UFA, Local 94, 15 OCB2d 33 (BCB 2022)

(Arb.) (Docket No. BCB-4481-22 (A-15905-22)

Summary of Decision*:** The City challenged the arbitrability of the Union's grievance alleging that the FDNY violated the parties' collective bargaining agreements and FDNY regulations by placing bargaining unit members on leave without pay for refusing to comply with the City Health Commissioner's COVID Vaccine Mandate. The City argued that court-enunciated public policy precludes arbitration of the grievance, that vaccination is a qualification of employment, which does not give rise to any arbitrable right, and that there was no nexus between the placement of unvaccinated bargaining unit members on LWOP and the cited provisions of the Agreements and FDNY regulations. The Board found that the portions of the grievance concerning EDE and use of accrued economic benefits was arbitrable, but that the portions of the grievance challenging the placement of unit members on LWOP was not arbitrable. Accordingly, the City's petition challenging arbitrability was granted in part and the Union's request for arbitration was granted in part. ***(Official decision follows).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Petitioner,

-and-

THE UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO,

Respondent.

DECISION AND ORDER

On March 28, 2022, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("UFA" or "Union") filed a request for arbitration alleging that the City of New York ("City") violated the parties' collective bargaining agreements (collectively "Agreements") and the regulations of the Fire Department of the City of New York ("FDNY" or "Department") by placing

unvaccinated bargaining unit members on leave without pay ("LWOP") pursuant to the City's COVID-19 Vaccine Mandate. On April 12, 2022, the City filed a petition challenging the arbitrability of the grievance. The City argues that arbitration of the grievance should be barred in accordance with court-enunciated public policy, that vaccination is a qualification of employment, which does not give rise to any arbitrable right, and that there is no nexus between the harm alleged in the grievance and the cited provisions of the Agreements and FDNY. The Board finds that there is a nexus between unit members being denied extra-Departmental employment ("EDE") and accrued economic benefits and the Agreements and FDNY Policy PA/ID 12-67. The Board finds no nexus between the placement of unvaccinated bargaining unit members on LWOP and the cited provisions of the Agreements and FDNY policy. Accordingly, the City's petition challenging arbitrability is granted in part, and the Union's request for arbitration is granted in part.

BACKGROUND

On August 31, 2021, the Mayor issued Executive Order ("E.O.") No. 78, mandating that as of September 13, 2021, City employees and covered employees of City contractors be vaccinated against COVID-19 or submit to a weekly PCR test. Thereafter, on October 20, 2021, the Mayor issued E.O. No. 83 and announced that these employees would no longer have the option of weekly testing and would instead be required to be fully vaccinated in order to maintain their City employment. Specifically, employees would be required to have their first dose of a vaccine by October 29, 2021. On the same day that E.O. No. 83 was announced, the City's Commissioner of Health and Mental Hygiene ("Health Commissioner") issued a separate order (collectively with EO No. 83, "Vaccine Mandate") similarly requiring all City employees to be vaccinated and providing further details, including that any employee who had not provided proof of having received a first dose of a vaccine by 5:00 p.m. on October 29, 2021 would be "excluded

from the premises at which they work beginning on November 1, 2021." On October 21, 2021, the FDNY issued Buckslip No. OPS-21-10-08 with the subject "Covid Vaccine Update" that incorporated the requirements of the Vaccine Mandate. (Pet., Ex. B, at 80)

On October 22, the City issued a fact sheet answering frequently asked questions about the New York City Employees Vaccine Mandate ("FAQ") to address employee concerns that might arise regarding the Vaccine Mandate. (Pet., Ex. B, at 87) The FAQ provided a detailed description of which employees were required to be vaccinated, how to get vaccinated and what would be considered proof of vaccination, and provided information on paid leave time and other incentives for vaccination.[1] It also provided that, as a "penalty," employees who failed to comply with the Vaccine Mandate would be placed on LWOP and would be "terminated in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreements."[2] (*Id*. at 99)

The Grievance

The UFA represents FDNY employees in five titles: Firefighters, Fire Marshals, Wipers, Pilots, and Marine Engineers. The City and the UFA are parties to three Agreements, which

[1] In addition to describing the Vaccine Mandate, the FAQ detailed the process for an employee to request a reasonable accommodation exemption to the Vaccine Mandate for medical or religious reasons and stated that any such request needed to be made by October 27, 2021. The FAQ stated that while the request for a reasonable accommodation was being evaluated, the employee was required to submit to weekly testing. Any employee who applied for a reasonable accommodation after October 27 would be placed on LWOP while their accommodation was considered. Additionally, the FAQ stated that the only reasonable accommodation available was the submission of a weekly negative test result. If an employee's request for a reasonable accommodation was denied, he or she could submit an appeal via an "online review request portal" within three business days. (*Id*. at 94)

[2] The FAQ further states that "Absent any collective bargaining agreement providing for other procedures, employees should be placed on LWOP effective November 1 and may be subject to discipline or other adverse employment action. Further guidance will be forthcoming." (Pet., Ex. B, at 99)

remain in *status quo* pursuant to NYCCBL § 12-311(d): one covering Firefighters and Fire Marshals; one covering Wipers; and one covering Pilots and Marine Engineers. The Firefighters and Fire Marshals Agreement defines a grievance, at Article XVIII, § 1, as follows:[3]

> A grievance is defined 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. B, at 64)

On December 1, 2021, the Union filed a grievance at Step III alleging multiple violations of the Agreements and FDNY regulations. (Pet., Ex. B, at 27) Specifically, the grievance alleged:

> [M]ultiple violations of the City and Department's contractual obligations to compensate certain UFA members pursuant to various terms of the [Agreements], and a failure to provide these members with their contractual rights pursuant to the Individual Rights Section of the [Agreements]. Furthermore, this grievance alleges violations and/or misapplication of FDNY policy and regulations.

(*Id.*)

The Union alleged that the FDNY breached the contractually mandated protections contained in the disciplinary process and procedures by placing bargaining unit members involuntarily on LWOP status and denying them contracted-for benefits following their placement on LWOP. The Union's grievance alleged that the above actions violated various economic provisions of the Agreements.[4] In addition, it cites to the Individual Rights provision.[5] The

[3] We take administrative notice that the definition of a grievance in the collective bargaining agreements governing Wipers, Pilots, and Marine Engineers are virtually identical.

[4] Specifically, the Union alleges that the City violated the following provisions of the Agreements: Article V, §§ 1 and 5 (Salaries); Article VI, §§ 2 and 3 (Longevity and Chauffeur Differential); Article VIII (Night Shift Differential); Article XII (Vacation and Leave); Article XII, § 10 (Terminal Leave Lump Sum Payment); Article XVII (Individual Rights); and Side Letter Attachment G (Cleaning and Maintenance Allowance). (Pet., Ex. B, at 151-2)

[5] We take administrative notice that the "Individual Rights" sections of the collective bargaining

grievance further alleged that the FDNY's actions violated Department Regulation § 17.5.1, which states:

> Special leaves of absence (without pay) shall be applied for in writing at least 24 hours in advance of such leave and include all pertinent information and reasons for request. Such leaves shall be limited to a minimum of one-half work day, and to a maximum of 15 work days. Applications for such leaves in excess of 15 days may be submitted, subject to approval of the Fire Commissioner.
>
> In addition, if applying for such leaves in excess of 30 days, members must telephone the Badge Desk to make an appointment to turn in their badge and ID card.

(Pet., Ex. B, at 35)

The Union's grievance also alleged that the City's actions violated FDNY Policy PA/ID 12-67, concerning EDE, which states that bargaining unit members are permitted to work in non-FDNY positions under certain conditions and without the approval of the Fire Commissioner. PA/ID 12-67 also details the procedures that govern EDE as well as exceptions to the Department's EDE policy. (*Id.)* Vaccination status is not listed as a factor in considering whether an employee can engage in EDE under PA/ID 12-67. The grievance further alleged that members who had been placed on LWOP were unable to access and utilize their already-accrued economic benefits, such as terminal leave. The Union did not identify any members who had elected to retire instead of vaccinate and had been denied access to their terminal leave benefits. As a remedy, the Union demanded that the FDNY cease and desist from placing bargaining unit members on LWOP without their consent, restore them to payroll with retroactive pay and benefits, and permit them to seek EDE. (Pet., Ex. B, at 37)

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agreements governing Firefighters, Fire Marshalls, Wipers, Pilots, and Engineers are virtually identical. The "Individual Rights" section of each of the Agreements detail the guidelines by which the FDNY shall conduct disciplinary investigations, interrogations, trials, and hearings of UFA members. It also details the rights of UFA members who are under investigation by the FDNY. (Pet., Ex. B, at 61-64)

On January 31, 2022, a Step III hearing was held before a FDNY Hearing Officer. According to the Step III Hearing Officer's determination ("Step III Decision"), the City did not dispute several of the claims alleged by the Union. The City acknowledged that members who had been placed on LWOP were unable to utilize their accrued leave benefits, such as annual leave. The City averred that this was due to a limitation with the CityTime system, which lacked the necessary codes that would permit members on LWOP to use these benefits. The City further acknowledged that members were unable to engage in EDE due to an unidentified policy of the Department of Citywide Administrative Services ("DCAS"). The City did not provide or identify the DCAS policy in question. The City argued that it has the right to establish a new qualification for employment, such as the Vaccine Mandate. Moreover, the City asserted that the Vaccine Mandate was a necessary response to the COVID-19 pandemic which had been upheld repeatedly in court decisions. According to the City, the Health Commissioner had the lawful authority to issue the Vaccine Mandate, which placed members who chose to remain unvaccinated on LWOP.

The Step III Decision was issued on February 9, 2022. The Hearing Officer determined, generally, that requiring proof of vaccination was a condition of employment that does not implicate any contractual disciplinary procedures. However, the Hearing Officer granted the grievance as to certain provisions. Specifically, he stated that that the FDNY violated policy PA/ID 12-67 by disallowing members placed on LWOP to perform EDE, because the FDNY failed to show how this practice was authorized under the Vaccine Mandate. The Hearing Officer further determined that unit members placed on LWOP were denied access to earned contractual benefits and were "entitled to benefits for which they have already worked and earned . . . ." (Pet., Ex. B, at 154)

Subsequently, on March 28, 2022, the Union filed its request for arbitration. Specifically, the Union appealed the Step III Decision and alleged multiple breaches of the Agreements and

FDNY policies governing leaves of absences and EDE, as noted earlier. The Union further argues that the City's enforcement of the Vaccine Mandate is not tantamount to discipline. As a remedy, the Union requests that an arbitrator issue an award directing the City to cease and desist from putting employees on LWOP involuntarily and restore all affected bargaining unit members on LWOP to payroll with retroactive pay and benefits.

POSITIONS OF THE PARTIES

City's Position

The City argues that the request for arbitration must be dismissed. It first argues that arbitration of the grievance should be precluded due to the court-enunciated public policy of permitting government employers to protect public health and the health of the workforce by taking effective steps to combat COVID-19. The City asserts that there are compelling public policy reasons that have been articulated in recent court cases that preclude this grievance from being arbitrated; namely, the importance of combatting the COVID pandemic. The City points to several recent decisions to support its argument. First, it notes that in *Ansbro v. De Blasio*, Index No. 159738/2021 (Sup. Ct. N.Y. Co. Dec. 20, 2021) (Perry, J.), the Supreme Court held that the UFA had not sufficiently demonstrated that any bargaining unit members' constitutional rights had been violated by enforcement of the Vaccine Mandate. In addition, the City contends that the Vaccine Mandate has been found to be a lawful qualification or condition of employment that does not implicate disciplinary procedures in recent court decisions, all of which stress the importance of permitting government employers to protect public health and the health of the workforce by taking effective steps to combat COVID-19. Finally, the City asserts that "the Third Department essentially endorsed" its position that public policy bars arbitration of matters relating to the

COVID-19 pandemic in *Matter of Arbitration Between City of Troy and Troy Uniformed Firefighters Assn., Local 86 IAFF, AFL-CIO*, 203 A.D.3d 1523 (3d. Dept. 2022). (Rep. at ¶ 16)

Second, the City asserts that the Union has failed to establish the requisite nexus between the grievance and the cited provisions of the Agreements and FDNY regulations. The City contends that this Board has ruled that a qualification does not give rise to arbitration rights under the parties' contractual wrongful disciplinary procedures. It asserts that the Vaccine Mandate has repeatedly been adjudicated by various courts to be a qualification of employment. The City maintains that the Agreements define a "grievance" as a dispute concerning the application or interpretation of its provisions and that the Union's grievance is not arbitrable under the wrongful disciplinary procedures of the Agreements. The City further avers that the Union has cited to no contractual language here that is applicable to the Vaccine Mandate. According to the City, the validity and enforcement of the Vaccine Mandate is a subject that falls outside the scope of the Board's authority, and the request for arbitration should be dismissed.

Union's Position

The Union argues that the petition challenging arbitrability should be denied. The Union asserts the parties are obligated to arbitrate this controversy because the alleged harm – loss of pay and benefits – resulting from being placed on LWOP pursuant to the Vaccine Mandate meets the definition of "grievance" as defined in the Agreements. Further, the Union argues that the City has not identified any public policy, contractual, or constitutional restrictions that preclude the arbitration of the grievance. Specifically, the Union claims that the request for arbitration sufficiently pled that the FDNY's actions deprived bargaining unit members of numerous terms and conditions of employment provided by the Agreements and FDNY regulations. Accordingly, the Union argues that it has established a nexus between the grievance and the Agreements by identifying the numerous provisions of the Agreements that the FDNY violated when it placed

bargaining unit members on LWOP involuntarily without any disciplinary due process. Specifically, these provisions of the Agreements relate to salary, pay grade levels, and longevity payments, which are "the core financial terms and conditions of employment." (Union Memo at 7) The Union therefore requests that this petition be dismissed and that its request for arbitration be granted.

DISCUSSION

Pursuant to NYCCBL § 12-309(a)(3), this Board has exclusive authority "to make a final determination as to whether a dispute is a proper subject for [the] grievance and arbitration procedure established pursuant to [§] 12-312 of this chapter."[6] The Board employs a two-pronged test to determine whether a matter is arbitrable:

> (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 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 (BCB 2012) (quoting *UFOA*, 4 OCB2d 5, at 8-9 (BCB 2011)) (citations and internal quotation marks omitted). Our inquiry is focused upon whether there exists a "relationship between the act [or omission] complained of and the source of the alleged right"

[6] 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.

sufficient to warrant arbitration of the dispute. *CEA*, 3 OCB2d 3, at 13 (BCB 2010) (citations and internal quotation marks omitted); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371, AFSCME, AFL-CIO*, 17 OCB 1, at 11 (BCB 1976). The Board does not make a final determination of the rights of the parties because it lacks jurisdiction over matters of contract interpretation and is not empowered to interpret the source of the right. *See NYSNA*, 3 OCB2d 55, at 7 (BCB 2010). Thus, the Board will not inquire into the merits of the dispute. *See DC 37, L. 420*, 5 OCB2d 4, at 12 (citations omitted); *see also* N.Y. Civ. Serv. Law § 205(5)(d).

We find that the Union has met the first prong in our analysis. This Board has previously held that the definition of "grievance" in the Agreements at issue here provides for grievance and arbitration procedures of certain issues. *See UFA*, 75 OCB 19, at 14 (BCB 2005). Further, the City has not identified any statutory or constitutional restrictions to arbitration of this issue. However, we must also consider whether there exists any court-enunciated public policy that precludes arbitration. "The New York State Court of Appeals has long recognized the 'strong and sweeping' public policy in favor of collective bargaining and the 'presumption . . . that all terms and conditions of employment are subject to mandatory bargaining.'" *DC 37*, 5 OCB2d 8, at 13 (BCB 2012) (quoting *Matter of City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79 (2000)); *see also Matter of City of N.Y. v. Patrolmen's Benevolent Assn.*, 14 N.Y.3d 46, 58 (2009). "Judicial restraint under the public policy exception is particularly appropriate in arbitrations pursuant to public employment collective bargaining agreements." *Matter of New York City Tr. Auth. v. Transp. Workers Union of Am., Local 100, AFL-CIO*, 99 N.Y.2d 1, at 7 (2002). This Board has long held that the scope of the public policy exception is extremely narrow. *See PBA*, 73 OCB 22 (BCB 2004) (citing *United Fed'n of Teachers, Local 2 v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 1 N.Y.3d 72, 80 (2003)).

Such exceptions must be based on "public policy considerations, embodied in statutory or decisional law, [and must] prohibit, *in an absolute sense*, particular matters being decided." *New York City Transit Auth. v. Transp. Workers Union of America, Local 100,* 99 N.Y.2d 1, at 7 (emphasis in original). Accordingly, we consider whether the courts have clearly stated that implementation of the Vaccine Mandate "express[es] a policy so important that the policy favoring collective bargaining should give way . . . ." *Matter of Patrolmen's Benevolent Ass'n of City of New York, Inc. v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563, 576 (2006).

First, we note that the Union's grievance addresses implementation of the Vaccine Mandate and does not challenge the Vaccine Mandate itself.[7] The City asserts that court-enunciated public policy precludes arbitration; namely, that this grievance cannot be the subject of arbitration due to the importance of combatting the COVID pandemic. In support of this argument the City relies on *Matter of Arbitration Between City of Troy and Troy Uniformed Firefighters Assn., Local 86 IAFF, AFL-CIO*, 203 A.D. 3d 1523 (3d. Dept. 2022). In that case, the Third Department ruled that public policy precluded arbitration of the determination to designate certain employees essential and others non-essential during the early days of the COVID pandemic. The court noted that arbitration of the staffing impact on local governments was not expressly precluded by the Governor's executive orders declaring an emergency and suspending state and local laws and that "[n]otably, the executive orders were issued at the inception of the pandemic when great uncertainty and trepidation affected us all." *Id.* at 289. However, the court held that

> Under these circumstances we cannot agree that [the City of Troy] breached the [Agreement] by responsibly implementing the Governor's directives. To hold otherwise would create an untenable result – i.e., it would sanction a finding that petitioner breached the [Agreement] based on its required compliance with state public policy. Based on the very nature of the pandemic, requiring extreme

[7] The Union does not attack the City's failure to assign work to unvaccinated unit members, only that these members cannot be unilaterally placed on LWOP for their failure to vaccinate.

> public health measures as implemented through the executive orders, we conclude that arbitration of the resulting impact on respondent's members is precluded as a matter of public policy.

Id. at 288.

Courts have acknowledged the significant public health policy favoring public employers' rights to require vaccination. *See, e.g., Garland v. New York City Fire Dept.*, 574 F. Supp. 3d 120, 129 (E.D.N.Y. 2021) (citing *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266 (2d Cir. 2021)); *Marciano v. de Blasio*, 2022 WL 678779 (S.D.N.Y. Mar. 8, 2022); *New York City Mun. Labor Comm. v. City of New York*, 75 Misc. 3d 411 (Sup. Ct. N.Y. Co. 2022); *see also Ansbro v. De Blasio*, Index No. 159738/2021 (Sup. Ct. N.Y. Co. Dec. 20, 2021) (Perry, J.). We do not find that these cases address the public policy favoring the arbitration of workplace disputes such as those raised in this grievance. Moreover, we find that the issues in *City of Troy* were different from the issues before this Board. The grievance in *City of Troy* concerned the municipality's determination of essential and non-essential workers and their assignments to operate in the workplace at the inception of the pandemic. It did not concern either vaccine mandates or their implementation. By contrast, the grievance at issue here concerns the implementation of the City's Vaccine Mandate and was first filed in December of 2021, a year and a half after the start of the pandemic.[8] As result, we do not find that *City of Troy* established a clear court-enunciated public policy that would preclude arbitration of the issue presented here.

Regarding the second prong of our analysis, to establish a nexus, "[t]he Board need only find a relationship between the act complained of and the source of the alleged right in order to

[8] Indeed, in denying preliminary injunctions against the Vaccine Mandate, other courts have implied, in *dicta*, that unvaccinated employees might have avenues to challenge "the actions taken against them" through the grievance procedures in their collective bargaining agreements or in an Article 78 proceeding. *Garland*, 574 F. Supp. 3d 120, 131; *see also Kane v. de Blasio*, 2022 WL 3701183, at *12 (S.D.N.Y. Aug. 26, 2022).

find a dispute to be arbitrable . . . ." *DC 37, L. 983*, 6 OCB2d 17, at 11 (BCB 2013) (quotation and internal quotation marks omitted); *see also PBA*, 4 OCB2d 22, at 13 (BCB 2011). This showing "does not require a final determination of the rights of the parties in this matter [as] such a final determination would in fact constitute an interpretation of the agreement that this Board is not empowered to undertake." *OSA*, 1 OCB2d 42, at 16 (BCB 2008) (quotation and internal quotation marks omitted); *see also* CSL § 205.5(d). If the Union's interpretation is plausible, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW*, 45 OCB 59, at 11 (BCB 1990) (citations omitted); *see also PBA*, 3 OCB2d 1, at 11 (BCB 2010).

Here, we find a nexus between the Union's claim regarding the City's implementation of the Vaccine Mandate and the FDNY EDE Policy PA/ID 12-67. It is undisputed that the City took the position that unvaccinated employees were not permitted to work outside employment, despite the terms of the pre-existing EDE policy that allows employees to have outside employment under certain circumstances. The City did not dispute the Union's claim that the City had violated PA/ID 12-67 during the Step III hearing and has not argued facts here to suggest that policy is not applicable.[9] Accordingly, we find that the Union has shown a nexus between this aspect of its grievance and FDNY Policy PA/ID 12-67 and it is arbitrable.

Similarly, the City did not address or challenge the Step III Hearing Officer's determination that unit members placed on LWOP were entitled to contractual benefits they had already accrued, such as annual leave. Accordingly, we further find the portions of the grievance asserting that the City denied unit members on LWOP the contractual benefits and pay they had already accrued to

[9] The City's position on the arbitrability of EDE is not expressly clear. In its petition, the City simply asserts that the entire grievance is not arbitrable.

be arbitrable.[10] *See SSEU, L. 371*, 3 OCB2d 53, at 9-10 (BCB 2010) (denial of accrued annual leave following an employee's termination found to be arbitrable); *OSA*, 7 OCB2d 22, at 10 (BCB 2014) (denial of requested use of sick leave is arbitrable).

We find that there is no reasonable relationship between FDNY Regulation § 17.5.1 and the placement of employees who chose not to vaccinate on LWOP. Section 17.5.1 outlines the procedures by which FDNY members can *apply* to be put on LWOP status. It does not purport to describe all the circumstances under which LWOP is appropriate, nor does it limit LWOP only to employees who voluntarily request to be put on LWOP, as the Union alleges. The Union has therefore failed to allege a reasonable relationship between § 17.5.1 and the City's enforcement of the Vaccine Mandate.

We now turn our analysis to whether there is a reasonable relationship between the City's implementation of the Vaccine Mandate, specifically, the placement of bargaining unit members on LWOP, and the cited provisions of the Agreements. The City argues that this Board and numerous courts have repeatedly held that failure to maintain a qualification of employment does not entitle a party to proceed to arbitration under the parties' contractual wrongful discipline procedures. Indeed, several courts have found that the Vaccine Mandate is a lawful condition of employment. *See, e.g., Garland*, 574 F. Supp. 3d 120, 128 (citing *We The Patriots USA*, 17 F.4th 266, 293-94 (2d Cir. 2021)); *Marciano*, 2022 WL 678779, at *10; *New York City Mun. Labor Comm.*, 75 Misc. 3d 415 (Sup. Ct. N.Y. Co. 2022); *see also Ansbro*, Index No. 159738/2021.

[10] The Step III Decision stated that "unit members are entitled to the benefits for which they have already worked and performed" but was silent as to what, if any, remedy these members should receive. (Pet., Ex. B, at 154) To the extent the City has not complied with the Step III determination, it is an issue for an arbitrator to decide whether there were accrued benefits due to employees who chose not to vaccinate. Similarly, whether these employees were entitled to but did not receive terminal leave upon retirement is also an appropriate issue for arbitration.

This Board has long held that the failure to maintain a qualification of employment, such as residency or a driver's license or certification, does not give rise to arbitration rights under the parties' contractual wrongful discipline procedures. *See SSEU, L. 371*, 77 OCB 5 (BCB 2006) (residency); *SSEU, L. 371*, 77 OCB 4 (BCB 2006) (residency); *DC 37, L. 983*, 75 OCB 24 (BCB 2005) (driver's license); *DC 37, L. 1407*, 75 OCB 7 (BCB 2005) (residency); *Local 2507, DC 37*, 67 OCB 18 (BCB 2001) (certification); *OSA*, 57 OCB 41, (BCB 1996) (residency). Here, as in those cases, the Union asserts in its request for arbitration that the withholding of wages and other contractual benefits is "tantamount to discipline" and maintains that placement of unvaccinated bargaining unit members on LWOP violated Article XVII of the Agreement. Article XVII expressly sets forth employee rights when subject to disciplinary investigations, interviews, and/or disciplinary trials. However, the City's actions did not involve any investigations, interviews, or disciplinary trials for bargaining unit members who chose not to vaccinate. Moreover, our prior case law establishes that failure to maintain a qualification or condition of employment is not arbitrable under contractual discipline procedures. Therefore, even if we analyzed the placement of these employees on LWOP as simply the consequence of their failure to comply with a qualification of employment, we find no nexus between the grievance and Article XVII of the Agreement.

Similarly, we do not find a nexus to the other provisions of the Agreements cited by the Union. In essence, the Union claims that by placing unvaccinated bargaining unit members on LWOP the City has violated its "contractual obligations to compensate" those employees. (Pet., Ex. B, at 27) Specifically, the Union notes that this action has violated economic provisions governing salaries, longevity pay, pay differentials, vacation and leave, terminal leave allowances, and cleaning and maintenance allowances. We have previously found no nexus when a grievance vaguely alleges that a contractual provision has been violated without identifying the specific

contractual language that is alleged to have been breached. *See NYDCC*, 15 BCB 31, at 16 (BCB 2022) (citations omitted) (finding no nexus between the granting of a financial incentive for vaccination and the general wage provisions of collective bargaining agreements and consent determinations) (quoting *CEA*, 3 OCB2d 3, at 15). Here, the Union's assertions that placement of unvaccinated bargaining union members on LWOP deprived them of the economic terms and conditions of employment set forth in the Agreements is an accurate assessment of the result of the City's action. Nevertheless, such a claim is insufficient to establish a source of right under the Agreements to the continuation of contractual pay and benefits under these circumstances, or to limit the City's right to enforce the Mandate by placing employees who chose not to vaccinate on LWOP. Accordingly, as the Union has not identified any contractual language in the Agreements that establishes a relationship between the placement of unvaccinated bargaining unit members on LWOP and the cited provisions of the Agreements, we find no nexus to the Agreements.

In accordance with the above, we find that the Union has established a nexus between the portions of its grievance alleging violations of the EDE policy and benefits and pay that have already accrued and the Agreements or FDNY regulations. We find that the Union has not established a nexus between the placement of unit members on LWOP and the cited portions of the Agreements and FDNY policy. Consequently, the City's petition challenging arbitrability is denied as it relates to the City's denial of EDE and accrued benefits and is granted as it concerns the placement of bargaining unit members who chose not to vaccinate on LWOP.

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, docketed as BCB-4481-22 is hereby granted in part and denied in part; and it is further

ORDERED, that the request for arbitration filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, docketed as A-15905-22, is hereby granted in part and denied in part.

Dated: September 28, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I concur. M. DAVID ZURNDORFER
MEMBER

I concur. CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

CONCURRING OPINION OF M. DAVID ZURNDORFER AND CAROLE O'BLENES

This decision grants the City's petition challenging arbitrability as it relates to the placement of bargaining unit members who chose not to vaccinate on leave without pay because the Union failed to establish a nexus between the placement of Union members on LWOP and the cited portions of the Agreements and FDNY policy. We agree. However, we believe the arbitration with respect to that portion of the grievance should also be stayed because it would violate public policy. *See City of Troy v. Troy Uniformed Firefighters Ass'n,* 203 A.D.3d 1523 (3d Dep't 2022), *motion for leave to appeal denied,* 38 N.Y.3d 911 (2022).