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TRANSCRIPT OF THE MINUTES

of the

COMMITTEE ON CIVIL SERVICE & LABOR

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250 Broadway

B E F O R E:
JAMES SANDERS, JR.
Chairperson

COUNCIL MEMBERS:
Melissa Mark-Viverito
Michael C. Nelson
Larry B. Seabrook
Eric A. Ulrich

A P P E A R A N C E S

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CHAIRPERSON SANDERS, JR.: Good morning, good morning, and let me apologize for my tardiness. Good morning, thank you for coming. My name is Council Member James Sanders, Jr., and I am the Chair of the Committee on Civil Service and Labor, and you'll notice that I'm reading it very well, I have my glasses this morning, unusual. Today we are hearing proposed introduction 658-A, "A local law to amend the administrative code of the City of New York in relation to the waiver of public employee organization's rights when submitting grievances to arbitration under the New York City Collective Bargaining Law." First of all, I must disclose that I am the sponsor of this bill. Although I introduced this legislation, today's hearing will be as fair and as impartial as possible. This is a very technical bill, it relates to one paragraph of the collective bargaining law of the City of New York, pertaining to waivers. When a unionized city worker goes to his or her union with a contract dispute, they are required to go to binding arbitration with the city at the independent New York City Office of Collective

Bargaining. When a grievance is filed, the member and the union are required, under section 12-312 of the New York City code, to sign a waiver. No one disputes that this waiver prevents the worker or union from going to court to re-litigate -- it must be that day -- the contract claims. These claims can only be decided by arbitration, however, it has been recently disputed as to whether separate claims by the worker or union, not related to the contract, in other words, statutory constitutional or common law claims, can separately be brought into court. The Office of Collective Bargaining has said the waiver applies to the contract claims, but in a recent court decision, Roberts vs. Bloomberg, has stated that all claims are waived, even claims that the arbitrator cannot legally decide. This bill would amend the collective bargaining law to clarify that only contract claims are waived, which would allow other non-contract claims to be decided by the court. I understand that Mayor Bloomberg's administration disagrees with this bill, and we will hear from the Commissioner of the Office of Labor Relations, James Hanley, in a moment. We

will also hear from the neutral Office of Collective Bargaining, and from the Municipal Labor Committee, including representatives from DC37, as well as other interested parties. Again, thank you for coming, we have been joined by Council Member Seabrook, was there any other? Council Member Seabrook so far. I would like to thank the Committee staff, Matthew Carlin, our counsel, Faith Corbett and our policy analyst. Now you can call your first witness.

MR. CARLIN: Commissioner James Hanley from the Office of Labor Relations.

CHAIRPERSON SANDERS, JR.: Good to see you, sir.

COMMISSIONER HANLEY: I'm joined by Richard Yates, the Deputy Commissioner in our office, as well. Good morning, Chairman Sanders and members of the Civil Service & Labor Committee. My name is James Hanley, I am the Commissioner of the Office of Labor Relations, which is part of the Mayor's Office. I am here today to testify regarding the proposed amendment to the New York City Collective Bargaining Law that is currently before this Committee. The city

opposes the proposed amendment to the law. The New York City Collective Bargaining Law was enacted in 1967 as a result of the recommendations of a tripartite committee that was made up of labor representatives, management representatives and impartial members representing the public. When this became law, it included a provision requiring an individual or a union bringing a grievance before the Office of Collective Bargaining to waive their right to seek review of the same underlying dispute in another forum. This intent is clear from the language of the provision and has not ever been amended since its enactment in 1967. Proposed Intro 658-A seeks to radically change the language and the meaning of that provision. If the proposed amendment were adopted, the waiver requirement would be narrowed and distorted, such that it would no longer have any functional application. Under the proposed amendment, grievants and unions could freely pursue parallel litigation in other adjudicative forums, even where there are common parties, common issues of fact, and common issues of law. Under the proposed amendment, these common issues

could be pending before an arbitrator at the Office of Collective Bargaining and before a judge in court at the same time. This would result in duplicative litigation and potentially inconsistent findings in the two forums. The waiver requirement has traditionally been enforced only where the parties are the same and the issues of fact and law are the same. The Board of Collective Bargaining since 1997 has recognized that certain Federal claims, including claims under Title 7 of the Civil Rights Act, or claims under the Federal Age Discrimination Law or Federal Disabilities Law, are not subject to the waiver. The city does not dispute this interpretation, the proposed amendment, however, essentially nullifies the waiver requirement and would allow employees and unions to proceed with duplicative litigation, the exact scenario the law was seeking to avoid when it was first enacted. It must be emphasized that as long as the collective bargaining law has been in existence, employees and unions have not been foreclosed from exercising their rights in either forum. It simply requires where the underlying dispute is

the same that the choice be made between the two forums. In fact, under longstanding case law and practice, an individual could initially file the claim in both court and at arbitration, and satisfy the waiver requirement by withdrawing one action. For these reasons the city opposes Intro 658-A, and thank you very much for your time.

CHAIRPERSON SANDERS, JR.: Interesting points, sir, interesting points. Question for you, in Roberts vs. Bloomberg, the union sued under the merit and fitness clause of article 5, section 6 of the New York State constitution. The court said that this claim was waived, what contract claim, if any, is the equivalent to this course of action?

COMMISSIONER HANLEY: Well, they filed in both locations, and they filed before the Board of Collective Bargaining, that was the New York City Housing Authority action. And the Board of Collective Bargaining dismissed the case, and the courts … we fought that particular issue, claiming that you can't have two bites on the apple, you can one or the other. And we wound up winning the case, because the intent of the waiver

was to pick one forum or the other, not to diminish anyone's right to have something adjudicated and reviewed, but just pick one forum, to avoid the inconsistency that could happen, and the confusion that could occur.

CHAIRPERSON SANDERS, JR.: Although you stated it, would you mind restating the main dangers that you believe that this bill will create?

COMMISSIONER HANLEY: Well, first of all, the fact that the bill itself was put together and written by unions along with management, and it's not been an issue since 1967 I think speaks for itself. But the main danger is inconsistencies. You could have two very different decisions on the same underlying issue, from a court and from an arbitrator. And at that point, I don't think that serves the process well at all. If you're trying to have your grievance addressed, redressed, and to get it resolved, then you should pick a forum, but not two, it does not serve the process well at all.

CHAIRPERSON SANDERS, JR.: Okay. Well, just in value to society, who creates a bill

is not as important as the merit of the bill itself. And one more question. Can you please tell us if there are any substantive non-contractual claims that relate to the same dispute, but do not have a similar contractual claim that would be waived by signing the waiver in code section 12-132, as has been interpreted by the court in Roberts vs. Bloomberg?

COMMISSIONER HANLEY: Well, as I indicated before, I mean, under … if it's a civil rights action, we're not asking anybody to ever waive that, you can't, you shouldn't. But if it's also connected to someone who wants their job back, for example, who feels that they were fired or in some way dismissed or something negative happened to them, that certainly is appropriate for an arbitrator. If at the same time they feel that there were civil rights violations involved in it, then that certainly should go to court, there's no problem with that at all, absolutely none.

CHAIRPERSON SANDERS, JR.: Do you have any questions? Okay. Well as usual, sir, you have argued your case well. I thank you for

testifying today.

COMMISSIONER HANLEY: Thank you.

CHAIRPERSON SANDERS, JR.: Thank you.

MR. CARLIN: Next we have Steven DeCosta, the General Counsel for the Office of Collective Bargaining.

CHAIRPERSON SANDERS, JR.: Whenever you are ready, sir.

MR. DeCOSTA: Thank you. Good morning, Chairman Sanders and members of the Civil Service & Labor Committee, my name is Steven DeCosta, I am the Deputy Director and General Counsel of the New York City Office of Collective Bargaining, which I will refer to as OCB. OCB is the impartial, non-mayoral administrative agency charged with administering and enforcing the provisions of the New York City Collective Bargaining Law. It has been, and is, the policy of this agency not to support or oppose proposed amendments to the statute we administer, unless of course it's an amendment which we have requested. This is not one of those. But rather our function is to inform the Council of the agency's view of

the significance and consequences of the proposed changes that the Council is considering. Thus, this statement is intended to provide information for the Council, so that its members can consider the proposed amendment for the better understanding of its context and effect. One of the statutory functions of OCB is to administer the grievance arbitration procedures that are found in collective bargaining agreements between the city and the municipal unions. The law contains a statement favoring the use of arbitration, and I quote from the law, it says, "It is hereby declared to be the policy of the city to favor and encourage the use of impartial and independent tribunals to assist in resolving impasses in collective negotiations, and final impartial arbitration of grievances between municipal agencies and certified employee organizations." To effectuate that policy, the law directs OCB to maintain a panel of impartial arbitrators, and to establish arbitration procedures. The law also contains the following requirement, which is enforced by OCB, which is at the heart of Intro 658-A. And I'm sure the

Committee is familiar with this, but I'll read the relevant part of it, which is, the law says, "As a condition to the right of a municipal employee organization to invoke impartial arbitration, the grievant or grievants and such organization shall be required to file with the director a written waiver of the right, if any, of the grievant or grievants and the organization to submit the underlying dispute to any other administrative or judicial tribunal, except for the purpose of enforcing the arbitrator's award." The language of this requirement, as Commissioner Hanley indicated, has been in the law since its enactment in 1967. OCB's Board of Collective Bargaining long ago expressed the reason for this waiver requirement. "The purpose of the rule", this is, I'm quoting from a Board ruling, "The purpose of this rule is to prevent multiple litigations of the same dispute, and to assure that a grievant who elects to seek redress through the arbitration process will not attempt at another time to relitigate the matter in another forum." The key question raised in applying this waiver provision to each request for arbitration that's filed is,

what is the meaning or the scope of the term "underlying dispute", that's the key term that's in the waiver provision of the statute. Over the years, the Board in its decision has consistently answered this question in the following way. The Board has said, "A union renders a waiver invalid by submitting to arbitration and another forum claims which arise from the same factual circumstances, involve the same parties, and seek determinations of common issues of law." Thus the waiver standard has always required identity of parties, facts, and common questions of law. In 2004, the Board clarified the continuing application of this standard to take account of evolving judicial case law, which informs the Board's assessment of what kinds of claims constitute common issues of law. In a case involving fire fighters in 2004, the Board undertook a comprehensive review and analysis of the waiver requirement, including consideration of the decisions of the courts on the question of whether common questions of law encompassed non-contractual claims. In that decision, after discussing all of the relevant Board and judicial

precedents, the Board concluded, and held, that, and I'm quoting, "The scope of the OCB waiver is limited to contractual claims under the collective bargaining agreement." In other words, the underlying dispute referred to in the OCB waiver does not encompass all statutory constitutional or common law claims arising from the same factual circumstances. To the extent that our prior cases are inconsistent, they are hereby overruled. Just an aside, relating to that last statement about the overruling prior cases, the Board's review was triggered in part by its recognition that a few similar cases in the past had inconsistent outcomes, and the Board noted that, for example, there was a DC37 case from 1987, in which the union filed a whistleblower claim in court, and then attempted to arbitrate a claim arising out of the same facts, and the Board said that they could not, that the waiver barred that. And that the Board contrasted with a 1997 case involving CWA, in which the employee had filed a Title 7 claim with the EEOC, and the Board said that the waiver did not prevent them from also arbitrating the related contractual claim. The Board's holding

reflected a unanimous decision by the tripartite Board, and that decision was not appealed by any party. The interpretation of the waiver, and I'm referring to the 2004 interpretation of the waiver, which was that it only applied to contractual claims, was followed by the Board in later cases. For example, there was a 2008 DC37 case in which it was followed. In 2009, however, the Board's interpretation of the waiver requirement was rejected by the courts in a case in which OCB and its Board were not parties. And this case has been mentioned before, the case is the matter of Roberts vs. Bloomberg. In that case, DC37 raised claims of statutory and constitutional violations in the State Supreme Court. The union's claims there included alleged violations of the notice of contracting out provisions of Local Law 35 and the merit and fitness provisions of Article 5, Section 6 of the State Constitution. DC37 simultaneously filed requests for arbitration of claimed contractual violations with OCB. Granting a motion by the city, the court dismissed the union's statutory and constitutional claims, finding that the union

had waived the right to have them adjudicated in court when it submitted the OCB waiver that accompanied its request for arbitration. That dismissal was affirmed by the appellate division. The courts construed the waiver's requirement reference to the underlying dispute to include the entire issue including statutory and constitutional claims arising out of the same facts. The appellate division stated that by submitting the OCB waiver, the petitioners, that is, the union, agreed to arbitrate the entire dispute, not just contractual claims. Indeed there is nothing in the statute or its legislative history to support petitioner's position that statutory or constitutional claims are exempt from the waiver. The court's ruling not only rejected the Board's well-established interpretation of the scope of the waiver, but also ignored a consistent body of Board case law, which holds that absent specific reference in a collective bargaining agreement, claims violations of statutory or constitutional provisions are not subject to arbitration. The appellate division decision also disregarded the fact that three Federal court

decisions had read the waiver in the same way that OCB had. There are several consequences that will flow from the court's ruling in the matter of Roberts. First, where a union wishes to adjudicate or enforce claims arising out of a single set of facts, but based on the violation of rights derived from both the collective bargaining agreement and a statutory or constitutional provision, it must elect only one forum in which to proceed. Moreover, this choice of forum may involve the relinquishment of certain rights. If a union decides to proceed only in court, seeking enforcement of statutory or constitutional rights, the court will not hear claim violations of a collective bargaining agreement. That's a matter the parties have agreed could only go to arbitration. Alternatively, if a union decides to proceed only in arbitration before OCB, seeking enforcement of its contractual rights, it risks a finding that any attendant statutory or constitutional claims are not submissable to the arbitrator. In other words, the union may have to choose which rights to enforce and which rights to lose, for lack of a forum. A second consequence

of the ruling in the Bloomberg … the Roberts vs. Bloomberg case, is that unions and their members who are under the jurisdiction of the city law are placed in a specially-disadvantaged position, that's because public employees and their unions in New York State, outside of the city law, that is, those who are under the coverage of the State Taylor law, are not required to submit a waiver of rights as a condition of going to arbitration. Therefore, the matter of Roberts vs. Bloomberg decision doesn't apply to them. They remain free to litigate their statutory or constitutional claims in court, even after arbitrating their contractual claims. And an example of that is a case called Wharton vs. Town of North Hempstead, in which the appellate term found that even though the union had arbitrated its claim, it could still pursue its statutory claims. Now, the proposed amendment, Intro 658-A, would modify the statutory language by replacing the term "underlying dispute" with the term, the phrase, "determination of the alleged contractual dispute". It would also insert a new sentence stating, "This subdivision shall not be construed to limit the

rights of public employees or public employee organizations to submit any statutory or other claims to the appropriate administrative or judicial forum, tribunal." These changes would narrow the scope of the required waiver back to what existed under the Board's decisions at least from 1977 up to the time of the matter of Roberts vs. Bloomberg. Unions would be required to waive their right to submit the contractual dispute in any other forum, but would not be required to waive any statutory or other claims. This would appear to be consistent with the Board's holding in the fire fighter case, the 2004 case that I referred to, and its later decisions prior to Roberts vs. Bloomberg. Presumably any change, if the Council were to pass this, would not affect any currently-pending cases, but it would establish a clear standard for future cases. Finally, a couple of hypothetical examples may be instructive. Consistent with the Board's decisions prior to Roberts vs. Bloomberg, and if Intro 658-A were passed, a union that has a claim that an employee was not paid the correct contractual hourly rate, or was not paid the

differential provided in the contract, and could then execute the required waiver and submit the dispute to arbitration at OCB. But they would be barred from litigating the same contractual claim in an action in court. However, a union representing an employee who believed he or she was wrongly disciplined for discriminatory reasons could execute the required waiver and submit to arbitration the question of guilt or innocence of the disciplinary charges, while still preserving the right to litigate the question of discrimination on the basis of race, gender, age, disability, etc., in the courts or an appropriate forum, such as the EEOC. I would be pleased to answer any questions that the members of the Committee might have about the implications of this proposed intro.

CHAIRPERSON SANDERS, JR.: I found your comments most enlightening, sir. In layman's terms, do you see the difficulties that Mr. Hanley spoke of?

MR. DeCOSTA: I recognize, certainly, the purpose for which the waiver was put into the law, and I don't think anyone is

suggesting that that be taken out, or that it doesn't serve a useful purpose. It's not in anybody's interests to have duplicative litigation of the same claims. The area that I think both the city and our office are concerned about is how you define what is the same underlying dispute, or how do you decide what are the same common issues of law. Certainly if the issues of law involved in an arbitration case overlap with those that somebody is trying to raise under some statute, we wouldn't want the law to be interpreted in a way that would let somebody arbitrate and litigate in court the same claim. As Commissioner Hanley correctly stated, you would risk inconsistent determinations, you would have a duplication of efforts, and that's something that we all agree would be proper to avoid. On the other hand, where you have statutory claims that are unrelated to the contractual claims, I don't see any reason why a party should have to basically give up one claim in order to pursue another. And I think maybe the case that led to the Bloomberg … the Roberts vs. Bloomberg decision might be a good example of that, to the extent that the union in

that case raised issues relating to the merit and fitness provision of the State Constitution, that's an issue that an arbitrator could not rule on. The parties have not agreed to submit constitutional issues to an arbitrator, it's something where the courts have the expertise to interpret the constitution. That's a different matter than the contractual claims which they made. I think as Commissioner Hanley also correctly stated, ultimately the Board, in a decision that came down last year, found that the contractual claims that the union raised could not go to arbitration, because they were basically raising it based on a contractual provision that applied to the city, but not to the Housing Authority, which was their employer. But the consequence of this is that they didn't get to arbitrate the contractual claim that they thought they had, and because of the court's ruling, they didn't get to litigate their constitutional claim either. And so they're basically left with no forum, and I think the concern is that it was not the intent of the law in putting that waiver provision in, to leave people with no forum for a

particular right that they might have. It was to avoid duplication of litigation, but not to extinguish particular rights. I hope that answered your question.

CHAIRPERSON SANDERS, JR.: As much as I understood it. How problematic has the "inconsistent decisions" from the arbitrator and the court that Mr. Hanley spoke about, how problematic has this been?

MR. DeCOSTA: Well, it would be problematic if it occurred. To the extent that it occurred, it would cause great damage to the process, if you did have inconsistent decisions coming down from an arbitrator and from a court. But in my experience, I have not seen that happen very often, mostly because the same issue does not end up getting heard in both forums. You know, I think that the way that the Board has applied the waiver, it has avoided that in the past, where if it's really the same claim, it only can go to one forum. If the union files the waiver and chooses to go to arbitration, then it would be precluded from going to court and vice versa. It's only where you have different rights that you're

seeking to litigate and get a determination, that you have this potential for inconsistent results and they're not really inconsistent, I think, because the facts may be the same, they may arise out of the same occurrence, the same factual situation, but to the extent that you're talking about rights that come from different sources, one from the contract, one from some statute, whatever the adjudication is, it shouldn't really … the adjudication in one forum shouldn't really be inconsistent with the one in the forum, because you're talking about different rights. So I don't see that as a problem.

CHAIRPERSON SANDERS, JR.: Well, on that same theme, does the OCB believe that this bill will lead to decisions by arbitrators of the OCB conflicting with court decisions relating to the same underlying circumstances?

MR. DeCOSTA: Well, I don't want to speak for the Board, you know, this is not a question that has come up before our Board.

CHAIRPERSON SANDERS, JR.: Okay.

MR. DeCOSTA: But I think just in terms of the staff of the agency, our view is that

if the law were clarified to hold that the waiver only applies to contractual claims, that this would not lead to inconsistent determinations, because the contractual claims are different than whatever statutory claims might be asserted. If, for example, you had a statute that gave you a right that was the same as a contractual right, then I could see the potential for inconsistent determinations. But that's not really what we're talking about here, we're talking about statutory rights that are different than the contractual rights, even though they arise out of the same facts. And that being the case, I … we don't think that there is a likelihood of having an arbitrator's ruling inconsistently with the courts.

CHAIRPERSON SANDERS, JR.: I thank you for your testimony, sir, your thoughts will be taken, certainly, under consideration. Thank you very much, sir.

MR. DeCOSTA: Thank you.

CHAIRPERSON SANDERS, JR.: Call the next witness.

MR. CARLIN: Next we have Robert J.

Burzichelli, and I hope I pronounced that correctly, from the New York City Municipal Labor Council and Mary J. O'Connell from District 37, District Council 37.

MS. O'CONNELL: Good morning. Good morning, Chairman Sanders and members of the Committee, my name is Mary O'Connell, I am the General Counsel to District Council 37 of AFSCME, and I thank you for the opportunity this morning to speak to you concerning our position in favor of the passage of Intro 658-A, a local law to amend the collective bargaining law, in order to clarify that statute's provision concerning submission of a waiver as a condition to arbitrate a contract grievance. This important issue concerns all unions covered by the NYCCBL, as you certainly will hear from Mr. Burzichelli a little bit later. As I know you are aware, DC 37 represents 121,000 members, the vast majority of whom are employees of the City of New York, or one of its related boards, authorities or corporations. As such, the city and this union are subject to the provisions of the collective bargaining law. This statute insures that the

employees of the City of New York and other covered employees enjoy the right to organize and bargain collectively, this statute also contains provisions related to representation of public employees, improper practices of both employers and unions in past procedures, and pertinent to our discussion this morning, the arbitration of contract grievances, the means by which the parties resolve alleged violations of their collective bargaining agreements. I won't repeat Section 12-312D of the collective bargaining laws, it's been mentioned a number of times, but as we know, that statute provides that the condition precedent to seeking arbitration, the parties, a grievant and the union must submit a waiver of the … agreeing to submit the underlying dispute to arbitration. Since at least 1992, and as Mr. DeCosta testified this morning, it's clarified in 2004, this provision has been interpreted by the Board of Collective Bargaining, and understood by both employers and labor organizations to mean that a grievant and the union, in order to avail themselves of the binding arbitration procedure contained in the collective bargaining agreement,

and administered by OCB, would have to agree to not take the contract violation to court for adjudication. It did not foreclose the union or the employee from asserting other claims such as a violation of a statute, in the appropriate judicial or administrative forum. For example, to use an individual's case, an employee may be terminated and he and the union may wish to take his case for wrongful discipline to arbitration under the contract. That individual may have other rights under various statutes arising from the same wrongful conduct of the employer. To give another example, a union activist may be a victim of employer discipline. Given the circumstances, it may be appropriate to challenge the discipline not only through a grievance, but also to take exception to the employer's anti-union conduct through filing an improper practice charge with the Office of Collective Bargaining, alleging violations of the collective bargaining law, of both the employee's and the union's rights under the NYCCBL. And as we know, case law in New York has made it clear that a waiver in order to be effective must be clear, explicit, unequivocal

and not depend on implication or subtlety. Further, the Federal courts have also held that a waiver filed pursuant to the NYCCBL was not a waiver of a statutory claim. Up until recently, the employee was able to fully address the employer's wrongful conduct in such forums as appropriate. Likewise, the union was able to address wrongful actions of the employer, not only through asserting its rights under the collective bargaining agreement, but also enforcing statutory provisions or agency rules and regulations which may have been violated. This long-standing right and practice was turned on its head in 2009 in the decision entitled Roberts vs. Bloomberg, which we've already talked about this morning. In that case, DC 37 sought to challenge the layoff of several hundred employees at the New York City Housing Authority. At the same time the union challenged the layoff as a violation of the merit and fitness provisions of the State Constitution, and as in bad faith and arbitrary and capricious, a common-law claim, and a violation of local law 35, the union filed a request with the Office of Collective Bargaining seeking to enforce Section

11 of our collective bargaining agreement, which requires the employers to engage in a specific process with the union before letting a contract which may adversely employees. The State Supreme Court found that by submitting the alleged violation of the collective bargaining agreement to arbitration, the union waived its rights to pursue its statutory claims which arose as a result of the city's and the Housing Authority's actions. The court relied upon a finding that the term "underlying dispute" meant all claims that arose from the same set of operative facts. The Appellate Division First Department affirmed the lower court ruling, agreeing that the statutory language was clear and distinguished the cases in which there was no waiver to individual employment cases. Intro 658-A will serve to correct this misinterpretation of the NYCCBL, it will make clear that which had been the parties' understanding in practice, that when an employer takes an action which the union believes to violate its collective bargaining agreement in some other statute, the union will be able to seek redress for its members in arbitration for

contractual claims in the appropriate judicial or administrative forum for other claims. Let me be clear: the union is not seeking two bites of the apple to litigate its contract claims in multiple forums. By the same token, the union and its members should not be deprived of the ability to redress statutory or constitutional violations if they file a request for arbitration. The union and its members should be able to use as many arrows in its quiver as it can to protect the jobs and enforce hard-earned protections. It should also be noted that the remedies for contractual violations may not be the same as remedies which the union could secure for statutory or constitutional claims. To use our NYCHA and the Roberts vs. Bloomberg case as an example, under section 11 of our economic agreement, the union has the ability to engage in a process by which it can make a proposal to keep work in-house. Ultimately however, the city retains the ability to decide whether or not to contract out work. On the other hand, were a court to find layoffs to be in bad faith or a constitutional violation, we would request the court to order the employees

reinstated with back pay. As I note the Council has noted in its findings of … legislative findings in intent, the waiver provision like that contained in the NYCCBL does not exist in the New York State Taylor law. To not amend the collective bargaining law to clarify its meaning would be to countenance a two-tier system with New York City employees unable to pursue their statutory or constitutional claims. Such a result is simply unjustifiable. Further, the alternative, foregoing arbitration, is equally troublesome. As I'm sure the Council is aware, New York State's public policy favors arbitration as a just, economical and efficient means by which to resolve disputes under the collective bargaining agreement. That policy will be undermined if the NYCCBL is not amended to clarify that which has been the case for so long. The submission of the waiver pursuant to the collective bargaining law will not foreclose pursuit of statutory, constitutional or common law claims. Once again, I thank you for allowing me to speak in favor of the Intro, and I would be happy to answer any questions.

CHAIRPERSON SANDERS, JR.: After the next speaker, perhaps. Are you speaking, sir?

MR. BURZICHELLI: Yes.

CHAIRPERSON SANDERS, JR.: Good, good to see you.

MR. BURZICHELLI: Nice to see you, Council Member, and the other members of the Council. Good morning, my name is Robert Burzichelli, I'm a member of the law firm Greenberg Burzichelli Greenberg, and our law firm serves as general counsel to the Municipal Labor Committee. Thank you for the opportunity to appear before you today on behalf of the MLC, and to present its position in favor of passage of Intro 658-A, a local law to amend the New York City collective bargaining law. As a background, the Municipal Labor Committee is an unincorporated association of New York City municipal labor organizations that currently represent approximately 300,000 active and retired New York City municipal workers in over 100 unions. Given the MLC's wide membership and its long history in labor relations, we feel that it's our duty to bring to your attention the importance of enacting

this bill. As testified to by District Council 37's General Counsel, Mary O'Connell, recent court decisions have significantly changed unions' and their members' legal rights to pursue arbitration under the respective collective bargaining agreements. I will not bore the Council with a repeat of the legal analysis outlined by Ms. O'Connell, since the MLC is in complete agreement with DC 37's position in this matter. Instead, what I want to highlight is the fact that this bill restore labor relations to the status quo, as it had existed for decades regarding arbitration and the union's ability to protect its rights under its collective bargaining agreements. Intro 658-A is needed to restore the balance of power between unions and the city in the conduct of labor relations. The court's recent interpretation of the law, if not corrected, will have a chilling effect on unions' decisions to utilize arbitration. If this bill is not passed, unions will avoid arbitration, since in order to enter the arbitral forum, the union must now waive redress for all other violations of rights they have under city, state, Federal, constitution and

common law claims. Further, the new policy without this bill will deter individual union members from utilizing the arbitration process to protect their own contractual rights. For example, and I think almost every speaker has touched about this, if a worker now decides to go to arbitration to challenge her wrongful termination, she would waive her rights to pursue any claims under state and Federal civil rights and anti-discrimination laws. Since an arbitrator does not have jurisdiction to decide civil rights issues, or provide the same relief under the civil rights laws as a court of competent jurisdiction, that worker will be effectively stripped of her rights. As such, the arbitration process for disciplinary matters will largely be abandoned, and instead the courts will be flooded with those issues. This is in direct contravention of New York's policy favoring alternative dispute resolution. For decades labor and the city have conducted labor relations with the understanding that contractual rights would be arbitrated, and other legal rights were to be decided in judicial forums. The arbitration process provides labor

and management an opportunity to settle their disputes in an informal process before arbitrators experienced in labor relations. Now that process could be compromised to the point of paralysis. If unions and their members are forced to forego arbitration and head to courts of law, it will be time-consuming, expensive and result in a great deal of uncertainty for both labor and the city, a truly no-win situation. On behalf of the MLC, I strongly urge the Council to enact this important piece of legislation, and to return the conduct of labor relations in the City of New York back to the status quo. Thank you.

CHAIRPERSON SANDERS, JR.: Thank the both of you. You know, I will yield to my colleagues, we have been joined by Council Member Nelson, Council Member Ulrich, we earlier were joined by Council Member Melissa Mark-Viverito. Was there anyone else? That's it. I will yield to you, Eric, on your question.

COUNCIL MEMBER ULRICH: Thank you, Mr. Chairman, I apologize for being late to the hearing. I just had a few questions, I want to thank you for your testimony, first of all. I'm

not completely familiar with the Bloomberg, the Roberts vs. Bloomberg case, was the city found to be arbitrary, capricious in delaying law for those employees? What was the court's finding there?

MS. O'CONNELL: The court never got to the substance of the dispute. The court dismissed the case, finding that because we had filed a waiver of the contract provision with the Office of Collective Bargaining, they dismissed the case and never ruled on the statutory common law claims.

COUNCIL MEMBER ULRICH: That's very interesting. So do you anticipate any further legal challenge on those grounds, or do you see any other, you know, situation where you'll be able to, you know, try to get that before a judge again?

MS. O'CONNELL: Well, the substance of the NYCHA layoff situation, I fear that these employees have exhausted the legal rights that they have, which is tragic, because it was several hundred employees in a situation that should not have occurred.

COUNCIL MEMBER ULRICH: Do you

believe that, if the Council were to pass this bill, that we would be strengthening the due process rights of the union members and also the collective bargaining rights of the organizations, you know, the labor organizations that represent them?

MS. O'CONNELL: I think were the Council to pass this bill, it would not be conferring new or additional rights, it would be clarifying rights that had been essentially taken away by that Roberts vs. Bloomberg decision. Again, as Mr. Burzichelli said, restoring the status quo, so that we know that we go to arbitration on our contractual claims, and go to the appropriate forum for other claims.

MR. BURZICHELLI: Yeah, I would agree with Ms. O'Connell, I think it's really just resetting the process to where it was prior to the court's rulings. It would be basically putting us all on an even playing field, it would allow us to continue to work with the City of New York resolving contractual issues, and not complicate it and put us at a disadvantage in terms of time and money to litigate issues that were formerly

easily disposed of with a contractual arbitration process.

COUNCIL MEMBER ULRICH: And it wouldn't necessarily preclude individual members from still going to court, you know, to civil court to seek relief, I mean, it's not … this would just give them another avenue.

MR. BURZICHELLI: Yeah, assuming there's a statutory right that you wanted to enforce, or a constitutional right. That's correct, we would just be once again restoring their opportunity to use the full array of laws applicable to their situation.

COUNCIL MEMBER ULRICH: And we would not have to seek … we would not have to seek state approval?

MS. O'CONNELL: No.

MR. BURZICHELLI: No.

COUNCIL MEMBER ULRICH: For any of this, well, that's very interesting. Okay, thanks for your testimony.

CHAIRPERSON SANDERS, JR.: I will yield to my distinguished colleague from Brooklyn.

COUNCIL MEMBER NELSON: Thank you,

Mr. Chair. Just to play devil's advocate for a moment, I'm not sure which side the devil is on in this case, or advocating for, one never knows. Duplicative litigation, is there any, probably just anecdotal, but any cases, any percentage, how many of the cases perhaps contain or charged to contain duplicative litigation? Just to get an idea, because that's really important, but I doubt if anybody kept this record. In other words, how many times it would come back and it was surely was duplicative, as opposed to another nuance, or some other area?

MS. O'CONNELL: Is the Council Member speaking of a situation, say, where an employee would file the waiver and then seek to litigate the contract claim in a court?

COUNCIL MEMBER NELSON: Yeah, it would come back with something that may not be exactly chapter and verse, the same issue, but, you know, a little twist here or there. It is very difficult, I know, it's almost rhetorical, I'm sure it's happened, but this is, I think, the crux of the matter, has it been abused, in other words, leaving us, the city, on one side, saying

okay, we've had enough of this, let's cut this, the amount of paperwork, and trial, litigation, money, time and effort, or the union saying, well, this isn't fair because, yeah, you throw out the entirety of the issue and it really didn't deal with this other issue? I know it's a difficult question, it's certainly difficult to answer. But do you have an idea of where I'm going with this? In other words, where is the fairness in this?

MR. BURZICHELLI: Council Member, I've been a labor lawyer in this town for over 20, I represent Local #3, the electricians, I represent the Painter's Union, I represent the New York City Trade Coalition, I represent the auto mechanics, we represent the correction captains, and I've never in my practice had that type of situation where we've run into those types of things, bouncing from court to arbitration and back and forth. I think the system has been good in terms of filtering out duplicative litigation. I think what really works well is the fact that during the grievance process, there's an opportunity for management and labor to sit down informally and hash a lot of things out before it

escalates, as well as educate our own members as we work through the grievance process, because a lot of times, you don't really fully understand what went on below, and there's no discovery for the union, so as you go through the grievance and arbitration process, things begin to unfold that may not have been made aware to you at certain points. So that's also important to understand too, because your rights and the violation of the rights, may not be fully understood until you reach a certain port in that process. So by the time you sign the waiver, you don't know anything really. You're asked to make a decision before things have become fully fleshed out in the process. So I think the process prior to the court's decision has done a good job of cutting down on litigation, cutting it down on duplicative actions, to be honest with you. But I have no statistics, I just know from my own personal practice and the volume we have, that up until this decision, we've never had a situation. Now, you know, I'm afraid of being sued for malpractice unless I tell my guy, well, don't sign it, go to court.

COUNCIL MEMBER NELSON: Uh huh. Well, that's a pretty good explanation.

COUNCIL MEMBER ULRICH: People sign, they would sign the waiver before the discovery process even takes place.

MR. BURZICHELLI: They sign the waiver prior, after step three, when you make your request for the notice of arbitration.

COUNCIL MEMBER ULRICH: Yeah, that's a- -

MR. BURZICHELLI: (Interposing) So you do have some process, but really we only have four … under most contracts you have 120 days to bring the grievance, so it's a very compressed period of time, with not a lot of information to make an informed decision.

COUNCIL MEMBER NELSON: Yeah, because it's in the best interest on your behalf, it's in the best interest on the city's behalf, and I think what we're supposed to be is an impartial arbitrator ourselves in that respect. Because certainly we don't want to do anything that would hurt union members that are in the right, and we don't want to, cause and effect,

people take advantage of the system as well. So that's just where I'm just trying to get to. Do you have any other questions there. Okay, thank you. Thank you, Mr. Chair.

CHAIRPERSON SANDERS, JR.: I thank the both of you. Could it be fair, would it be fair to say that Roberts vs. Bloomberg puts the unions in a unique position of having to choose between union rights versus workers' rights?

MS. O'CONNELL: I believe that the decision could force that situation in the appropriate circumstance. I think one example is one I alluded to in my testimony, where there is some alleged conduct by the employer that is motivated by anti-union animus, and an employee is fired. The employee can grieve their termination, and that can go to arbitration under the collective bargaining agreement, but there are other additional, and very important, rights not only to the individual employee, but to the union, which could be lost in that instance. You have the employee who wants, and the union wanting to get that employee's job back, but importantly, we would want a ruling from the Office of Collective

Bargaining, which would find that that type of conduct violates the act, and that there's a declaration from OCB that that conduct was improper. That is a valuable relief for us, because it educates, it informs the union's members and the employers that there is certain type of conduct which is inappropriate and illegal under the collective bargaining law. I fear that a potential result of Roberts vs. Bloomberg, if the statute is not amended, is that we in fact would have to choose filing a grievance for the individual member, or filing that improper practice charge at the Office of Collective Bargaining.

CHAIRPERSON SANDERS, JR.: So in summation, you are contending that 658-A is a corrective, a return to a status quo that was working before Roberts vs. Bloomberg?

MR. BURZICHELLI: That's correct, Council Member.

MS. O'CONNELL: Absolutely.

CHAIRPERSON SANDERS, JR.: All right, if there are no further questions, then I thank this panel for helping us with this.

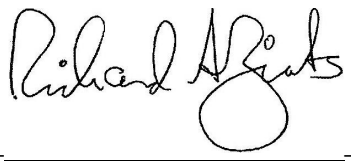
MR. BURZICHELLI: Thank you.

MS. O'CONNELL: Thank you.

CHAIRPERSON SANDERS, JR.: We are … I'm personally going to reach out to several of you who have spoken here to hear more information. But we're going to end this hearing, and I thank everyone who presented, it was most enlightening, and I learned a great deal. Thank you very much, this hearing is now adjourned.

C E R T I F I C A T E

I, Richard A. Ziats, certify that the foregoing transcript is a true and accurate record of the proceedings. I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.



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Date _____March 8, 2012_____