OFFICE OF LABOR RELATIONS

40 Rector Street, New York, N.Y. 10006-1705
nyc.gov/olr

ROBERT W. LINN
Commissioner

RENEE CAMPION
First Deputy Commissioner

MAYRA E. BELL
General Counsel

CHRIS BERNER
Chief of Staff

GEORGETTE GESTELY
Director, Employee Benefits Program

OLR BULLETIN

1. NOTEWORTHY ARBITRATION AND BOARD DECISIONS

Progressive discipline not necessary in case where employee was discharged for repeatedly falsifying her timesheets and adjusting her work schedule to go shopping and engage in personal activities. *OSA and DOHMH*, OCB Case No. A-14487-13. After receiving multiple complaints that an employee with 13 years of service was hard to locate during work hours and that she was pressuring parents and service providers to change scheduled meeting times, DOHMH counseled the employee and reported the matter to the DOHMH's Employment Law Unit. Investigators placed the employee under surveillance for 18 days. Investigators discovered that, although the employee consistently recorded the start of her shift as 9 a.m., she never appeared at that time to any of her work locations. The employee was consistently 15-60 minutes late. Investigators also determined that during her scheduled work day, the employee often went shopping, visited hair and nail salons, or simply sat in her car. Upholding the employee's discharge, the arbitrator rejected the union's argument that the employee was entitled to progressive discipline before being fired. "No agency should have to put up with an employee who deliberately adjusts her schedule," the arbitrator explained, so she can arrive late, leave early, and engage in personal business during the day.

Arbitrator upholds 30-day suspension of employee overheard threatening to bring a gun to work. *Local 371 SSEU and ACS*, OCB Case No. A-14369-13. Two security guards overheard an ACS employee complaining about her transfer request being denied. The employee said, "They will take me seriously when I get a gun and people start dying." The guards warned the employee not to make such statements, but she repeated them. ACS suspended the employee for 30 days. The arbitrator upheld the discipline, finding that the employee's statements were a "threat" within "the dictionary and common usage sense of that word." Moreover, the arbitrator explained, "it was reasonable to discipline her for her inflammatory language" because the employee declined "an opportunity to renounce what she said."

Overlapping duties of PAA and Clerical Associates defeat "reverse out of title" claim. *Local 1549, DC37 and DEP*, OCB Case No. A-13717-11. The DEP assigned Clerical Associates and Principal Administrative Associates to various field offices. The employees in the two titles performed a similar mix of office duties – processing work orders, making computer entries, answering phones, and processing

timekeeping records. Emphasizing the essential supervisory nature of the PAA job specifications, the Clerical Associates argued that that work of the two titles was "substantially different" and PAAs should not be performing clerical duties. The arbitrator disagreed. Although the principal duties of the PAAs were supervisory, the PAA job specifications also included "responsible office…or administrative work of varying degrees of difficulty."

2. GRIEVANCE HANDLING MEMO: IDENTIFYING A POTENTIAL "PAST PRACTICE"

Agencies frequently seek advice from the Office of Labor Relations on whether they can change a well-established workplace practice. Determining whether an existing practice is binding on the parties – and cannot be changed without bargaining – depends on a careful analysis of the collective bargaining agreement and the parties' course of conduct. Here are the basic rules that frame OLR's advice in a particular case.

1. If the contract language is "plain and clear," arbitrators generally will not consider evidence of a practice that conflicts with the contract.
2. But contract language sometimes can be difficult to understand. And sometimes a contract does not address a particular circumstance. In these cases an arbitrator may consider evidence of a past practice:
    a. To help interpret ambiguous contract language;
    b. To establish the rules governing circumstances that are not addressed by the contract.
    c. To support allegations that the written contract has been intentionally amended by the parties to reflect their regular practices.
3. A past practice can be binding on both parties and cannot be changed unilaterally by either party without bargaining.
4. In order to determine whether a past practice is binding, most arbitrators look for the following factors (to be proven by a preponderance of the evidence by the party claiming that the past practice exists):
    a. **Long-standing practice.** Is the practice one that has recurred over a reasonably long time; generally, over a number of years?
    b. **Uniformity.** Has this practice been implemented in an unequivocal and systematic manner?
    c. **Open conduct that is known by - or "notorious" to - both parties.** Has this practice taken place openly and with knowledge of both management and the union?
5. Different approach by the Board of Collective Bargaining: The BCB's approach to analyzing a past practice claim is different in one key respect: The BCB does **not** require proof that both parties knew about the practice, nor that management consented or acquiesced to it.

Practice tips for labor relations professionals:

- *Think carefully before adopting informal or unwritten practices.*
- *Seek advice from OLR if your agency is contemplating a change in a longstanding practice.*

3. LEGAL DEVELOPMENTS IN LABOR RELATIONS AND HUMAN RESOURCES

Supreme Court invalidates recess appointments to NLRB, throws validity of many Board decisions made by the appointees into doubt. In June 2014, the Supreme Court ruled in Noel Canning v. NLRB that three recess appointments to the National Labor Relations Board made by President Obama in 2012 were invalid because the Congressional recess at issue was simply too short. The ruling means that decisions made by the three appointees are no longer valid. Some of the decisions thrown into doubt by Noel Canning are:

- A ruling reversing a 34-year precedent and ordering an employer to disclose witness statements gathered by the employer in its internal investigation.
- A ruling requiring an employer to establish a specific, legitimate business justification for requiring employees to maintain confidentiality during internal investigations.
- A ruling striking down an employer's mandatory arbitration policy because it interfered with employees' organizing rights.

Despite the breadth of its effect, the legal holding in Noel Canning is actually very narrow. It does not apply to other recess appointments made to the Board and it does not alter the composition of the current Board. The Supreme Court's decision can be found at: http://www.supremecourt.gov/opinions/13pdf/12-1281_bodg.pdf.

EEOC issues guidance on pregnancy discrimination laws. In July 2014 the EEOC issued a long-awaited Enforcement Guidance on Pregnancy Discrimination. The Guidance presents the EEOC's comprehensive position regarding pregnancy discrimination, and analyzes the interrelationship of many employment laws, including the Pregnancy Discrimination Act (PDA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Affordable Care Act (ACA).

According to the EEOC, pregnant employees are entitled to reasonable accommodation under both the PDA and the ADA, and pregnant employees should be afforded the same types of accommodations that the employer offers to its non-pregnant disabled employees. The Guidance also identifies best practices for employers to follow, including:

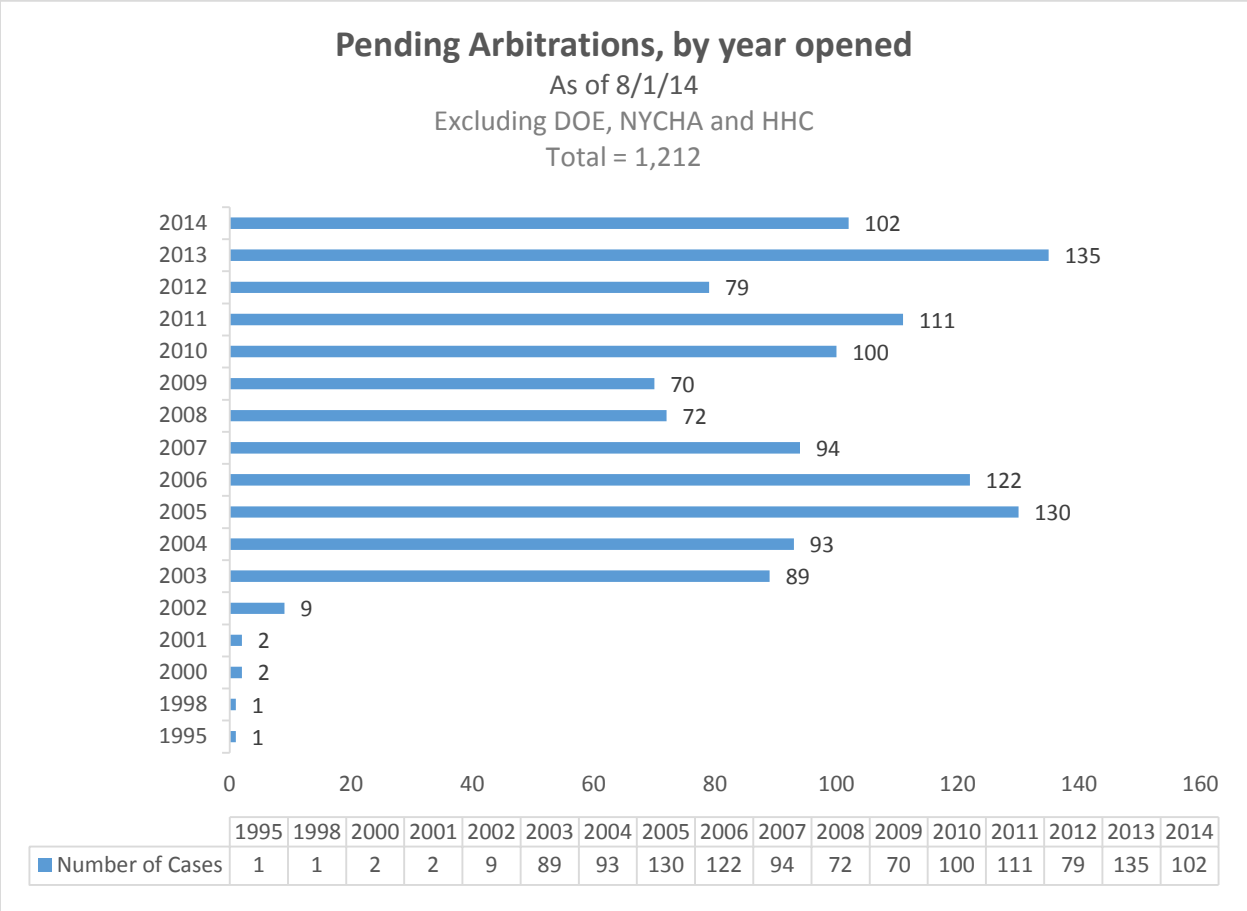
- Focus on an employee's qualifications when making employment decisions rather than the employee's pregnancy, caregiver status, or history of pregnancy.
- Make sure the business reasons for an employment action are well documented.
- Take pregnancy discrimination complaints seriously and protect employees who complaint from retaliation.

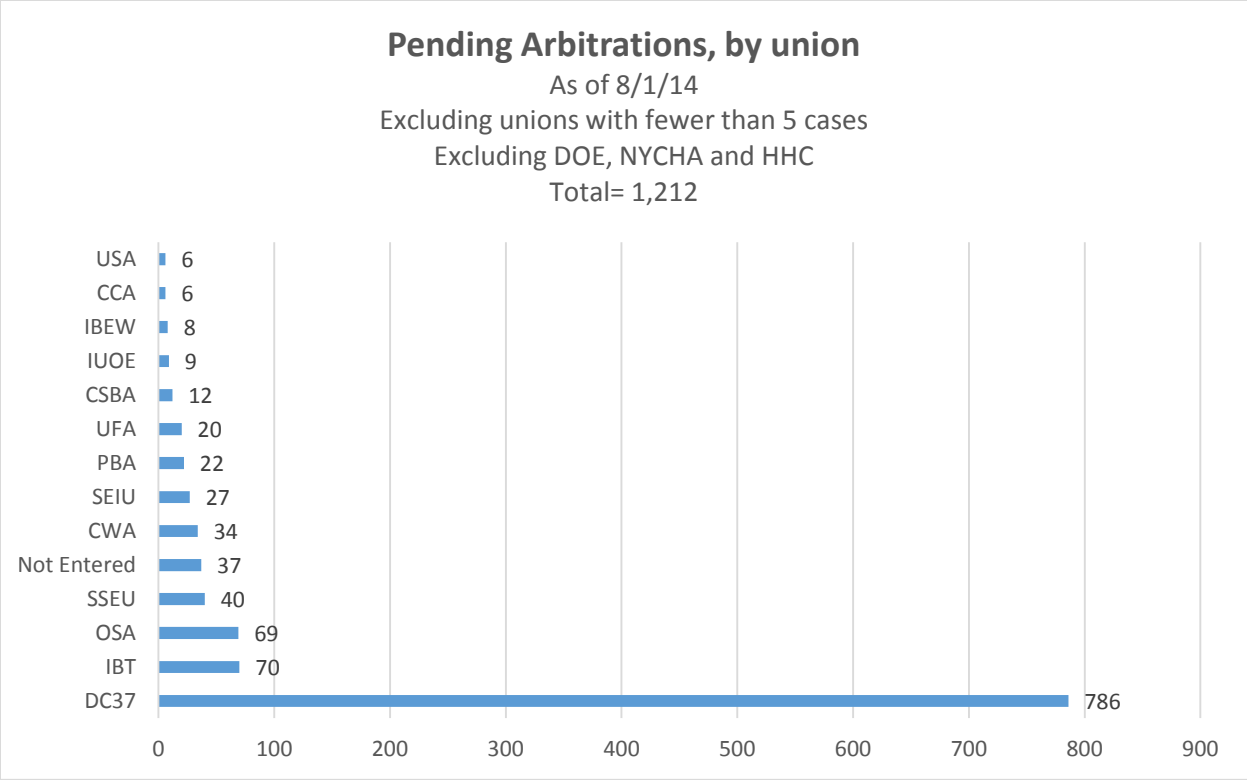
A full copy of the EEOC's Guidance can be found at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

4. BY THE NUMBERS: ARBITRATION ACTIVITY AT OLR

Annual Arbitration Activity, 2011-13

	2011	2012	2013
Pending cases as of 12/31	1313	1305	1394
Cases filed in the year	298	202	225
Cases with a final disposition in the year	286	214	140




Pending Arbitrations, by union
As of 8/1/14
Excluding unions with fewer than 5 cases
Excluding DOE, NYCHA and HHC
Total= 1,212
USA 6
CCA 6
IBEW 8
IUOE 9
CSBA 12
UFA 20
PBA 22
SEIU 27
CWA 34
Not Entered 37
SSEU 40
OSA 69
IBT 70
DC37 786
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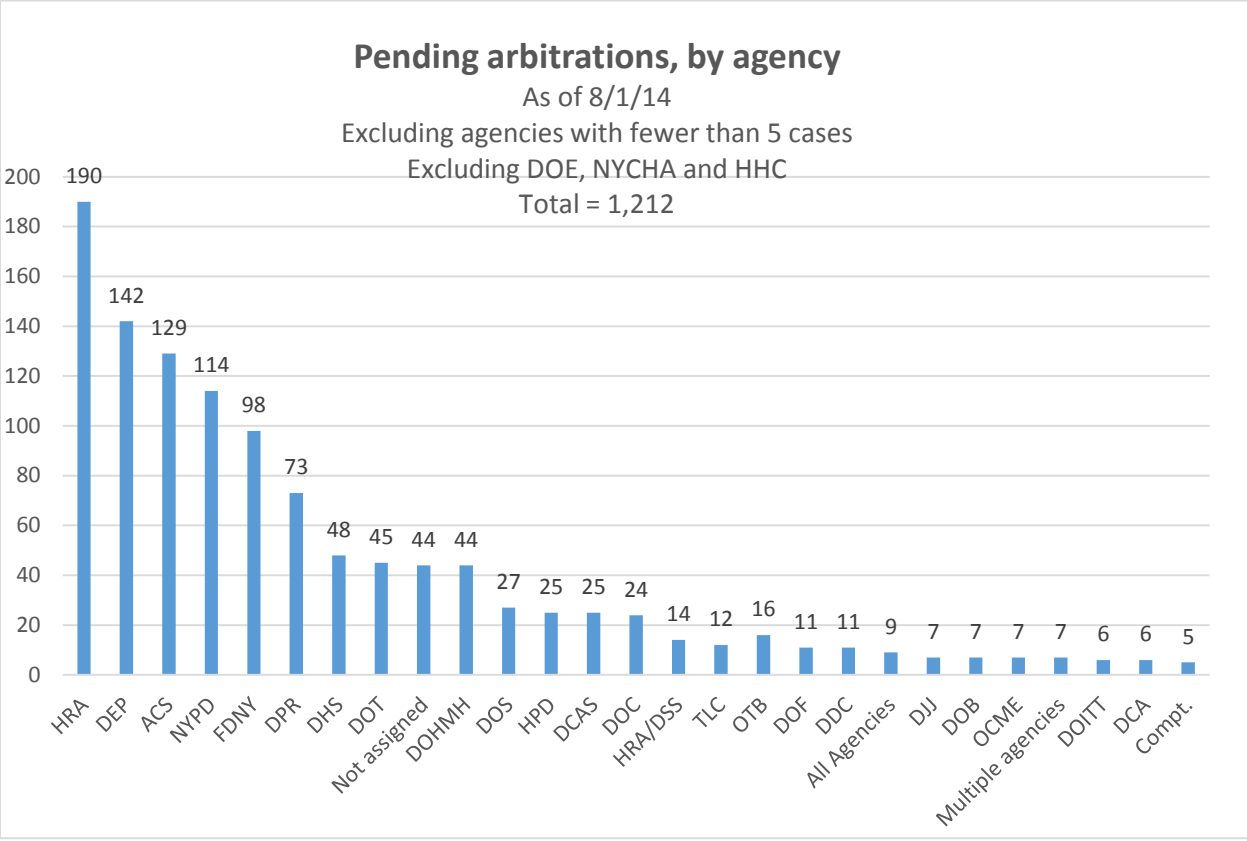
Pending arbitrations, by agency
As of 8/1/14
Excluding agencies with fewer than 5 cases
Excluding DOE, NYCHA and HHC
Total = 1,212
200 180 160 140 120 100 80 60 40 20 0
190 142 129 114 98 73 48 45 44 44 27 25 25 24 14 12 16 11 11 9 7 7 7 7 6 6 5
HRA DEP ACS NYPD FDNY DPR DHS DOT Not assigned DOHMH DOS HPD DCAS DOC HRA/DSS TLC OTB DOF DDC All Agencies DJJ DOB OCME Multiple agencies DOITT DCA Compt.

5. BENEFITS UPDATE

New York City Flexible Spending Account. The Open Enrollment Period for New York City's Flexible Spending Account (FSA) began on September 22, 2014, and runs through October 31, 2014. Current participants will receive a re-enrollment form automatically in October. For more information and to download the 2015 FSA Program Brochure and Enrollment Forms, visit: www.nyc.gov/fsa.

Health Benefits Program Transfer Period. The 2014 Health Benefits Program Fall Transfer Period will take place this year for both employees and retirees.

Active employees will be able to participate throughout the month of October.

Retirees can participate in a Transfer Period every other year, in even numbered years, and will be able to do so this year throughout the month of November.

During a Transfer Period, active employees and retirees will have the opportunity to change plans, add or drop a rider, add a dependent, and make other changes that are not normally permitted during the rest of the year. Changes made during this Transfer Period will take effect in January 2015. Active employees and retirees who do not wish to make any changes are not required to do anything.