DC 37, 3 OCB 2d 5 (BCB 2010)

(IP) (Docket Nos. BCB-2787-09).

Summary of Decision: The Union alleged that the City violated NYCCBL § 12-306(a)(1) and (4) when it began charging employees a fee to replace a lost or damaged paycheck. The City argued that the new fee did not constitute a unilateral change in a term or condition of employment, the fee was a non-mandatory subject of bargaining, and the policy is a managerial right. The Board found that by implementing the new check replacement fee, the City made a unilateral change in terms and conditions of employment. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On July 30, 2009, District Council 37, AFSCME, AFL-CIO ("Union" or "DC 37") filed a verified improper practice petition alleging that the City of New York ("City") made unilateral changes regarding a mandatory subject of bargaining in violation of New York City Collective Bargaining Law ("NYCCBL") § 12-306(a)(1) and (4) when it began charging employees a fee to replace a lost or damaged paycheck. The City argued that the imposition of the admittedly new paycheck replacement fee did not constitute a unilateral change in a term or condition of

employment, that the fee is a non-mandatory subject of bargaining because it does not relate to wages, and that the fee applies to a group much larger than the unit members. The City further argues that the policy is a managerial right because it relates to the Office of Payroll Administration ("OPA") core mission and is consistent with the City's past practice of charging fees under other circumstances. We find that the City's institution of a check replacement fee constitutes a unilateral change in a mandatory subject of bargaining. Accordingly, the Union's petition is granted.

BACKGROUND

DC 37 represents City employees in various civil service titles serving in many different City agencies. DC 37 and the City are parties to several unit collective bargaining agreements, as well as the Citywide Agreement. The City's payroll for employees serving in all City agencies is disbursed by OPA, whose mission, as stated on its website, is the following:

> [E]nsuring timely and accurate employee and retiree payrolls and providing responsive payee services; maintaining and enforcing uniform payroll policies and procedures; coordinating payroll matters among central agencies including the Comptroller's Office, the [Department of Citywide Administrative Services], the [Office of Labor Relations], the [Office of Management and Budget], the [Department of] Finance, and [the] Law [Department]; ensuring the continued security, integrity, and effectiveness of the City's payroll systems; using technology to the greatest possible advantage in support of payroll operations; ensuring compliance with requirements of federal, state, and City taxing authorities; and managing and reconciling the City's payroll accounts.

(Rep., Ex. A).

In a letter to the Chair of the Municipal Labor Committee ("MLC"), dated May 1, 2009, the Commissioner of Labor Relations stated that OPA would be instituting a fee in order to recover

some of the cost associated with replacing paychecks:

> Starting July 1, 2009, the City will charge employees a Check Replacement fee of $55.00 if the employee was responsible for the loss or damage to the check. This fee will be deducted from the replacement check. The Check Replacement fee will be waived if the employee enrolls for direct deposit.

(DC 37 Pet., Ex. A). DC 37, a member of the MLC, responded to the Commissioner in a letter dated June 9, 2009, stating that the City's decision to unilaterally implement a check replacement fee schedule was a mandatory subject of collective bargaining, and further stated:

> The Union has been made aware of the City's plan to unilaterally implement a check replacement fee schedule. This is a mandatory subject of collective bargaining and we are requesting a meeting to begin negotiations over the impact of this fee.

(DC 37 Pet., Ex. B).

According to the City, it utilizes a Check Replacement Unit, which employs a staff whose job duties are dedicated exclusively to check replacement processing. Also, the City asserts that although it charges employees an administrative fee of only $55 to replace a pay check, the actual cost incurred by the City per check replaced is $61.58. The City further asserts that this service costs OPA approximately $567,179 per year. Under the new policy, the City will waive the $55 fee under various circumstances, such as if the employee elects to enroll in direct deposit, if the employee submits evidence of extenuating circumstances to show the check was lost or stolen through no fault of the employee, and if an employee submits an affidavit declaring that the check was never received.

POSITIONS OF THE PARTIES

Union's Position

DC 37 asserts that the City's implementation of a fee to replace lost or damaged paychecks violates the NYCCBL § 12-306(a)(1) and (4) as it amounts to a unilateral change in a term or condition of employment.[1] This new fee falls within the meaning of wages under the NYCCBL, a mandatory subject of bargaining, and as such, a change may not be instituted without good faith bargaining. In support of its position, DC 37 cites to several cases, most notably *CIR*, 49 OCB 22 (BCB 1992), where employees had to choose between continuing to be exempt from FICA requirements if they participated in a retirement plan or opting out of the retirement plan and thereby becoming subject to the payroll deductions. In *CIR*, the Board embraced a broad view of "wages" to include discretionary changes in the withholding of pay. This Board has also found to be mandatorily negotiable deductions of salary, methods of calculating pay, and other matters related to salary payment. *DC 37*, 69 OCB 20 (BCB 2002). The New York State Public Employee

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[1] Section 12-306 of the NYCCBL provides, in pertinent part:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

NYCCBL § 12-305 provides, in relevant part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

Relations Board ("PERB") has likewise found mandatorily negotiable matters such as these, where it required bargaining to determine reductions in salary and recoupment procedures, as well as the discontinuance of free transportation. *Westchester County COBA*, 33 PERB ¶ 3025 (2000), *City of New York*, 9 PERB ¶ 3076 (1976).

DC 37 also argues that payroll deductions may be considered "as a constitutional matter" as has been held by the New York Court of Appeals, which has opined that "a 10% payroll deduction can have a substantial impact on an employee already confronted with expenses for the necessities of life." (DC 37 Mem. of Law at 6). In addition, the City is required to bargain over the procedure it implements to collect the fee. Under *Albany Police Officers Union*, 23 PERB ¶ 4531 (1990), the City is required to bargain over the procedure by which it implements payroll deductions.

In response to the City's arguments discussed below, DC 37 asserts that characterizing the replacement fee as optional is not a proper use of the word, as choosing to pay the fee or to not get paid is not truly an option. The City's decision to unilaterally impose this new fee shifted the costs of covering the expense from the payor to the payee, and is a "fundamental reordering of the wage landscape[, which] calls out for [citywide] collective bargaining." (Rep., ¶ 30). As the "recognized collective bargaining representative for citywide matters," DC 37 properly brings this petition as it is the "sole and exclusive bargaining representative" for such an issue. (Rep., ¶ 34).

Furthermore, DC 37 contends that the City's deeming this a "service fee" does not remove it from being considered a mandatory subject of bargaining. Charging of such a fee is not a matter that may be exempted from bargaining as being at the "core of entrepreneurial control." (Rep., ¶ 38). Also, the cases that the City cites to regarding fees for promotion and fees related to paperwork for newly hired employees are distinguishable as they are not related to requiring fees to obtain

wages already earned and due to the employee, pursuant to a collective bargaining agreement.

As relief, DC 37 requests that the Board order the City to cease and desist from charging the check replacement fee, rescind policies related to check replacement fee, bargain in food faith over such a fee and the procedures to implement the fee, reimburse bargaining unit members that have been assessed the fee, and post appropriate notices.

City's Position

Regarding the Union's challenge to the check replacement fee, the City argues that it did not violate the NYCCBL because the new fee does not constitute a unilateral change in a term or condition of employment. The policy concerns a non-mandatory subject of bargaining as it does not fit within the meaning of wages under the NYCCBL. The employees are only charged these fees on a voluntary and optional basis. Moreover, they are not charged the fee if they enroll in the direct deposit program for a one year period. The OPA fees are not an "emolument of value," which is necessary to constitute a "wage" under the National Labor Relations Act. (Ans., ¶ 50).

The policy is also a non-mandatory subject of bargaining because it applies to and affects a group much larger than the membership of the petitioning union. The policy applies uniformly to any City employee, including the unit employees, managerial employees, exempt employees, and retired employees.

Further, the new policy does not violate the NYCCBL as it relates directly to OPA's core mission and, therefore, is a managerial right pursuant to NYCCBL § 12-307(b). As "OPA's main responsibility and mission is the efficient and expeditious disbursement of the City's payroll . . . [c]harging service fees related to this core mission clearly lies within the core of OPA's entrepreneurial control." (Ans., ¶ 70). The City also "noted that the employee's check has already

been provided once at cost to the City . . . . [and] [t]he costs to the employee for providing this service are less than what it costs. . . OPA to provide this service." (Ans., ¶¶ 75, 76).

Instituting this new policy is consistent with the City's past practice of deducting administrative fees from employee pay checks, such as the processing fee charged by the Department of Citywide Administrative Services in conjunction with employment applications. Management has no obligation to accommodate employee preferences regarding the way in which fees will be paid. Further, the City is required to charge this fee in order to provide the level of service it does, and "[a]s it is a management right to determine the standards of service to be offered by its agencies and to determine how to run its business, the City should not be required to revise duties and job specifications of staff, employ additional staff, and/or alter its methods of processing payments, in order to accommodate employee preference for payment options, where, as here, the City is providing a service to those employees." (Ans., ¶ 85).

Finally, the City asserts that as it did not violate the duty to bargain under § 12-306(a)(4), there can be no derivative violation of § 12-306(a)(1). Also, the Union did not assert facts necessary to support a claim of an independent violation of § 12-306(a)(1).

DISCUSSION

Pursuant to NYCCBL § 12-307(a), public employers and employee organizations have a duty to bargain in good faith concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment. *DC 37*, 75 OCB 8, at 6-7 (BCB 2005). Under NYCCBL § 12-306(a)(4), an employer commits an improper practice when it refuses to bargain in good faith on matters within the scope of collective bargaining. *DEA*, 2 OCB2d 9

(BCB 2009). Therefore, under our law an employer commits an improper practice when it makes a unilateral change in a term and condition of employment. *Id.*

Pursuant to NYCCBL § 12-307(a), "wages" are mandatorily negotiable and have been found to include "direct and immediate economic benefits flowing from the employment relationship." *Local 621, SEIU,* 2 OCB2d 27, at 10 (BCB 2009) (internal citations omitted). Additionally, it is well established that pay deductions are mandatorily bargainable. *DC 37,* 65 OCB 36 (BCB 2000). We have explicitly held "the term 'wages' also embraces within its meaning . . . discretionary change[s] in payroll withholding." *CIR*, 49 OCB 22, at 14 (BCB 1992). The New York Court of Appeals has affirmed our conclusion "that payroll deductions affect wages and were therefore a matter within the scope of collective bargaining." *Levitt v. Board of Coll. Barg.*, 79 N.Y.2d 120, at * 130 (1992). Moreover, as PERB has made clear, an employer commits an improper practice when it unilaterally imposes a fee for a service it had previously provided for free. *State of New York*, 6 PERB ¶ 3005 (1973); *see also Board of Educ. of the City School Dist. of City of New York,* 42 PERB ¶ 4568 (2009). We find, consistent with these decisions, that the undisputed prior practice of permitting employees to receive a replacement check at no cost, prior to the institution of the new fee, constituted an economic benefit, and its unilateral revocation constitutes an improper practice.

The City asks the Board to consider the "optional" nature of the fee; however, "voluntary participation by individual employees in procedures relating to mandatorily negotiable subjects of bargaining [does not remedy] a failure to negotiate with the certified bargaining agent." *DC 37*, 79 OCB 37, at 12 (BCB 2007) (City violated its duty to bargain when it unilaterally established a new mediation program as an alternative process to resolve disciplinary matters). Therefore, the fact that employees have the option of not being charged this fee, either by not requesting a replacement check,

or by enrolling in direct deposit, does not affect our finding. *Id.*

Further, the City asks us to consider as a "past practice" that various agencies throughout the City charge fees to perform various services. However, as it is undisputed that the City was not charging a fee for this particular service, and that, therefore, employees were receiving this service at no expense, this claimed past practice is not relevant to our determination of whether the City must bargain over the newly imposed check replacement fee. If anything, the relevant past practice here is the City's undisputed past practice of issuing replacement checks free of charge. A "past practice" is one that "was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged." *Local 621, SEIU*, 2 OCB2d 27, at 12 (citing *County of Nassau*, 38 PERB ¶ 3005 (2005)). There is no assertion that there has ever been any practice other than providing replacement checks at no charge. Thus, while it may be true that providing this service involves and always involved a cost to the City, the City may not unilaterally shift part or all of that cost to its employees without first bargaining in good faith.

The City also contends that because this new policy applies to and affects all City employees, a group much larger than the petitioning union's membership, this policy may not be considered a mandatory subject of bargaining. In support of this position, the City cites several PERB cases in which PERB found that employers were not required to bargain over policies applying to the public at large, including *State of New York*, 13 PERB ¶ 3099 (1980), *State of New York*, 19 PERB ¶ 3029 (1986), and *Roswell Park Cancer Inst.*, 34 PERB ¶ 4582 (2001). However, those cases are distinguishable from the instant matter in that all of them concerned an impact on employees in their capacity as members of the public and did not arise out of the employment relationship. While "it has long been held that employer action which is intended to, and in fact does, apply to a group

composed only in part of public employees, does not encompass terms and conditions of employment.and is not mandatorily negotiable," such is not the case here, where only City employees are affected by the paycheck replacement fee. *Roswell Park Cancer Inst.*, 34 PERB ¶ 4582 at 4773. Moreover, as DC 37 correctly indicated, that Union is the citywide representative for collective bargaining and therefore the proper party to bring this action on behalf of all city employees for whom certain terms and conditions must be uniform, pursuant to NYCCBL § 12-307(a)(2).

The City also asks us to consider this issue under a core mission analysis. An agency's "core mission" may be considered as part of a balancing of interests conducted by the Board in circumstances in which the disputed action is not expressly or implicitly included in the statute's definition of mandatory subjects of bargaining and in which it is unclear whether the action involved is a term and condition of employment that must be bargained. *CEU, Local 237, IBT*, 2 OCB2d 37 (BCB 2009); *see also Unif. Firefighters Assn. v. City of New York*, 79 N.Y.2d 236, 241-242 (1992) (quoting *Levitt v. Bd. of Coll. Barg*., 79 N.Y.2d at 127; *Bd of Educ. City Sch. Dist City of NY v. NYS PERB*, 75 NY2d 660, 670-671 (1991). However where, as here, the matter concerns an express mandatory subject of bargaining, "wages," we need not consider whether the issue falls within any agency's "core mission," be it OPA, or otherwise.

Based on the above, we find that by unilaterally imposing the check replacement fee, the City has violated its duty to bargain under § 12-306(a)(4), and has likewise derivatively violated § 12-306(a)(1).

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 improper practice petition Docket No. BCB-2787-09 is granted, and it is further

ORDERED, that the City violated NYCCBL § 12-306(a)(1) and (a)(4) by failing to bargain in good faith over its unilateral implementation of the check replacement fee; and it is further

ORDERED, that the City rescind its implementation of the check replacement fee; and it is further

ORDERED, that the City reimburse employees charged this check replacement fee.

Dated: New York, New York
January 25, 2010

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER