EXHIBIT 1

PBA, 4 OCB2d 67 (BCB 2011)
(Arb) (Docket No. BCB-2977-11) (A-13934-11).

Summary of Decision: The City challenged the arbitrability of a grievance alleging that the NYPD retaliated against the Grievant for seeking the assistance of a Union representative and pursuing a grievance related to alleged illegal quotas. The City argued that there was no nexus between the alleged discrimination based on Union activity and the collective bargaining agreement because the Grievant did not engage in Union activity, but, rather, exercised a statutory right under the New York State Labor Law. The Union argued that the requisite nexus existed because the agreement prohibits discrimination based on Union activity and the NYPD retaliated against the Grievant after he sought the assistance of a Union representative in raising a complaint concerning the employment relationship. The Board found that the requisite nexus existed. Accordingly, the City's Petition Challenging Arbitrability was denied, and the Union's Request for Arbitration was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Arbitration

-between-

THE CITY OF NEW YORK and
NEW YORK CITY POLICE DEPARTMENT,

Petitioners,

-and-

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On August 16, 2011, the City of New York ("City") filed a petition challenging the arbitrability of a grievance filed by the Patrolmen's Benevolent Association of the City of New York ("Union"). The Union's Request for Arbitration, filed on behalf of Officer Rajinder Singh

("Grievant"), claimed that the New York City Police Department ("NYPD") violated Article XVIII of the 2006-2010 Patrolmen's Benevolent Association Agreement ("Agreement") by retaliating against the Grievant for seeking the assistance of a Union representative and pursuing a grievance related to alleged illegal quotas. The City argues that there is no nexus between the alleged discrimination based on Union activity and Article XVIII of the Agreement because the Grievant did not engage in Union activity, but, rather, exercised a statutory right under the New York State Labor Law. The Union argues that the requisite nexus exists because the Agreement prohibits discrimination based on Union activity and the NYPD retaliated against the Grievant after he sought the assistance of a Union representative in raising a complaint concerning the employment relationship. This Board finds that the requisite nexus exists. Accordingly, the City's Petition Challenging Arbitrability is denied, and the Union's Request for Arbitration is granted.

BACKGROUND

The Grievant is a Police Officer who works at the NYPD's 20th Precinct. The Union is the duly certified collective bargaining representative of NYPD employees in the Police Officer civil service title, including the Grievant. The City and the Union are parties to the Agreement, which covers the period of August 1, 2006, through July 31, 2010, and currently remains in effect pursuant to the *status quo* provision of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

Article XXI of the Agreement sets forth the parties' grievance procedure and § 1(a) defines the types of grievances that are subject to arbitration, including "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." (Pet., Ex. 1).

The Union alleges a violation of Article XVIII of the Agreement, which is entitled "No Discrimination" and states, "In accord with applicable law, there shall be no discrimination by the City against any employee because of Union activity." *Id.*

The following factual allegations made by the Union are denied by the City. Prior to January 11, 2011, the Union alleges that the Grievant was assigned to regular patrol duties and was assigned to work with the same partner for each tour of duty. On January 11, 2011, however, the Union alleges that Lieutenant Steven Chantel, the Platoon Commander, informed the Grievant and his partner that—per the orders of the Commanding Officer, Christopher McCormack—they would no longer be working as partners because they did not have a sufficient number of C-summonses and UF-250s on their December 2010 monthly activity reports.[1] Believing that the decision to separate him from his partner was unfair and constituted discrimination for failing to meet an illegal quota, the Grievant purportedly contacted Officer Lee Furman, a Union delegate, to inform him of Lieutenant Chantel's decision. The Union alleges that Officer Furman spoke with Lieutenant Chantel regarding the Grievant's complaint and informed him that his conduct was in violation of New York State Labor Law,[2] which prohibits discrimination against police officers for failing to meet quotas for various forms of enforcement activity, including summonses and UF-250s. According to the Union, Lieutenant Chantel agreed to reunite the Grievant and his partner because he understood that the separation might have been improper.

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[1] According to the Union, C-summonses are issued by police officers for so-called "quality-of-life" offenses and UF-250s are reports completed by police officers to record stop and frisk incidents.

[2] New York State Labor Law § 215-a is entitled "Discrimination against employees for failure to meet certain ticket quotas" and generally provides that an employer may not penalize or threaten an employee as to his or her employment for failing to meet a quota of tickets or summonses, arrests, or stops of individuals suspected of criminal activity within a specified period of time.

The Union alleges, however, that the following day Lieutenant Chantel switched the Grievant's scheduled assignment with another officer's assignment, again separating the Grievant from his partner. The Union alleges that Lieutenant Chantel would not change his position and refused to explain to Officer Furman why he reversed his decision. Two days later, the police officer performing roll call allegedly informed the Grievant that Lieutenant Chantel ordered her not to assign the Grievant to work with his partner for that day's tour or at any time in the future. The Union asserts that, following these events, the Grievant neither was assigned to work with another partner on a permanent basis nor was he assigned to a regular sector, as were other officers, including those less senior than him. Instead, the Grievant has been routinely assigned to lone foot-posts in other commands, ordered to perform "Critical Response Vehicle" duty, or otherwise ordered to perform undesirable assignments. According to the Union, the Grievant also has been regularly subject to an openly hostile attitude from Heriberto Bermudez, the day tour Platoon Commander Lieutenant. The Union further contends that, in retaliation for his protected activity, the Grievant was ordered to transport a hostile prisoner without leg restraints, resulting in an altercation and injuries to his knee, shoulder, and neck.

On April 11, 2011, the Union filed a Step III grievance alleging that the NYPD "violated Article XVIII of the [Agreement] by retaliating against officer Singh for seeking the assistance of his union delegate and grieving a violation of New York State Labor Law § 215-a." (Pet., Ex. 2). On May 5, 2011, the NYPD denied the Step III grievance, reasoning that "[t]here has been no violation, misinterpretation, or misapplication of the current collective bargaining agreement, nor has there been any violation, misinterpretation, or misapplication of the rules and procedures of this Department." *Id.* The NYPD characterized the grievance as an allegation of "the imposition of an illegal summons quota by the commanding officer . . . ." *Id.*

On June 7, 2011, the Union requested further consideration of the matter pursuant to Step IV of the grievance procedure. On July 8, 2011, the Police Commissioner denied the Step IV grievance, similarly finding that "[t]here has been no violation, misinterpretation, or misapplication of the current collective bargaining agreement." (Pet., Ex. 2).

On August 2, 2011, the Union filed a Request for Arbitration, which includes the requisite waiver and describes the grievance to be arbitrated as:

> Whether the Police Department, through Captain Christopher McCormack, Lt. Steven Chantel and Lt. Heriberto Bermudez, retaliated against Police Officer Rajinder Singh in violation of Article XVIII of the agreement for seeking the assistance of a union delegate and pursuing a grievance relating to illegal quotas by permanently separating him from his partner, regularly reassigning him to undesirable assignments, creating a hostile work environment, and ordering him to transport a hostile prisoner/flight risk without leg restraints.

(Pet., Ex. 2). As relief, the Union requests that an arbitrator:

> (i) find that the Police Department, through Captain Christopher McCormack, Lt. Steven Chantel and Lt. Heriberto Bermudez, retaliated against Police Officer Rajinder Singh for pursuing his grievance by permanently separating him from his partner, regularly assigning him to undesirable assignments outside of his command, creating a hostile work environment, and ordering him to transport a hostile prisoner/flight risk without leg restraints; (ii) order the Police Department, including Captain Christopher McCormack, Lt. Steven Chantel and Lt. Heriberto Bermudez, [to] cease and desist from engaging in any retaliatory conduct against Officer Singh[;] and (iii) order the Police Department to reassign Officer Rajinder Singh to work with his former partner.

Id.

POSITIONS OF THE PARTIES

City's Position

The City argues that the grievance is not arbitrable because there is no nexus between the act complained of, discrimination based on Union activity, and the source of the alleged right, Article XVIII of the Agreement, because the Grievant did not engage in Union activity. Citing *PBA*, 79 OCB 126 (BCB 2007), the City contends that the Board has interpreted Article XVIII of the Agreement as only prohibiting discrimination for the exercise of collectively-bargained rights. Because the Union has alleged discrimination against the Grievant for his exercise of a statutory right to remedy the consequences of his failure to meet an alleged ticket quota, and not the invocation of a collectively-bargained right, the grievance must be dismissed.

According to the City, the basis for the Grievant's claim is his statutory right to file a grievance regarding a ticket quota. However, there is no evidence that the Grievant filed a grievance claiming a violation of New York State Labor Law § 215-a. Furthermore, the Grievant did not invoke any collectively-bargained right to challenge a ticket quota, and the parties have not negotiated the right for police officers to file grievances regarding ticket quotas under New York State Labor Law § 215-a. Accordingly, the City maintains that there is no nexus between the Grievant's exercise of a statutory right and Article XVIII of the Agreement, which prohibits discrimination based on Union activity.

In any event, the City argues, the Grievant's purported use of a Union delegate to address penalties that allegedly were imposed for failing to meet a ticket quota does not give rise to Union activity. Relying on *CIR*, 67 OCB 45 (BCB 2001), the City argues that the mere fact that the Grievant sought the assistance of a Union delegate does not transform the underlying activity into Union activity. The City contends that the Grievant could have easily contacted a private attorney for assistance with his statutory grievance, and the Union's purported assistance does

not transform the alleged filing of a New York State Labor Law grievance into activity protected under the NYCCBL.

The City further asserts that to invoke Article XVIII of the Agreement there must be Union activity and not merely an allegation of retaliation. Here, the City alleges that no grievance, either oral or written, was filed by the Grievant and the Union has failed to proffer any evidence of Union activity, including no evidence of any informal resolution of a grievance. Accordingly, the City contends that the Union has not established an arguable nexus between the grievance and the Agreement.

Union's Position

The Union argues that the grievance is arbitrable because there is a nexus between the retaliation committed by the NYPD against the Grievant and the contractual anti-retaliation provision, Article XVIII of the Agreement. Article XVIII prohibits discriminatory or retaliatory acts taken against employees for engaging in Union activity. Article XXI, § 1(a), defines a grievance as "a claimed violation, misinterpretation or inequitable application of the provisions of this Agreement." (Pet., Ex. 1). The Union argues that there can be no dispute that Article XVIII is grievable, a fact that the Board recognized in a prior decision.[3]

The City's request that the Board determine whether the Grievant engaged in Union activity is improper because that issue concerns an essential element of the retaliation claim and the Board does not inquire into the merits of the dispute when deciding questions of arbitrability. Nevertheless, assuming, *arguendo*, that issue is properly before the Board, the Union maintains

[3] The Union explains that the Board has long recognized the independent contractual right under Articles XVIII and XXI to seek arbitral resolution of this sort of dispute. The Union argues that the City cannot force the parties to have the merits of the dispute decided by the Board when the Agreement permits grievances alleging violations of Article XVIII to be determined by an arbitrator. As in *PBA*, 61 OCB 15 (BCB 1998), the Union maintains that the matter should proceed to arbitration for a determination on the merits.

that the Grievant engaged in Union activity by seeking the assistance of a Union representative in bringing a grievance. Step I of the grievance procedure provides that a grievance shall be presented to the Commanding Officer either orally or in writing, and, here, the Union delegate orally brought the Grievant's claim to the Platoon Commander. Contrary to the City's claim, the Union argues that the filing of a formal written grievance is not necessary to a finding of Union activity. The Union asserts that the Grievant's conduct constitutes Union activity because it involved concerted action related to conditions of employment and was pursued in the interests of the Union's membership. Furthermore, the Agreement defines Union activity with reference to the Mayor's Executive Order No. 75, which provides that a union delegate has a right to investigate grievances, assist in their early resolution, and process them at all levels of the grievance procedure. The Union asserts that the Grievant and the Union delegate engaged in such activity by attempting to informally resolve the grievance at the command level.

The Union additionally argues that the City's contention that the Grievant's conduct was not protected because it related to a statutory right under New York State Labor Law lacks merit because the statutory provision requires union activity in order to bring a claim alleging the enforcement of an illegal quota. The Union contends that the City's reliance on Board precedent is misplaced because, unlike in *CIR*, 67 OCB 45, the Grievant's activities in the instant matter relate to the employment relationship.

DISCUSSION

The NYCCBL provides that it is the statutory policy of the City to favor the use of impartial arbitration to resolve disputes.[4] *See ADW/DWA*, 4 OCB2d 21, at 10 (BCB 2011); *NYSNA*, 69 OCB 21, at 6 (BCB 2002). To carry out this policy, the "Board is charged with the task of making threshold determinations of substantive arbitrability."[5] *ADW/DWA*, 4 OCB2d 21, at 10 (quoting *DEA*, 57 OCB 4, at 9-10 (BCB 1996)). The Board's function "is confined to determining whether the grievance is one which, on its face, is governed by the contract." *UFOA*, 15 OCB 2, at 7 (BCB 1975); *see also ADW/DWA,* 4 OCB2d 21, at 10 (following *DEA*, 57 OCB 4, at 9-10); *Local 300, SEIU*, 55 OCB 6, at 9 (BCB 1995). The "presumption is that disputes are arbitrable, and that doubtful issues of arbitrability are resolved in favor of arbitration." *CEA*, 3 OCB2d 3, at 12 (BCB 2010) (citations omitted). The Board, however, cannot create a duty to arbitrate if none exists or enlarge a duty to arbitrate beyond the scope established by the parties. *See CCA*, 3 OCB2d 43, at 8 (BCB 2010); *SSEU, L. 371*, 69 OCB 34, at 4 (BCB 2002).

To determine whether a grievance is arbitrable, the Board employs a two-prong test, which 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.

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[4] NYCCBL § 12-302 provides that it is "the policy of the city to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations."

[5] NYCCBL § 12-309(a)(3) grants the Board the power "to make a final determination as to whether a dispute is a proper subject for grievance and arbitration procedure . . . ."

UFOA, 4 OCB2d 5, at 8-9 (BCB 2011) (citations and internal quotation marks omitted); *see also SSEU*, 3 OCB 2, at 2 (BCB 1969).

In short, we inquire whether there is a "relationship between the act complained of and the source of the alleged right" to arbitration. *CEA*, 3 OCB2d 3, at 13 (citations omitted); *see also CIR*, 33 OCB 14, at 15 (BCB 1984); *Local 371*, 17 OCB 1, at 11 (BCB 1976). This inquiry does not require a final determination of the rights of the parties because the Board lacks jurisdiction to enforce contractual rights. *See NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9. Accordingly, the Board generally will not inquire into the merits of the dispute. *See DC 37*, 27 OCB 9, at 5 (BCB 1981).

When the City 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." *Local 371, SSEU,* 65 OCB 39, at 8 (BCB 2000) (citations omitted)*; see also DC 37,* 61 OCB 50, at 7 (BCB 1998); *Local 371*, 17 OCB 1, at 11. If the Union establishes an arguable relationship, "the conflict between the parties' interpretations presents a substantive question of interpretation for an arbitrator to decide." *Local 3, IBEW*, 45 OCB 49, at 11 (BCB 1990) (citations omitted); *see also PBA*, 3 OCB2d 1, at 11 (BCB 2010).

Here, it is undisputed that the parties have agreed to submit certain disputes to arbitration. The Agreement contains a grievance procedure, which provides for final and binding arbitration of specified matters. The Union's Request for Arbitration set forth the following statement of the grievance:

> Whether the Police Department, through Captain Christopher McCormack, Lt. Steven Chantel and Lt. Heriberto Bermudez, retaliated against Police Officer Rajinder Singh in violation of Article XVIII of the agreement for seeking the assistance of a

> union delegate and pursuing a grievance relating to illegal quotas by permanently separating him from his partner, regularly reassigning him to undesirable assignments, creating a hostile work environment, and ordering him to transport a hostile prisoner/flight risk without leg restraints.

(Pet., Ex. 2). For the grievance to be arbitrable, this Board must find a reasonable relationship between Article XVIII of the Agreement and the alleged retaliation against the Grievant for seeking the assistance of a Union representative after the NYPD took adverse action against him for failing to meet an alleged illegal quota. For the reasons set forth below, we find that the requisite nexus has been established.

The crux of the Request for Arbitration is an allegation that, after the Union delegate informed the Grievant's supervisor of the Grievant's complaint, the Grievant was discriminated against in violation of the Agreement. In other words, the Union alleges that an employee brought a complaint to the Union, which the Union then raised with the employer on the employee's behalf. In response to such activity, the Union alleges that the employer retaliated against the employee. Such allegations—coupled with a contractual provision prohibiting discrimination based on Union activity—are sufficient to establish a nexus between the Agreement and the subject of the grievance. It is immaterial whether the Grievant's initial complaint concerned a statutory right or a collectively-bargained right because the Union has alleged that the Grievant made a complaint related to the employment relationship to the employer through his Union representative and then was subject to retaliation. We find unpersuasive the City's primary argument that there is no nexus because the Grievant did not engage in union activity, but, rather, invoked a statutory right pursuant to New York State Labor Law § 215-a.

Because we find a reasonable relationship between the contractual provision and the Union's claim that the Grievant was discriminated against as a result of the Union's activity on his behalf, the requisite nexus has been established, and the Union is entitled to proceed to arbitration. Notwithstanding the City's assertions, in this instance it is for an arbitrator—and not the Board—to determine whether the Grievant's conduct constitutes Union activity within the meaning of the Article XVIII of the Agreement. It is also for an arbitrator to determine whether retaliatory actions were taken against the Grievant as a result of this activity. Consequently, for the reasons stated above, we deny the City's Petition Challenging Arbitrability and grant the Union's Request for Arbitration.

ORDER

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

ORDERED, that the Verified Petition Challenging Arbitrability filed by the City of New York and the New York City Police Department, docketed as BCB-2977-11, hereby is denied; and it is further

ORDERED, that the Request for Arbitration filed by the Patrolmen's Benevolent Association of the City of New York, docketed as A-13934-11, hereby is granted.

Dated: December 20, 2011
New York, New York

MARLENE A.GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER B. PEPPER
MEMBER