USA, Local 831, 3 OCB 2d 6 (BCB 2010)

(IP) (Docket No. BCB-2788-09).

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 Union additionally challenged various other payroll-related fees. The City argued that the new fee did not constitute a unilateral change in a term or condition of employment and that the fee was a non-mandatory subject of bargaining, and that the policy is a managerial right. The City also argued that the Department of Sanitation must be dismissed as a respondent because it did not implement, enforce, or profit from this new policy, and to the extent that the Union's petition pertains to fees other than the replacement check fee, the petition should be dismissed as untimely. The Board found that by implementing the new check replacement fee, the City made a unilateral change in terms and conditions of employment. The Board ordered a hearing on the timeliness of the other claims. Accordingly, as to the check replacement fee, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

THE UNIFORMED SANITATIONMEN'S ASSOCIATION, LOCAL 831, I.B.T.,

Petitioner,

-and-

THE CITY OF NEW YORK, *et al.*

Respondent.

INTERIM DECISION AND ORDER

On July 31, 2009, the Uniformed Sanitationmen's Association, Local 831, I.B.T. ("Union" or "USA") filed an improper practice petition, amended on August 27, 2009, against the City, the

Department of Sanitation of the City of New York ("DOS"), the Office of Labor Relations, and the Office of Payroll Administration ("OPA") claiming that the City violated New York City Collective Bargaining Law ("NYCCBL") § 12-306(a)(1) and (4), and § 12-307(a) when DOS unilaterally instituted a new payroll policy, which assessed a fee for replacing a lost or stolen paycheck. The Union additionally complained of several other newly instituted fees for employees, including a fee to obtain a copy of a payroll statement, a fee to obtain a copy of an earnings report, a fee to obtain a copy of a paid check, and a fee to obtain a copy of a W-2 or 1127 tax form for any tax year prior to the past three years.

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 OPA's core mission and is consistent with the City's past practice of charging fees under other circumstances. Also, the City argues that DOS must be dismissed as a respondent because it did not implement, enforce, or profit from the fee policy instituted by OPA. To the extent that the Union's petition pertains to the fees other than the fee to replace a paycheck, the petition should be dismissed as untimely.

We find that the City's institution of a check replacement fee constitutes a unilateral change in a mandatory subject of bargaining. Accordingly, as to the check replacement fee, the Union's petition is granted. As the record does not contain sufficient evidence to determine whether the Union's allegations concerning other fees were timely raised, we order a hearing on this issue.

BACKGROUND

USA represents the Sanitation Workers employed by the DOS. The City's payroll for employees serving in all City agencies is disbursed by OPA.

On July 10, 2003, OPA issued a memo to "All Concerned Agencies," concerning "Fees for Services," which states in pertinent part:[1]

> Effective July 7, 2003, the Office of Payroll Administration will charge the following fees for certain services as follow[s]:
>
> | Service | Fee |
> |---|---|
> | Request for a Copy of a Payroll Register | $22.00 |
> | Request for a Copy of an Earnings Report | $22.00 |
> | Request for a Copy of a Paid Pay Check | $22.00 |
> | Request for a Copy of a W-2 or 1127 Statement | $5.00 |

(Ans., Ex. 1). The City asserts that other City agencies, such as the Department of Citywide Administrative Services and the Department of Investigation, also charge fees related to employment. Further, according to the City, as explained below, the City incurs expense in order to issue replacement checks. On July 10, 2009, DOS's Deputy Director of Human Resources/Payroll Administration distributed a memorandum regarding payroll to all DOS supervisors, which reads in pertinent part:

> Fees for Services
>
> Effective July 01, 2009, [OPA] will charge the following fees for

[1] The City does not allege that a copy of this OPA memo was sent to the Union.

certain services as follows:

– Replacement Check Charge (For lost or stolen checks)	$55.00
– Request for a copy of Payroll Statement	$22.00
– Request for a copy of an Earnings Report	$22.00
– Request for a copy of a paid Pay Check	$22.00
– Request for a copy of a W-2 or 1127 (For a tax year prior to the last three tax years.)	$5.00

A city employee enrolled in Direct Deposit never requires a PMS replacement check. There is no charge, if the employee enrolls in Direct Deposit within 30 days and remains enrolled for more than 1(one) year or the employee was not responsible for the loss. The $55 fee will be deducted from the net pay of the OPA replacement Check.

(Pet., Ex 1).[2]

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.

[2] USA did not number this document. For the purposes of this decision, the document will be referred to as "Pet., Ex 1."

POSITIONS OF THE PARTIES

Union's Position

The Union submits that its claims regarding all of the fees are timely. The City argued that the fees other than the check replacement fee were untimely, and cited to an internal City memorandum written in 2003 that discusses adopting such fees. However, this document, which was sent by OPA to the management of other agencies, does not prove that the Union was given notice of the new fees.

Regarding the substantive matters, the Union argues that by implementing this new policy, the City violated its duty to bargain over actions affecting wages in violation of NYCCBL § 12-306(a)(1) and (4) and 12-307(a).[3] Prior to this new policy, Union members could receive replacement checks and earning-related materials without being charged. However, after the implementation of the new policy, these employees no longer have this benefit; and "[w]here the imposition of a new fee negates a benefit previously conferred upon employees by their employer,

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[3] NYCCBL §12-307(a) states in pertinent part that:

> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law, but in no event exceeding sums equal to the periodic dues uniformly required of its members by such certified or designated employee organization and for the payment of the sums so deducted to the certified or designated employee organization, subject to applicable state law.

thereby resulting in a reduction in pay, there is a direct impact on wages, terms and conditions of employment." (Pet., ¶ 15). Payment of wages and related procedures are mandatory subjects of bargaining, and thus the City violated the NYCCBL when it unilaterally implemented this new policy. In support of its position, the Union cites to several Board and PERB decisions, most notably *DC 37*, 65 OCB 36 (BCB 2000), in which the Board held that the manner in which disciplinary fines could be deducted from salaries was a mandatory subject of bargaining. Further, the Union cites *DC 37*, 59 OCB 13 (BCB 1998) for the proposition that where the imposition of a new fee removes a previously available benefit, such an action has a direct impact on wages, terms and conditions of employment.

In response to the City's stated defenses, the Union asserts that the City misapplies the "core mission" doctrine, relating it to OPA, not to DOS, even though Union members are employed by DOS. The City's decision to have one agency provide payroll services to other agencies does not excuse the employing agency from bargaining over terms and conditions of employment. The City also misapplies the "core mission" doctrine as to OPA in that an agency cannot assert that it provides services to its own employees and thereby deem terms and conditions of employment as part of its core mission. Further, the new fees affect only current and former City employees, not the public-at-large. Thus, the cases cited by the City, which concerned actions taken to the public-at-large with incidental effects on employees, actually support USA's position. Also, the City's past practice was to provide free of charge the services for which it has instituted fees; the City may not now change its past practice without good faith bargaining. Finally, the City does not contradict the Union's claim that the definition of "wages" should be broadly interpreted.

In response to the City's contention that a fee is not an emolument of value, the Union asserts

that charging a fee for a service previously provided without charge indeed is a reduction in the value of employee compensation.

In addition to its request that the Board find that Respondents violated NYCCBL §§ 12-306 (a)(4), 12-306 (a)(1), 12-307(a), the Union requests that the Board order Respondents to cease and desist from charging the fees at issue, that the Board require the City to reimbure bargaining unit members that have been charged such fees, and order that Respondents bargain in good faith over imposing the fees and deducting them from employee paychecks.

City's Position

Regarding the Union's claims on the check replacement fee, the City argues that it did not violate the NYCCBL because the new fee did 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., ¶ 77).

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., ¶ 97). 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., ¶¶ 102, 103).

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., ¶ 111).

The City also argues that DOS is not a proper party and must be dismissed as a respondent because it did not implement, enforce, or profit from the policy instituted by OPA. The fee was implemented by OPA; DOS neither instituted the fee, nor does it have the ability to modify or remove the fee, and therefore any remedy is not within DOS's control. Dismissing DOS as a respondent would not prejudice the Union in any way.

Additionally, the Union's petition pertains to the fees other than the replacement paycheck fee. Although the Union alleges that the City implemented these fees for the first time in July 2009, OPA has in fact assessed these fees since 2003. Therefore the petition, filed in 2009, should be

dismissed as untimely.

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, facts have not been asserted to support a claim of an independent violation of § 12-306(a)(1).

DISCUSSION

The City claims that the Union's allegations concerning fees other than the check replacement fee are untimely on the ground that the City has been charging such fees since 2003. Under NYCCBL § 12-306(e), claims of violations of the NYCCBL must be made within four months of the accrual of the claim, when a petitioner knew or should have known that the action in question occurred.[4] *Nardiello,* 2 OCB2d 5, at 28 (BCB 2009), *see also* § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). In support of its contention, the City presented a memorandum sent by OPA to "All Concerned Agencies," which detailed new fees for certain services. The Union denies that it had received a copy of this memorandum and argues that this document does not establish that the Union was given constructive notice of the change. Because the record does not contain sufficient evidence to determine the point at which the Union had effective notice of the changes, we will direct the holding of a hearing on the question of whether the Union's claims concerning these other fees were

[4] NYCCBL § 12-306(e) provides in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

timely filed.

Regarding the check replacement fee, for the reasons discussed in the companion case *DC 37,* 3 OCB2d 5 (BCB 2010), we find that the City violated the NYCCBL by unilaterally changing a mandatory subject of bargaining when it implemented this fee without bargaining.

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 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, DOS or otherwise. Moreover, the fact that the employing agency, for example, DOS in the case of USA, was not responsible for creating or implementing the new fee, which was created by OPA, does not prevent or preclude the fee from being considered as an action of the City. *See Lieutenants Benev. Assn*, 63 OCB 23 (BCB 1999), *aff'd Lieutenants Benev. Assn v. City of New York*, No. 403410/99 (Sup. Ct. N.Y. Co. Oct. 27, 1999), *aff'd*, 285 A.D.2d 329, 730 N.Y.S.2d 78 (1st Dept 2001) (City violated NYCCBL § 12-306(a)(4) when the New York City Department of Finance unilaterally implemented of a new requirement that NYPD employees submit certain financial information).

We also reject the City's claim that because DOS did not implement the fee, it is not a proper

party to this action. DOS is the employing entity of the affected employees and is a proper party to this proceeding. As the dispute involves a claimed unilateral change in DOS employees' economic benefits, there is a sufficient connection to DOS to warrant retaining them as a party to this case. We see no prejudice to DOS remaining as a party in this matter. Further, in *DC 37,* 3 OCB2d 5 (BCB 2010), we found that DC 37, as the citywide representative, was the proper party to bring an improper practice petition on behalf of city employees for whom certain terms and conditions must be uniform, pursuant to NYCCBL § 12-307(a)(2). Similarly, pursuant NYCCBL § 12-307(a)(4), USA as representative of the Sanitation Workers, members of a uniformed force, is the proper party to bring this failure to bargain improper practice petition.

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-2788-09 be granted in part; 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; and it is further

ORDERED, that a hearing be held on the timeliness of the claims regarding the fees, other than the check replacement fee, listed in the Union's petition.

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