UFT, 4 OCB2d 2 (BCB 2011)

(IP) (Docket No. BCB-2806-09).

Summary of Decision*:** The Union alleged that the City violated NYCCBL § 12-306(a)(1), (4) and (5) when, during on-going negotiations for a first-time collective bargaining agreement, it ceased paying Hearing Officers (Per Session) for time scheduled to work but superseded by jury service which it paid prior to the time at issue. The City asserted that the Union's allegations were untimely, concerned a non-mandatory subject of bargaining, and failed to establish a violation of the *status quo*. The Board found the petition timely. It also found that the City's admitted failure to negotiate over the wage issue violated § 12-306(a)(4) and that its change to the *status quo* violated § 12-306(a)(5). The Board also found that these actions violated § 12-306(a)(1) derivatively and granted the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On October 6, 2009, the United Federation of Teachers, Local 2, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") on behalf of their members in the title Hearing Officer (Per Session) ("Hearing Officer") employed at the Environmental Control Board ("ECB"). The Union claims that the City violated the New York City

Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") §§ 12-306(a)(1), (4) and (5) when, during on-going negotiations for a first collective bargaining agreement, it ceased paying Hearing Officers for previously scheduled work hours superseded by jury service ("jury service hours"), which it paid prior to the time at issue. The City asserts that the Union's complaint is untimely, that the matter does not concern a mandatory subject of bargaining, and that the petition fails to establish a violation of the *status quo* requirement of NYCCBL § 12-311(d). The Board finds that the petition is timely, that the City's admitted failure to bargain over compensation violated NYCCBL § 12-306(a)(4), and that the unilateral change affected the *status quo* thus violating NYCCBL § 12-306(a)(5). Accordingly, the petition is granted.

BACKGROUND

In September 2007, the Union was certified as the exclusive collective bargaining representative for Hearing Officers. Some Hearing Officers are employed at the ECB, which is the administrative tribunal that adjudicates "quality of life" infractions such as illegal dumping, abandoned vehicles, dirty sidewalks, unlicensed street vendors, and building and fire codes. The City asserts, and the Union does not deny, that, in June 2008, the Union sought bargaining for an initial Collective Bargaining Agreement ("CBA"). Negotiations have been continuing since then.

In August 2008, the City Council enacted Local Law No. 35, which placed the ECB under the Office of Administrative Trials and Hearings ("OATH"), instead of the Department of Environmental Protection ("DEP") under which it previously operated. There is no dispute that,

prior to August 2008, the City paid Hearing Officers for jury service hours.[1] However, the City asserts that since ECB's reorganization as part of OATH in August 2008, the City has not paid Hearing Officers for jury service hours.

The Union asserts that Hearing Officer Myra Michael was called to jury duty on June 15, 16, and 17, 2009. Before being selected for jury service, she was scheduled to work at ECB on June 16, 2009, plus two other dates, June 23 and 26, 2009. She was ultimately empaneled to serve at a trial from June 19 through June 29, 2009. On June 19, 2009, Michael emailed the Director of Human Resources at OATH to inform the agency that she had been selected to serve on the jury and to request her regular pay for the days that she had been scheduled to work at ECB but would be on jury duty. Three days later, the OATH Human Resources Director responded by forwarding the request to the OATH Payroll Manager. On June 23, 2009, the OATH Payroll Manager responded that:

> According to the NYC Leave Regulations, while full time and part [time] employees who submit the required documentation shall be paid their salaries when they serve jury duty during their regularly scheduled hours of work, per diem Hearing Officers are not. Therefore, you must fill out the required paperwork from the Supreme Court to acquire the $40 fee.

(Michael Affidavit, Exhibit B). Michael asserts that she asked the OATH Payroll Manager to direct her to the specific section in the leave regulations which denied Hearing Officers their regular pay for time spent on jury duty but that she received no response.[2] (*Id.*).

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[1] The payment at issue herein is distinct from any payment by the Office of Court Administration for jury service.

[2] The leave regulations were not made a part of the record but are not dispositive of the issues before us.

As relief, the Union seeks an order requiring the City to cease and desist from changing terms concerning mandatory subjects of bargaining such as wages paid for jury service hours; to reinstate the *status quo* regarding payment of wages for jury service hours; to make such unit members whole who have not been paid for jury service hours, including back pay; to bargain over imposing changes in payment of wages to such unit members for jury service hours and related procedures; and for other, appropriate relief such as the Board finds.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the instant complaint accrued in June 2009 when the change at issue came to the Union's attention, not when the change actually took place. The change came to the Union's attention when Michael lodged the instant complaint in June 2009 about not being paid. Thus, the Union contends that the instant petition was timely filed in October 2009, within the four-month limitations period prescribed under Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").[3]

[3] Section 1-07(b)(4) of the OCB Rules provides, in pertinent part:

> One or more public employees or any public employee organization acting on their behalf or a public employer may file 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 § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

The Union argues that the City violated NYCCBL § 12-306(a) (1), (4), and (5) by changing the policy of paying Hearing Officers for days they were scheduled to work at ECB but were subsequently called for jury service and did so during a period of on-going negotiations.[4] As wages are a mandatory subject of bargaining, the Union argues that the City's unilateral change in Hearing Officers' wages violates NYCCBL § 12-306(a)(4). Moreover, the Union asserts that the City's own contention that bargaining had formally been requested in June 2008, two months before OATH subsumed ECB, establishes that the parties were in a period of negotiations when the change at issue here took place. Thus, the Union argues that the new policy changes the *status quo* concerning wages during the on-going period of contract negotiations, violating NYCCBL § 12-306(a)(5).[5]

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[4] NYCCBL § 12-306(a) provides in pertinent part:

> 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;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.
>
> NYCCBL § 12-305 provides, in pertinent 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 . . . .

[5] NYCCBL § 12-311(d) provides, in pertinent part:

City's Position

The City does not deny that, before August 2008, ECB paid Hearing Officers for jury service hours but the City contends that ECB stopped that practice in August 2008 when OATH assumed jurisdiction over ECB. Although the City does not allege that notice was provided by it to the Union, the City alleges that the claim accrued at that time. Thus, the City alleges, the instant petition has been filed well outside the applicable limitations period.[6]

The City contends that the Union cannot establish its claim on the merits because no enforceable policy or past practice existed. Since the policy was not reduced to a writing and was not contained in any agreement, the Union must demonstrate not only that the matter concerns a

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

[6] The City did not assert a timeliness defense in the Answer but raised it at the case conference. The Trial Examiner ascertained subsequently that the parties had supplemented the record to their own satisfaction, and to the extent required for this determination, and closed the record. *See City of Elmira*, 41 PERB ¶ 3018 (2008) (holding that charging party created sufficient record to warrant examination of timeliness issue by presenting evidence during its *prima facie* case), citing *Town of Hempstead*, 26 PERB ¶ 3063 (1993) (holding that an ALJ may raise and rule on the issue of timeliness *sua sponte* following the closure of the evidentiary record).

mandatory subject of bargaining but that the asserted practice was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to create an expectation that the practice would continue. The City contends that OATH's assuming jurisdiction over ECB is the furthest back in time the practices at issue can be looked to under this definition, and since any practice in this regard took place before ECB was subsumed under OATH, the practice at issue does not meet the criteria required to create an expectation that the practice would continue.

Even if the Board were to find a consistent practice, the City maintains that the Board has declined to treat a past practice presumptively as a mandatory subject of bargaining in the absence of an existing collective bargaining agreement. Thus, the City contends that a change in a past practice involving a mandatory subject of bargaining is not deemed to be a violation of the *status quo* provisions of the NYCCBL in the absence of an existing CBA. Although the City itself identifies the date of the Union's bargaining-demand notice as June 2008, the City emphasizes that there is no current or previous collective bargaining agreement upon which to base the *status quo*. Thus, the City contends that the Union fails to support its claim that NYCCBL § 12-306(a)(5) has been violated.

Pursuant to NYCCBL § 12-307(b), certain subjects are reserved to the public employer, particularly those matters pertaining to determining job assignments, to determine the method, means and personnel by which governmental operations are to be conducted and the right to determine necessary levels of staffing. Included in that prerogative is the right to determine the method, means and personnel by which the ECB's functions are to be conducted including whether ECB Hearing Officers will be paid for work scheduled but jury service hours. Thus, the City has no bargaining obligation here and has not violated any duty to bargain.

DISCUSSION

We first address the timeliness of the instant petition. The City contends the Union's failure to raise the instant complaint within four months of OATH's change of the asserted past practice at issue here vitiates the charge. We find the City's argument unavailing. *See OSA*, 1 OCB2d 45, 9-10 (BCB 2008) (petition timely filed when union acquired knowledge of facts giving rise to complaint concerning employer's failure to provide union with information about title change); *DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008).

An improper practice charge "must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *affd*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and OCB Rule § 1-07(d))[7]; *see also Tucker*, 51 OCB 24, at 5 (BCB 1993); *but compare UFA*, 3 OCB2d 13 (BCB 2010) (petition not timely filed for want of factual assertion that union did not know about start of pilot program for firefighters on light duty).

[7] 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. . . .

OCB Rule § 1-07(d) 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 Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . .

We do not necessarily consider an action to have occurred on the date a party announces an intended change. The statute of limitations begins to run "after the intended action is actually implemented and the charging party is injured thereby." *DC 37, L. 1508,* 79 OCB 21, at 19 (BCB 2007). Here, no agency-wide announcement was made as to the change as to payment for jury service hours. Nor does the City claim that any notification of this change was provided before June 23, 2009, when Michael received the OATH payroll manager's email stating that Michael would not receive pay for her jury service hours. Thus, we find that the City has not provided any evidence that the Union had notice of the change until June 2009, when Hearing Officer Michael sought to avail herself of it. *UFA*, 77 OCB 39, at 12-13 (BCB 2006); *USA L. 831*, 3 OCB2d 6, at 9-10 (BCB 2010). We find that the Union has appropriately interposed itself upon discovering the injury to its member, and that, accordingly, the petition timely was filed October 6, 2009, less than four months after the Union's discovery of that injury. *See SSEU, L. 371,* 79 OCB 34, at 7 (BCB 2007); *DC 37,* 47 OCB 6, at 8 (BCB 1991).

The City also contends that the refusal to bargain over payment for jury service hours falls within the ambit of NYCCBL § 12-307(b), and is thus not a mandatory subject of bargaining. However, this section does not address the subject at issue, concerning itself instead with matters such as management's right to determine job assignments and the right to determine necessary levels of staffing. The change at issue here does not involve any of these subjects; rather, it is about non-payment of wages. The NYCCBL provides, in pertinent part:

> [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). . . .

Section 12-307(a).

The subject of wages constitutes a mandatory subject of bargaining. *See Local 1757, DC 37*, 67 OCB 10, at 13 (BCB 2001). However, what constitutes "wages" is not limited to base pay; it includes other monetary benefits. *PBA* 3 OCB2d 18 (BCB 2010) (college loan repayment program); *DEA*, 2 OCB2d 11 (BCB 2009) (parking permits); *PBA* 1 OCB2d 14 (BCB 2008) (uniform allowances part of wages). Similarly, we find that pay for jury service hours is a mandatory subject of bargaining, as a monetary benefits other than base pay.

There is no dispute that the ECB routinely paid Hearing Officers for jury service hours before ECB was subsumed under OATH. There is also no dispute that ECB stopped paying for jury service hours, and that was sufficient to constitute a change. Under NYCCBL § 12-306(a)(4), a public employer commits an improper practice by "refusing to bargain collectively in good faith on matters within the scope of collective bargaining." *DC 37, L. 1457*, 1 OCB2d 32, at 26 (BCB 2008). Here, the City admits that it did not bargain over the agency's decision to withhold pay for jury service on regularly scheduled work days. Thus, we hold that ECB violated NYCCBL § 12-306(a)(1) and (4) for failing to negotiate over the decision not to pay in such circumstances.[8]

Finally, under NYCCBL § 12-306(a)(5), it is an improper practice "to unilaterally make any change as to any mandatory subject of collective bargaining *or* as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization." (Emphasis added). There is no requirement in the statute that the change evince the kind of regularity and duration needed to establish a formal "past practice" in the context of

[8] A public employer found to have committed either such violation also derivatively violates NYCCBL § 12-306(a)(1). *UFT*, 3 OCB2d 44 (BCB 2010).

arbitration or contract interpretation, although we have in the past adverted to such criteria in resolving a dispute as to the existence of a policy or practice in order to determine the *status quo* alleged to have been changed. *See, e.g., UFT*, 3 OCB3d 44, at 9-10 (BCB 2010).

Here, the City admits that the ECB had, prior to August 2008, regularly and consistently paid Hearing Officers for jury service hours. The City's admission of the existence of the practice renders the practice sufficiently unequivocal that the change constituted an alteration to a mandatory subject of bargaining, wages. As in *UFT*, we here find the *status quo* at issue to have been that at ECB, the agency which employs the Hearing Officers in question, and not at OATH itself or any other agencies now under OATH's jurisdiction. *UFT*, 3 OCB2d 44 at 10. We also find that the City departed from the practice it previously followed. We, thus, conclude that the City violated NYCCBL § 12-306(a)(5).

The City's contention that there is no collective bargaining agreement upon which to base a *status quo* was previously asserted, and rejected, in *UFT*, 3 OCB2d 44. As we stated in that case, "[t]he language of the statute is unambiguous – an existing collective bargaining agreement is not a condition precedent to invoking the *status quo* provision." *Id.*, 3 OCB2d 44, at 10 (quoting *USCA*, 67 OCB 32, at 7 (BCB 2001). Thus, establishing a violation of NYCCBL § 12-306(a)(5) requires only that the change to a mandatory subject of bargaining be made during a "period of negotiations." *Id.* Such is the case at bar. The parties agree that they began bargaining for an initial CBA in June 2008 and that negotiations continued as of the date that the instant petition was filed. Accordingly, we find that the City's admitted failure to negotiate over the wage issue violated NYCCBL § 12-306(a)(4), that its change in the *status quo* concerning payment of wages for jury service hours

violated § 12-306(a)(5), and that these actions violated § 12-306(a)(1) derivatively. The instant petition is granted in its entirety.[9]

[9] Payment for jury service hours as the phrase applies in this case is, in no way, intended to abrogate any obligation on the part of any such employee which may arise pursuant to payment by the Office of Court Administration for jury service.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, the improper practice petition filed by the United Federation of Teachers, Local 2, AFL-CIO, docketed as BCB-2806-09 be, and the same hereby is, granted in its entirety; and it is further

ORDERED, that the City of New York rescind the new practice of denying payment of wages to Hearing Officers (Per Session) assigned to work at the Environmental Control Board for jury service hours, and reinstate the *status quo* regarding payment of wages to such unit members who perform jury service; it is further

ORDERED, that the City of New York cease and desist from implementing new changes in the payment of wages at issue herein until such time as the parties bargain over any such changes; and it is further

ORDERED, that the City of New York make whole by awarding back pay to such Hearing Officers (Per Session) assigned to work at the Environmental Control Board during jury service hours, with the proviso that payment for jury service hours as the phrase applies in this case is, in no way, intended to abrogate any obligation on the part of any such employee which may arise regarding any payment from the court for jury service.

Dated: January 5, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA A. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 4 OCB2d 2 (BCB 2011), in final determination of the improper practice petition between The United Federation of Teachers, Local 2, AFL-CIO, and The City of New York.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby:

ORDERED, the improper practice petition filed by the United Federation of Teachers, Local 2, AFL-CIO, docketed as BCB-2806-09 be, and the same hereby is, granted in its entirety; and it is further

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ORDERED, that the City of New York cease and desist from implementing new changes in the payment of wages at issue herein until such time as the parties bargain over any such changes; and it is further

ORDERED, that the City of New York make whole by awarding back pay to such Hearing Officers (Per Session) assigned to work at the Environmental Control Board during jury service hours, with the proviso that payment for jury service hours as the phrase applies in this case is, in no

way, intended to abrogate any obligation on the part of any such employee which may arise regarding any payment from the court for jury service.

The City of New York
(Department)

Dated:_____ (Posted By)_____
_____(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material