to which the Fire Commissioner has delegated his authority to conduct hearings and issue reports and recommendations on disciplinary charges.

The Union and the City are parties to the Agreement, which covers the period of August 1, 2010 to July 31, 2017.[2] In 2012, Grievant was involved in a series of incidents with another Firefighter in his firehouse (hereinafter "the other Firefighter"). The other Firefighter is a member of the Vulcan Society, an organization of African-American firefighters that is party to a lawsuit against the FDNY for alleged racial discrimination in its hiring practices ("Lawsuit"). Grievant is a member of an advocacy group called Merit Matters, an organization that opposes the Vulcan Society's claims that the FDNY has engaged in racial discrimination in its hiring.[3] According to the City, in 2012 Grievant repeatedly wore a t-shirt, despite orders not to do so, which contained statements the other Firefighter found to be offensive. Additionally, on May 21, 2012, Grievant attended an EEO training led by a team that included the other Firefighter. The City asserts, and the Union denies, that Grievant "disrupted" the training. (Pet ¶ 13)

According to the City, sometime thereafter the other Firefighter filed a claim against Grievant with the FDNY's EEO office. On or about October 12, 2012, the EEO office notified Grievant that it was investigating a claim and that he would be interviewed. Grievant appeared for the EEO interview with his attorney on December 7, 2012. He then requested permission to record the interview with his own tape recorder. Due to questions as to whether this would be permitted, the interview did not proceed. Thereafter, the EEO office referred the matter to the Department's Bureau of Investigations and Trials ("BITS") to conduct an investigatory interview pursuant to the Mayor's Executive Order 16 ("MEO 16"). The BITS interview was scheduled for

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[2] At the time that the requests for arbitration were filed, the Agreement in effect was the 2008-2010 Firefighters Agreement, which remained in *status quo* pursuant to § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Board takes administrative notice that on August 5, 2015, the parties signed a Memorandum of Understanding that extended the 2008-2010 Agreement to 2017 and made certain modifications that are not relevant to this proceeding.

[3] Merit Matters is not a party to the Lawsuit.

January 29, 2013, and the City contends that it sent Grievant's attorney an email confirming the date and subject matter of the interview. The Union denies knowledge or information sufficient to form a belief as to these events but avers that Grievant never received written notification of the BITS interview. The BITS interview went forward on January 29, 2013, and Grievant signed a form advising him of his right against self-incrimination and right to counsel. The Union claims, and the City denies, that Grievant was never advised at the interview of the specific subject matter of the interview or whether or not he was a suspect, as required by the Agreement. It also claims that Grievant was not advised of his right to union representation and did not have a union representative present. Nevertheless, it is undisputed that a Union-provided attorney was present with Grievant. A transcript of the interview was created ("BITS transcript").

On or about September 19, 2013, the FDNY served Grievant with disciplinary charges. The charges list six violations that Grievant is alleged to have committed. These include:

> Engage in conduct meant to create a hostile work environment and/or to harass and/or retaliate against other firefighters/FDNY personnel that were believed to be part of a federal lawsuit concerning racial discrimination or EEO matters.
>
> Failing to wear only Department issued clothing in the firehouse. (20 counts)
>
> Insubordination/failing to comply with an order (20 counts)
>
> Failing to wear only uniforms that are in compliance with the specifications and were issued by Quartermaster. (20 counts)
>
> Conduct Bringing Reproach/Reflecting Discredit Upon the
>
> Oath of Office

(Pet., Ex. 3) (reprinted verbatim) Next to each allegation is listed the corresponding FDNY Regulation that is claimed to have been violated. The charges also contain a detailed description of the allegations.

The City states that, on or about October 30, 2013, Grievant's Union-provided attorney sent an email objecting to the use of the BITS transcript during an upcoming informal disciplinary conference concerning the charges. On November 8, 2013, the informal disciplinary conference was held before an FDNY Deputy Assistant Chief. Over the Union's objection, the Deputy Assistant Chief was presented with and relied upon the BITS transcript in making his findings and recommended penalty. In his decision, dated March 23, 2013, the Deputy Assistant Chief substantiated all of the charges against Grievant and recommended a penalty of forfeiture of twenty days' pay. Grievant chose not to accept the recommended penalty, and the FDNY initiated formal disciplinary proceedings at OATH.

First Grievance

On or about April 28, 2014, the Union filed a grievance on Grievant's behalf at Step III of the grievance procedure ("First Grievance").[4] The grievance alleged that the FDNY violated Sections 2, 5, and 8 of Article XVII of the Agreement when it failed to advise Grievant in writing of the BITS interview and of his right to union representation. Article XVII of the Agreement is titled "Individual Rights" and states, in pertinent part:

> Section 2. At the time an employee is notified to appear for interrogation, interview, trial or hearing at Department headquarters, the Fire Department shall advise that employee either in writing, when practicable, or orally to be later confirmed in writing of (1) the specific subject matter of such an interrogation, interview, trial or hearing; and (2) whether that employee is a suspect or non-suspect. If notified orally, the employee shall be given written notice before

[4]Article XVIII, § 1 of the Agreement defines a "grievance," in pertinent part, 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 the terms and conditions of employment . . . .

(Pet., Ex. 1(A))

> the interrogation, interview trial or hearing.
>
> ***
>
> Section 5. When an employee is a suspect in a departmental investigation or trial . . .
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> Such employee shall be advised of the right to union representation. When the interrogating officer is advised by the employee that the member desires the aid of counsel and/or a union representative, the interrogation shall be suspended and the employee shall be granted a reasonable time to obtain counsel and/or a union representative, which time shall not be less than twenty-four (24) hours.
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> ***
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> Section 8. If the Department fails to comply with the provisions of this Article, any questions put to the employee shall be deemed withdrawn and the refusal to answer any such questions shall not be prejudicial to the employee. Withdrawal as herein described shall not preclude the Department from proceeding anew in the manner prescribed herein.

(Pet., Ex. 1 (B))

The grievance also alleged that the FDNY violated Chapters 21 and 29 of the Regulations, as well as Grievant's First Amendment rights, when it selectively prosecuted Grievant for his failure to wear only department-issued clothing in the firehouse. Chapter 21 of the Regulations is titled "Roll Calls, Formations and Related Duties." (Pet., Ex. 7) It states, in pertinent part:

> 21.1.1 At 0900 and 1800 hours daily, officers on duty shall assemble members of their units in apparatus quarters and conduct a roll call in accordance with instructions in this chapter.
>
> 21.1.2 Members of the incoming platoon shall be inspected for proper work duty uniform, in accordance with chapter 29, and for a neat military appearance and grooming. Special orders or instructions shall be issued by the officer on duty at this time. The form of assembly shall be discretionary with the company commander.

(*Id.*)[5]

[5] Chapter 29 of the Regulations was not included in the record. However, the related OATH decision in this case, which will be discussed below, notes that "Department rule 29.1.2 requires members to wear only uniforms issued by the Quartermaster and rule 29.6.3 lists the articles of approved clothing." (Rep., Ex. 10 at 27)

Finally, the grievance alleged that Grievant was subjected to retaliation for his "involvement on behalf of 'Merit Matters' in [the Lawsuit]" and for raising an alleged conflict of interest issue at the EEO training, in violation of the FDNY EEO Anti-Retaliation Policy.[6] (Pet., Ex. 1) The "Fire Department's EEO Anti-Retaliation Policy" states, in pertinent part:

> The Fire Department is firmly committed to preventing discrimination, harassment and retaliation . . . .
>
> The Fire Department's Anti-Retaliation Policy . . . extends to all persons who are involved with, or perceived to be or have previously been involved with, any employment discrimination litigation, including but not limited to the litigation filed by the Department of Justice and the Vulcan Society against the City of New York and the FDNY. This applies to retaliations against members who may be plaintiffs, witnesses, or have some other role in such litigation or make a claim under the litigation.
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> ***
>
> Any employee who engages in retaliation will be disciplined to the full extent of Fire Department rules, regulations and procedures….
>
> ***

(Pet., Ex. 8)

Second Grievance

On or about July 24, 2014, the Union filed another grievance on behalf of Grievant at Step III of the grievance procedure ("Second Grievance"). This grievance alleged that the FDNY violated Section 26.6.3 of the Regulations when the Deputy Assistant Chief failed to issue his decision following the January 29, 2013 informal conference within two weeks. It also alleged violations of Sections 2, 5, and 8 of Article XVII of the Agreement, because the BITS transcript was improperly considered at the informal disciplinary conference.

Chapter 26 of the Regulations is titled "Discipline, Charges." (Pet., Ex. 9) Section 26.6.3

[6] In the grievance, the Union stated that Grievant "spoke to the Court at a Fairness Hearing conducted on October 1, 2012" in connection with the Lawsuit. (Pet., Ex. 1)

states:

> The pre-trial conference is an informal meeting at which the charges are discussed. Both the complainant and the respondent will have an opportunity to present their views. At the end of the conference or within two weeks thereafter, the presiding officer will determine whether the charges have been sustained and, if appropriate, recommend a penalty. Written notice of the determination will be distributed to all parties. Disposition or settlement of the charges is subject to the Commissioner's approval.

(*Id*.)

Requests for Arbitration

On July 31, 2014, the FDNY's Director of Labor Relations issued a Step III determination denying the First Grievance as untimely. On August 28, 2014, the Union filed a request for arbitration regarding that grievance ("First RFA"). Regarding the Second Grievance, both parties agreed to waive the Step III determination. The Union then filed a request for arbitration regarding the Second Grievance on or about October 8, 2014 ("Second RFA"). The parties jointly requested consolidation of the two Requests for Arbitrations and the Deputy Director granted the request. On October 24, 2014, the City filed a petition challenging the arbitrability of both grievances.[7]

OATH Proceedings on the Disciplinary Charges

In the meantime, the OATH proceedings concerning Grievant's disciplinary charges commenced. On July 9, 2014, Grievant filed a motion to dismiss the disciplinary charges pending against him at OATH. According to the OATH Administrative Law Judge's ("ALJ") interim decision ("Interim Decision"), Grievant alleged that the petition against him should be dismissed because the FDNY "violated his rights under the applicable collective bargaining agreement

[7] Consideration of the petition challenging arbitrability by this Board was delayed due to the Board's request for additional briefing on claims that were initially raised in the petition and thereafter withdrawn.

("CBA") and because the initiation of disciplinary charges violated his First Amendment Rights." (Pet., Ex. 5, p. 1) Grievant also sought "to preclude statements he made during an investigatory interview because he did not receive a transcript of the interview for nine months." (*Id*.) With respect to Grievant's contractual claims under Article XVII, §§ 2 and 5, the ALJ found:

> To the extent respondent alleges that petitioner violated his rights under the CBA, OATH's jurisdiction is limited to hear the disciplinary matter pursuant to Administrative Code section 15-113. OATH does not have jurisdiction to hear the alleged violation of the parties' CBA which is governed by the impartial arbitration procedures set forth in the CBA (Resp. Ex. F), FDNY Order PA/ID 7-73 (June 15, 1973) (Pet. Ex. 10), and section 12-312 of the New York City Collective Bargaining Law. *See e.g., Health and Hospitals Corp. (Harlem Hospital Ctr.) v. Norwood*, OATH Index No. 143/05, mem. dec. at 5 (Mar. 7, 2005) ("grievance proceedings, are creatures of collective bargaining agreements, and are therefore governed by those collective bargaining agreements"); *Dep't of Correction v. Smith*, OATH Index No. 496/95 at 6 (Jan. 3, 1995) (OATH should not venture to interpret the CBA of the parties which should be done through the impartial arbitration procedures set forth in the CBA).
>
> Even if OATH had jurisdiction to hear the grievance, the remedy under section 8 of the CBA for violations of Article XVII is withdrawal of the questions made during the interview, not dismissal of disciplinary charges related to the incident investigated during the interview.
>
> The motion to dismiss the petition for alleged violations of the CBA is denied.

(Pet., Ex. 5, p. 3) The ALJ also denied the remainder of Grievant's motion to dismiss.

On January 13, 2015 the OATH decision was issued ("OATH Decision"). In it, the ALJ sustained all of the charges against Grievant and made the following "Findings and Conclusions":

> 1. [The FDNY] demonstrated that the potential workplace disruption outweighs respondent's First Amendment right to wear non-Department-issued t-shirts in the firehouse.
>
> 2. [The FDNY] demonstrated that from May 6, 2012 until December 2012, respondent engaged in conduct meant to create a hostile work environment in violation of Department rules.

> 3. [The FDNY] demonstrated that respondent repeatedly failed to wear Department-issued clothing in the firehouse and repeatedly disobeyed orders to wear only authorized clothing in the firehouse in violation of Department rules.

(Rep., Ex. 10 at 31)

On February 10, 2015, Grievant was terminated by decision and order of the FDNY Fire Commissioner.

POSITIONS OF THE PARTIES

City's Position

The City contends that the Union has not submitted a valid waiver, because the same claims asserted in the grievances were presented by Grievant in a disciplinary hearing conducted by OATH. The City argues that the claim that the disciplinary charges against Grievant violate FDNY Regulations was decided by OATH, when an ALJ issued her report and recommendations. Specifically, the ALJ sustained all of the charges against Grievant and found that wearing the t-shirt at issue here was not permitted by FDNY policy. Regarding the alleged violations of the Agreement relating to disciplinary interrogations, the City asserts that Grievant also submitted these claims in his OATH proceeding. According to the City, it does not matter that the ALJ did not make a determination as to these claims due to lack of jurisdiction, because the waiver submitted "waives the right to merely *submit* such claims to another forum." (Rep. ¶ 5) (citing to *COBA*, 57 OCB 24 (BCB 1996)) (emphasis in Rep.)[8] Furthermore, the City contends that the fact

[8] The City contends that this case is "essentially identical to [*COBA*, 57 OCB 24], in which the Board found that Grievant's submission of a defense at OATH based on an alleged violation of a collective bargaining agreement rendered his waiver invalid when he attempted to submit the same issue to arbitration." (Pet. ¶ 32)

that the Union was not a party to the OATH proceeding is irrelevant, because NYCCBL §12-312 (d) requires a valid waiver from both the union and the grievant as a condition for invoking arbitration. Thus, it argues, "the grievant's inability to execute a valid waiver renders the entire grievance non-arbitrable." (Rep. ¶ 7)

Finally, the City argues that the Union has failed to establish a nexus between its claims and any provision of the Agreement. As to the Union's claims that Grievant's discipline violated the FDNY's EEO policy, the City contends that the Board has consistently found that EEO policies such as that at issue here are not grievable because they are simply statements of goals or policy couched in general and precatory language. Additionally, there is no provision in the Agreement that allows for a grievance alleging a violation of the First Amendment. Regarding the remaining claims, the City argues that they are not arbitrable because the parties' Agreement does not define a grievance to include a claimed wrongful disciplinary action and does not contain any procedures for disciplinary matters to proceed to arbitration. The City asserts that the Union's claims that the FDNY violated, misinterpreted, and inequitably applied its own policies and regulations, and therefore Article XVII of the Agreement, by taking disciplinary action against Grievant are merely "attempts to circumvent the lack of any grievance procedure for an alleged wrongful disciplinary action" and, therefore, are not arbitrable. (Pet. ¶ 54)

Union's Position

The Union argues that the grievances are arbitrable because the waivers at issue are valid and satisfy the waiver requirement set forth in the NYCCBL. The Union contends that none of the claims set forth in Grievance One or Two were presented or heard in Grievant's disciplinary hearing at OATH or any other forum. OATH did not consider the merits of the grievances at issue,

except to the extent that it addressed Grievant's First Amendment rights.[9] Furthermore, the Union was not a party to the OATH proceeding. Thus, the Union argues that Grievant has not attempted to re-litigate the same dispute in another forum. Additionally, the Union contends that neither the Union nor Grievant is challenging the substance of any of the FDNY's disciplinary rules or regulations. Instead, the grievances challenge the FDNY's application of sections of Article XVII that set forth individual employee's rights, as well as the selective application of the FDNY's disciplinary rules and regulations and the EEO Policy.

The Union also contends that it has established the requisite nexus between its allegations and the regulations and provisions it cites. It asserts that where the FDNY "has imposed punitive measures undertaken without compliance with the disciplinary procedures set forth in the contractual and Departmental regulations, procedures and policies cited in the requests for arbitration, the Union has sufficiently established the requisite nexus . . . ." (Union Memo of Law, p. 23, citing *UFA*, 39 OCB 14 (BCB 1987)) The Union argues that there is no merit to the City's argument that the EEO policy is not arbitrable because its language is general and precatory. To the contrary, the FDNY's EEO policy expressly provides for discipline, up to and including termination, for a violation of the policy. As such, the Union argues that EEO policy provides substantive rights to employees, and therefore there is a nexus between it and Grievant's claims.

DISCUSSION

"The policy of this Board, as is made explicit by § 12-302 of the NYCCBL . . . is to favor and encourage arbitration to resolve grievances." *OSA*, 7 OCB2d 28, at 8 (BCB 2014) (quoting

[9] We note that at the time the Union filed its answer, the Interim Decision had been issued but the OATH Decision had not.

OSA, 1 OCB2d 42, at 15 (BCB 2008)) (internal quotation marks omitted).[10] In recognition of this policy, we have long held that "the presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *DC 37, L. 420*, 5 OCB2d 4, at 12 (BCB 2012) (quoting *CEA*, 3 OCB2d 3, at 12 (BCB 2010)) (internal quotation marks omitted).

As a preliminary matter, the Board must address the City's argument that Grievant has not submitted a valid waiver, as such waiver is a "statutory condition precedent to arbitration." *PBA*, 3 OCB2d 41, at 12 (BCB 2010). NYCCBL § 12-312(d) provides that:

> As a condition to the right of a municipal employee organization to invoke impartial arbitration under such provisions, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of said grievant or grievants and said organization to submit the contractual dispute being alleged under a collective bargaining agreement to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award. This subdivision shall not be construed to limit the rights of any public employee or public employee organization to submit any statutory or other claims to the appropriate administrative or judicial tribunal.

It is well established that the purpose of the waiver requirement is to prevent multiple litigation of the same dispute, and to ensure that a grievant who elected to seek redress through the arbitration process will not attempt to also litigate the same contractual dispute in another forum. *See UFA*, 4 OCB2d 65, at 10 (BCB 2011); *DC 37, L. 376*, 1 OCB2d 36 (BCB 2008); *Local 3, IBEW*, 45 OCB 7 (BCB 1990). Where the employer argues that a court action precludes the

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

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

submission of a valid waiver and the court action has been adjudicated, the Board will look at whether the contract claim sought to be arbitrated was decided on the merits. *See LBA*, 8 OCB2d 16, at 12 (BCB 2015) (citing *PBA*, 3 OCB2d 41, at 12); *see also UFA*, 4 OCB2d 65, at 10-11; *DC 37, L. 376*, 1 OCB2d 36, at 13. Where the merits of a particular claim were not adjudicated in that alternate forum, arbitration of that claim would not be duplicative and, therefore, a valid waiver can be executed. *See LBA*, 8 OCB2d 16 at 12-13; *cf. IBT, L. 237 (Moore)*, 75 OCB 21, at 10 (BCB 2005) (review by OATH barred arbitration of same contract claim); *Local 371, SSEU*, 59 OCB 30 (BCB 1997) (same).

If the Board finds that the waiver is valid with regard to any of Grievant's claims, it will then make a finding as to substantive arbitrability. The Board applies a two-pronged test to determine whether a dispute is arbitrable. This test considers:

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

DC 37, L. 420, 5 OCB2d 4, at 12 (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). "When a public employer challenges the arbitrability of a grievance based on a lack of nexus, [t]he burden is on the Union to establish an arguable relationship between the City's acts and the contract provisions it claims have been breached." *DC 37, L. 1549*, 6 OCB2d 7, at 12 (BCB 2013) (quoting *Local 371, SSEU*, 65 OCB 39, at 8 (BCB 2000)) (internal quotation marks omitted). If the Union's interpretation is plausible, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Id.* (quoting *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990)) (internal quotation marks omitted). As the Board lacks jurisdiction to enforce contractual rights, it will

generally not inquire into the merits of the parties' dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citations omitted); *see also* N.Y. Civ. Serv. Law § 205(5)(d).

First Grievance

We find that the waiver is valid as to Grievant's claims that the FDNY violated Sections 2, 5, and 8 of Article XVII of the Agreement when it failed to advise him in writing of the BITS interview and of his right to union representation at the interview. The record clearly establishes that OATH did not decide these issues. Specifically, in the Interim Decision, the ALJ ruled that OATH did not have jurisdiction to consider these claims because they are "governed by the impartial arbitration procedures set forth in the CBA." (Pet., Ex. 5, p. 3). Therefore, because there was no consideration of the merits of these allegations, the waiver is valid.[11]

However, we find that the waiver is invalid with respect to the remaining claims contained in the First Grievance – that the FDNY violated Chapter 21 and 29 of the Regulations, the FDNY EEO Anti-Retaliation Policy, and Grievant's First Amendment rights; and that Grievant was retaliated against for his involvement with Merit Matters and for raising a conflict of interest at an EEO training. The OATH ALJ carefully considered these claims raised by Grievant as defenses to his disciplinary charges and found them to be without merit. *See COBA*, 57 OCB 24 (waiver invalid when Grievant submitted contractual claims as a defense in an OATH proceeding, and such claims were rejected on their merits).

First, the ALJ engaged in a lengthy analysis of Grievant's First Amendment claims and found that any First Amendment rights Grievant was entitled to were outweighed by the actual and

[11] We are not persuaded that our decision in *COBA*, 57 OCB 24, warrants a finding that the waivers are invalid. In *COBA*, the Board found the grievant's waiver invalid because the OATH decision explicitly discussed his contractual defense and concluded that the provision at issue did not prevent the employer from terminating him. *See COBA*, 57 OCB 24, at 3-4. Here, OATH declined to consider Grievant's contractual claims.

potential disruption to the workplace caused by his actions. Therefore, the ALJ dismissed Grievant's motion to dismiss on this ground and found that the FDNY had the "authority and a duty under federal, state, and city discrimination laws and its own EEO policies to eliminate unwelcome and harassing conduct in the workplace." (Rep., Ex. 10, p. 20)

Next, the ALJ determined that Grievant violated the FDNY's EEO Anti-Retaliation policy when he engaged in a pattern of behavior intended to "create a hostile work environment and/or to harass and/or retaliate" against the Firefighter with whom he had a disagreement. (*Id*. at 27) She found that he did so largely by wearing t-shirts that he knew the other Firefighter objected to, even after he was instructed on multiple occasions to cease doing so. As such, the ALJ determined that Grievant also violated various Department Regulations and orders, including Regulations 29.1.2 and 29.6.3, which require members to wear only approved articles of clothing that are properly issued by the Quartermaster.[12] Additionally, the ALJ found that Grievant acted improperly when he disrupted the EEO training and had to be removed from the class. In doing so, she discredited Grievant's claims that it was actually the other Firefighter, or the FDNY, that violated its EEO policy. Thus, the ALJ found that it was Grievant who committed the acts of harassment and retaliation against a Firefighter who supported the Lawsuit with which he disagreed. As these portions of Grievant's claims were carefully considered and decided on their merits, the waiver submitted is invalid and these claims may not proceed to arbitration.[13]

[12] Although the ALJ did not cite to Chapter 21 of the Regulations in making this finding, we find that Chapter 21 does not contain a substantive rule regarding proper uniforms and clothing. Instead, it addresses steps that officers must take when conducting the daily roll call. Thus, to the extent that these Regulations were not fully discussed in the OATH Decision, we find that this is inconsequential because there is no nexus between Grievant's claims and Chapter 21 of the Regulations.

[13] We reject the Union's argument that the waiver is valid as to the Union because it was not a party to the OATH proceeding. The grievances were filed by the Union on behalf of Grievant only, and not on behalf of similarly-situated Firefighters. Thus, the claims are personal to

As to the claims for which the waiver is valid, we find them to be substantively arbitrable. The parties do not dispute that they have agreed to submit certain disputes to arbitration. The relevant inquiry is, therefore, whether there is a reasonable relationship between the Union's claims and the cited contractual provisions. The First Grievance alleges that Article XVII, §§ 2, 5, and 8 of the Agreement were violated when the FDNY failed to advise Grievant in writing of the BITS interview and failed to inform him of his right to union representation. This dispute falls squarely within the language of Article XVII, §§ 2 and 5, which address the requirement of written notification prior to any interview as well as the requirement that employees be advised of the right to union representation. Additionally, Section 8 of this Article provides for a remedy for such violations. Consequently, the nexus between these allegations and the cited provisions is apparent, and this portion of the First Grievance is arbitrable.

Second Grievance

The Second Grievance alleges that the FDNY violated Chapter 26.6.3 of the Regulations when the Deputy Assistant Chief failed to issue his decision following the informal disciplinary conference within two weeks. It also alleges that the FDNY violated Article XVII, §§ 2, 5, and 8 of the Agreement because the BITS transcript was improperly considered at Grievant's informal disciplinary conference. As discussed above, the ALJ specifically determined in the Interim Decision that OATH did not have jurisdiction to address Grievant's claims regarding Article XVII, §§ 2, 5, and 8 of the Agreement. Furthermore, there is no discussion in either the Interim Decision or OATH Decision regarding Chapter 26.6.3 of the Regulations, and thus there is no evidence that

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Grievant, and do not survive beyond the OATH decision. *Cf. COBA*, 57 OCB 24 (where grievance was filed by Union on behalf of a grievant and "other similarly situated correction officers," waiver was invalid as to the grievant who raised the same contractual claim in an OATH proceeding, but valid as to the claim regarding other correction officers).

this Regulation was raised by Grievant or considered during the OATH proceedings. Consequently, we find that the waiver submitted is valid as to the entire Second Grievance.

We additionally find that these claims are substantively arbitrable, as the disputes have a reasonable relationship to the provisions cited in the FDNY Regulations and the Agreement. Specifically, Chapter 26.6.3 of the Regulations states that "[a]t the end of the conference or within two weeks thereafter, the presiding officer will determine whether the charges have been sustained and, if appropriate, recommend a penalty. Written notice of the determination will be distributed to all parties." (Pet., Ex. 9). Additionally, Section 8 of Article XVII provides that if the Department fails to comply with other provisions of the Article (such as Sections 2 or 5), "any questions put to the employee shall be deemed withdrawn . . . ." (Pet., Ex. 1 (B)). Based on these provisions, the Union's claim that a transcript containing withdrawn questions should not be considered when determining whether to discipline the employee is plausible. Therefore, we find that the requisite nexus has been established, and the claims in the Second Grievance are arbitrable.

In conclusion, we find that the Second Grievance is arbitrable in its entirety. Additionally, we find the portions of the First Grievance that allege violations of Article XVII, §§ 2, 5, and 8 of the Agreement are arbitrable. We therefore deny the City's petitions challenging arbitrability and grant the Union's requests for arbitrability as to these claims. However, we find that the remainder of the claims in the First Grievance are not arbitrable, as the waiver submitted is invalid. Consequently, we grant the City's petition challenging arbitrability and deny the Union's request for arbitrability in this regard.

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 request for arbitration filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, on behalf of Thomas Buttaro, docketed as A-14764-14, hereby is granted; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, on behalf of Thomas Buttaro, docketed as A-14738-14, hereby is granted as to the claims that the FDNY violated Article XVII, §§ 2, 5, and 8 of the Agreement; and denied as to the claims that the FDNY violated Chapter 21 and 29 of the Regulations, the FDNY EEO Anti-Retaliation Policy, and Grievant's First Amendment rights; and it is further

ORDERED, that the petition challenging arbitrability filed by the New York City Fire Department, docketed as BCB-4084-14, hereby is denied in part and granted in part, consistent with the above.

Dated: October 19, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER