THE CITY OF NEW YORK
OFFICE OF LABOR RELATIONS
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ROBERT W. LINN
Commissioner

OLR BULLETIN

1. NOTEWORTHY ARBITRATION AND BOARD DECISIONS

In suspension case, claims of longstanding practice do not overcome written policy. DC37 and DEP. *OCB Case No. A-14319-13*. Six long-term construction laborers violated DEP's written policy by leaving their work locations and taking an unauthorized break at a local bagel shop. The arbitrator did not find the grievants' testimony regarding their actions credible. The arbitrator also rejected the union's claim of a past practice of allowing breaks, explaining: "simply because the grievants had taken breaks every day for years did not mean there was no rule prohibiting such breaks." Accordingly, the arbitrator upheld the suspensions of the laborers.

Theft justifies employee's discharge, despite his long service. Local 371 (AFSCME) and DHS. *OCB Case No. A-14291-12*. Arbitrator upheld the discharge of an employee with 24 years of service after it was determined the employee used a city cell phone for five months without authorization. The phone was assigned to another employee, who was on leave at the time and had left it in her desk drawer during her absence. The grievant also failed to appear for an investigatory interview. "In spite of [the grievant's] long service," the arbitrator explained, "there is no justification for a second chance."

Two cases involving fights in the workplace demonstrate the importance of thorough investigations and careful assessment of witness credibility:

- **Suspension for making threats reduced from 60 to 30 days; grievant may have been provoked.** Local 237 (IBT) and HRA. *OCB Case A-14076-11.* The grievant, a custodian with 26 years of service, was suspended without pay for 30 days after he threatened to beat up co-worker. HRA doubled the penalty to 60 days in the Step II decision. Even though the grievant had previously been suspended for 15 days for a "similar incident," the arbitrator reduced the suspension to 30 days because the grievant may have been provoked, the victim's story was not entirely credible, and the investigation could have been more thorough.
- **Arbitrator reinstates employee, finding that he threatened a co-worker, but did not have a knife as charged.** DC37 and DOHMH, *OCB Case No. A-14270-12.* The Office of the Chief Medical Examiner fired a 14-year mortuary technician with a clean record who, during a "heated and profane argument" with a co-worker, was charged with pulling a knife and threatening to "perform an autopsy" on the co-worker. The arbitrator reduced the penalty to a 30-day suspension because a knife wasn't found in the grievant's possession; eyewitnesses disagreed whether grievant pulled a knife or a pen; and the co-worker's testimony wasn't credible. In addition, the grievant demonstrated remorse for arguing. Citing the principle of progressive discipline and mitigating circumstances, the arbitrator converted the discharge to a 30-day unpaid suspension.

Manager's smart actions justify suspension for insubordination. DC37 and DEP. *OCB Case No. A-14113-12.* With two hours left in the shift, a DEP manager instructed a construction laborer to go to a different work site to assist with the emergency repair of a broken water main. The laborer refused, stating that he didn't want to work overtime, and was subsequently suspended without pay for five days. The arbitrator upheld the suspension, crediting the manager for taking all of the steps needed to establish a clear case of insubordination. Specifically, the manager gave the grievant a clear, reasonable, and work-related order, and let the employee know the consequences if he did not follow the order. The arbitrator also relied on the "work now, grieve later" rule, and found that construction laborers can be required to work mandatory overtime in emergencies, such as a water main break.

Split decision in case alleging duty to bargain over new performance evaluation policy. Local 133 (Longshoremen) and DOT. *6 OCB2d 25(BCB 2013).* The union filed an improper practice charge challenging DOT's decision in 2012 to issue – without bargaining -- a new performance evaluation policy and manual that included new instructions for managers to follow on how to factor an employee's undocumented sick time into the evaluation. The new policy also included a new procedure for employees to follow if they wanted to appeal poor evaluations they receive. The Board concluded that the new policy, including the instructions regarding undocumented sick time, "simply clarif[ies] and expand[s] upon already existing concepts and information," and therefore the DOT was not obligated to bargain over any changes. However, the new appeal procedure constituted a change that was a mandatory subject of bargaining.

2. GRIEVANCE HANDLING MEMO: "OUT OF TITLE" CLAIMS

Working "out of title" is one of the most common types of grievances that agencies encounter. These claims are governed by law and contract. Most collective bargaining agreements covering municipal workers prohibit NYC from assigning duties to an employee (or group of employees) that are "**substantially different** from those stated in their job specifications."

OLR's Legal Division has prepared the following summary to help you assess the strength of an out of title claim:

1. Compare the duties found in the grievant's job specification with the duties found in the specifications of the higher title.
2. If the grievant is performing duties entirely within his/her job specification, there is no out of title claim, even if his/her duties overlap with those of a higher title.
3. Many job specifications have overlapping duties. To establish an out of title claim, a grievant must establish that he/she performing duties that are:
    a. Unique to a higher title, and
    b. "Substantially different" from his/her regular duties.
4. To determine if the new duties are "substantially different," consider the following:
    a. The complexity of the new duties.
    b. Whether the new duties require additional training.
    c. Whether the grievant is exercising more independent decision making authority or is acting more independently.
    d. Whether the grievant is acting with less supervision.
    e. Whether the grievant is taking on greater accountability or liability

Two recent cases illustrate the importance of these factors:

- *In DOF and DC37, OCB Case No. A-14069-11, the grievant claimed he was performing the duties of a higher level of city assessor in DOF. Noting that the primary difference between the levels was the "complexity" of the assessments the assessor had to complete, the arbitrator denied the out of title claim because he was persuaded the grievant was not "assigned to large, extremely complex properties." In addition, the grievant's supervisor "credibly testified" that she reviewed the grievant's work and returned it "after deeming it unacceptable."*
- *In ACS and DC37, OCB Case No. A-14367-13, the greivants were construction project managers in ACS, responsible for monitoring the work of construction and maintenance contractors doing work in daycare facilities. The grievants claimed they were performing the duties of a higher title because they started reviewing engineering and architectural projects. Despite this change in duties, the arbitrator denied the out of title claim because the new projects were "routine" in terms of scope and cost, and the grievants continued to rely "extensively on their supervisors for assistance."*

3. LEGAL DEVELOPMENTS IN LABOR RELATIONS AND HUMAN RESOURCES

NLRB Regional Director holds college football players are employees. In March 2014, the NLRB's regional director in Chicago ruled that members of the Northwestern University football team receiving athletic scholarships are employees, not students, who have the right to form a union through an NLRB election. In finding the players were "employees," the Regional Director focused on the "compensation" they received for playing football at the school – not in the form of a traditional paycheck, but in the form of scholarship money for tuition, room and board, and books. Citing the amount of time they devoted to football, and the strict team rules that governed much of their daily schedule, the Regional Director determined that the players were subject to the University's "control" in performance of their duties. The analysis and decision applies only to scholarship players. An appeal of the decision is pending. The decision can be found at: http://mynlrb.nlrb.gov/link/document.aspx/09031d4581667b6f

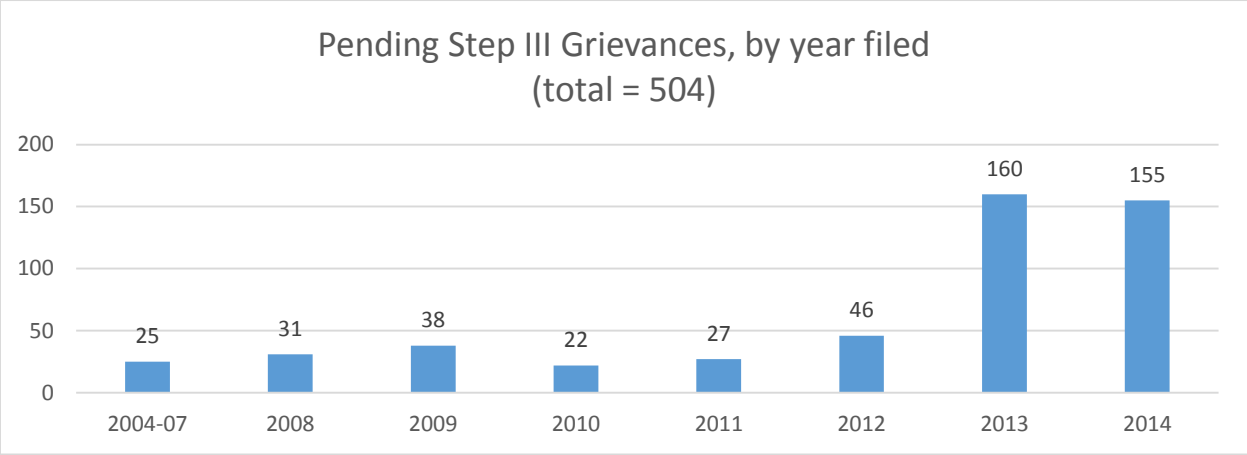
EEOC Issues New Guidance on Religious Garb and Grooming in the Workplace. In March 2014, the EEOC released a new Q&A and fact sheet on religious dress and grooming in the workplace under Title VII of the Civil Rights Act of 1964. The EEOC explained that religious discrimination charges had increased, and the new Q&A was intended to improve employer awareness and compliance with the law. The publication doesn't create new obligations, but it does attempt to clarify several important issues regarding religion in the workplace, including:

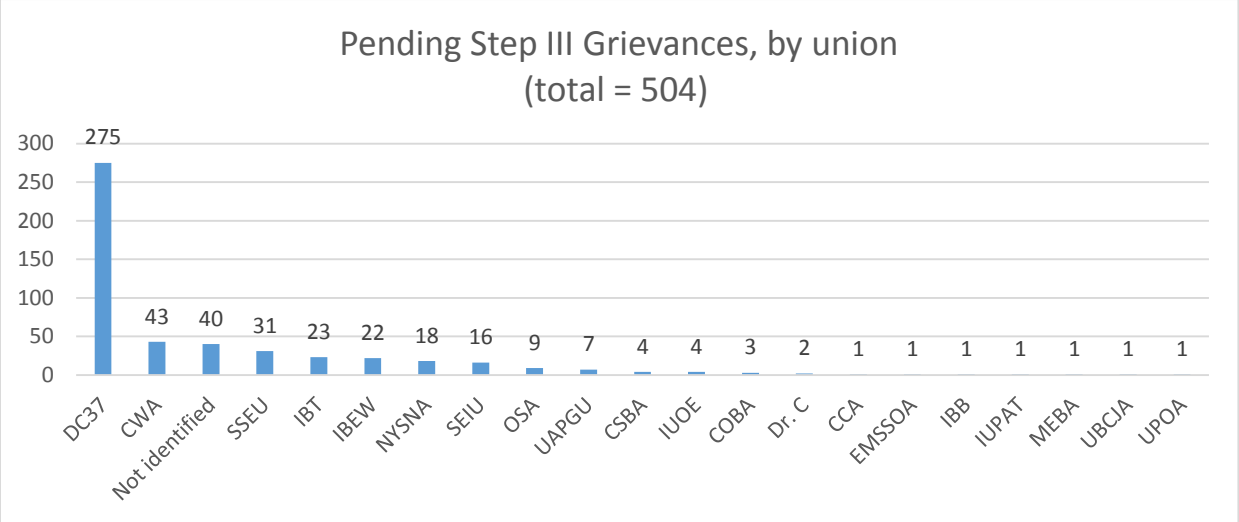
- What an employer should do if an applicant's or employee's religious dress conflicts with a dress code or appearance policy.
- Examples of appropriate accommodations for an employee's religious dress or grooming practice.
- What it means for a religious practice to be "sincerely held."
- What constitutes religious harassment and retaliation in the workplace.

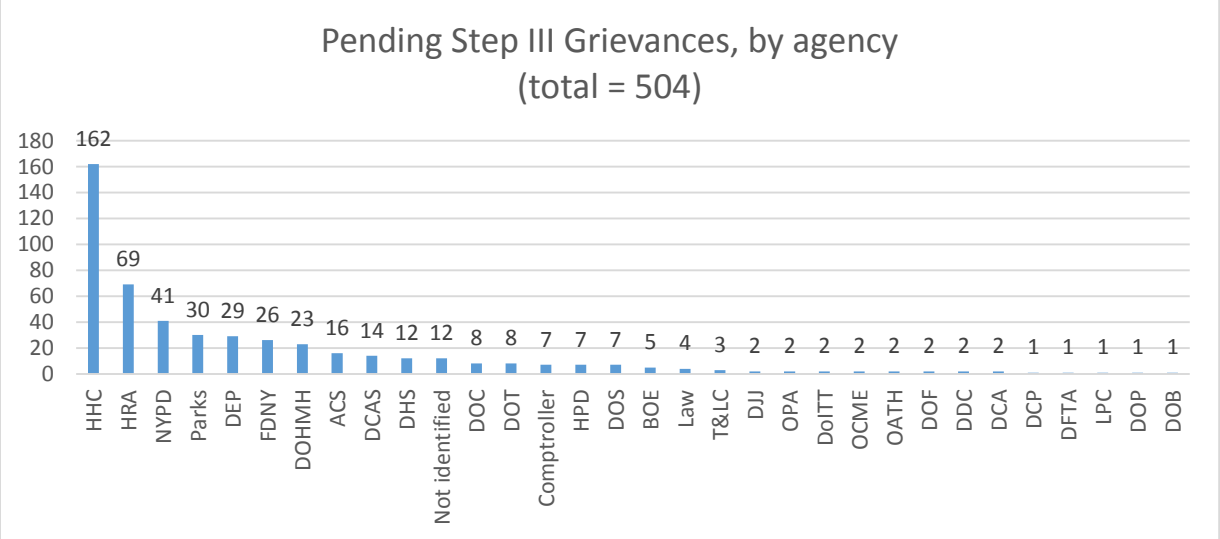
The full text of the EEOC's Q&A can be found at:
http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

4. BY THE NUMBERS: STEP III GRIEVANCE ACTIVITY AT OLR

DATA AS OF APRIL 14, 2014
EXCLUDES AUTHORITIES, CUNY, DOE, CULTURAL INSTITUTIONS







Annual Step III Grievance Activity at OLR			
	2011	**2012**	**2013**
Step III grievances filed with OLR in the year	711	605	695
Step III grievances with a disposition – decided, settled, withdrawn (may have been filed in previous year)	915	527	632
Number of step III grievances that went to arbitration in the year	292 (32%)	175 (38%)	188 (30%)
Percentage of Step III conferences that proceeded as scheduled	30%	38%	42%

5. BENEFITS UPDATE

OLR's Employee Benefits Program is expanding its Financial Planning Center by adding the Women's Financial Roundtable Program.

The Financial Planning Center, a division of the Deferred Compensation Plan, provides all City employees with the opportunity to attend free educational seminars covering a variety of subjects, ranging from Retirement and Distribution Planning to College and Eldercare Planning presented by non-commission-based Certified Financial Planners (CFPs).

The Women's Financial Roundtable provides a forum for women to collaborate in order to discover different ways of effectively managing their financial needs as they juggle their various roles as mother, wage earner and caregiver. Eight to ten women gather at Deferred Compensation's Financial Planning Center or at their worksite to discuss and share issues that particularly impact their ability to achieve a successful financial retirement. One of the Financial Planning Center's CFPs will act as a facilitator. Watch the promotional video for the Women's Financial Roundtable: http://www.nyc.gov/html/olr/html/women_finance/women_promovideo.shtml