NYSNA, 4 OCB2d 23 (BCB 2011)

(IP) (Docket No. BCB-2924-11).

Summary of Decision: The Union filed a verified improper practice and scope of bargaining petition alleging that HHC and the City unilaterally changed a term and condition of employment by instituting a new policy that will require registered nurses to wear particular-colored uniforms, in violation of § 12-306(a) (1) and (4) of the NYCCBL. The Union also argued that the new uniform policy will result in a financial impact on its members as they will need to purchase new uniforms solely to comply with the changed policy. The City argues that the policy falls within the management rights clause of the NYCCBL and that, in any event, the Union's claims of practical impact are vague and speculative. The Board found that although the determination and prescription of authorized uniforms is a management prerogative, HHC and the City must bargain over the implementation of the new policy since uniform allowances are mandatory subjects of bargaining and the parties did not exhaust their duty to bargain through the prior execution of an MOA. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

NEW YORK STATE NURSES ASSOCIATION,

Petitioner,

- and -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

The New York State Nurses Association ("Union") filed a verified improper practice and scope of bargaining petition alleging that the New York City Health and Hospitals Corporation

("HHC") and the City of New York ("City") unilaterally changed a term and condition of employment by instituting a new policy that will require registered nurses to wear color-coded uniforms based on their functions, in violation of § 12-306(a) (1) and (4) of the NYCCBL. The Union also argues that the new uniform policy will result in a financial impact on its members as they will need to purchase new uniforms solely to comply with the changed policy. The City argues that the policy falls within the management rights clause of the NYCCBL and that, in any event, the Union's claims of practical impact are vague and speculative. The Board finds that although the determination and prescription of authorized uniforms is a management prerogative, HHC and the City must bargain over the implementation of the new policy since uniform allowances are mandatory subjects of bargaining and the parties did not exhaust their duty to bargain through the prior execution of an MOA.

BACKGROUND

The City, HHC, and the Union are parties to a collective bargaining agreement ("Nurses Agreement") which covers the term from December 1, 2007 through January 20, 2010, and remains in effect under the *status quo* provisions of the NYCCBL. The Nurses Agreement covers the wages, hours, and other terms and conditions of employment for employees working as Staff Nurses and Head Nurses, among other titles. The City, HHC, and District Council 37 are parties to a collective bargaining agreement ("Citywide Agreement") which addresses certain City and HHC employees' general working conditions and other non-wage-related terms and conditions of employment.

While on duty, nurses at HHC facilities are required to wear uniforms, consisting of scrub tops, bottoms, and shoes. The prior policy, promulgated in September of 2009, did not require that

the nurses' uniforms be a particular color, just that the nurses' scrubs appear neat and professional. From 1972 until 2006, the parties' collective bargaining agreements provided for a uniform allowance, which was pro-rated at $400.00 per year in 2006, for all unit members.

On May 10, 2006, the parties executed a Memorandum of Agreement ("MOA"), which, among other things, eliminated the annual uniform allowance in order to receive the value as part of members' wages. The elimination of the uniform allowance is a recurring rate item reflected in the members' salaries as outlined in the Nurses Agreement.

On September 14, 2010, HHC distributed a letter to nurses at Jacobi Medical Center ("Jacobi") and North Central Bronx Hospital ("NCB") stating that, effective on the "target implementation date" of January 10, 2011, registered nurses would be required to wear color-coded uniforms. (Pet., Ex. A). Afterward, HHC determined that the uniform policy, which, as of March 9, 2011 had not yet been implemented, will require nurses to wear non-white scrub tops of a color to be determined, white scrub bottoms, and white shoes.[1] Once the policy goes into effect, nursing staff will be required to wear properly color-coded uniforms in order to clearly identify nursing staff.

On October 5, 2010, Leon Bell, a NYSNA Labor Relations Representative, sent a letter to Patricia Slesarchik, New York City Office of Labor Relations ("OLR") Assistant Commissioner demanding that the City and HHC meet with the Union to bargain over the decision to change the required uniform and the impact the new policy would have on its members. (Pet., Ex. B).

The Union contends that on December 14, 2010, NYSNA and the City and HHC held a meeting where Slesarchik stated that the City was not obligated to bargain either about the

[1] The Union contends that it has been determined that nurses will be required to wear blue tops.

implementation or the impact of the new uniform policy. The City denies that Slesarchik stated that the City was not obligated to bargain about either the implementation or the impact of the policy. The meeting ended without any further discussion or bargaining over the new uniform policy. On December 23, 2010, Slesarchik wrote to NYSNA indicating that OLR was willing to discuss in good faith the decision to change the uniform requirements, but reaffirmed that the decision to determine the color of the uniform worn by nurses at NCB and Jacobi is a management right. (Ans., Ex. 7).

The Union filed the instant improper practice and scope of bargaining petition on January 13, 2011.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City and HHC have unilaterally changed a term and condition of employment by requiring registered nurses to wear a particular-color uniform, in violation of NYCCBL § 12-306(a)(4).[2] Even though the Board has held in prior decisions that the determination and prescription of authorized uniforms is a management prerogative, the Board's prior holdings should be overruled. The NYCCBL's "management rights" clause, § 12-307(b), is not substantially similar to any part of Article 14 of the New York State Civil Service Law ("Taylor Law").[3] Thus, the availability of the management rights exception to mandatory collective bargaining is not validly

[2] NYCCBL § 12-306(a)(4) provides that it shall be an improper practice for a public employer or its agents "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. . . ."

[3] NYCCBL § 12-307(b) provides, in pertinent part, that is the right of the City to, "determine the standards of selection for employment, . . . [and] determine the methods, means and personnel by which government operations are to be conducted . . . . "

prescribed by NYCCBL § 12-307(b). The Union argues that since the City and HHC have violated NYCCBL § 12-306(a)(4), they have also derivatively violated § 12-306(a)(1).[4]

Primarily, the Union argues that the City and HHC's new uniform policy will result in a practical financial impact on the registered nurses. According to an affidavit provided by Sean Petty, who has been employed as a registered nurse at Jacobi Medical Center since 2007, nurses maintain five or more sets of top scrubs and bottom scrubs, as well as "a few sets of shoes." (Pet. Aff., ¶ 3). He avers that nurses replace scrubs and shoes only when they need to be replaced, such as when they wear out or become damaged or stained. (*Id.*). Petty avers that once the new policy goes into effect, all nurses will have to purchase new tops, bottoms, and/or shoes in order to comply with the directive. (Pet. Aff., ¶ 5).

The Union contends that nurses are obligated to maintain a neat and professional appearance during their work shifts. Therefore, the cost of maintaining white scrub bottoms and white shoes, which are more susceptible to soiling and staining, will be greater than would be imposed by the current uniform policy that allows nurses to wear darker or patterned bottoms and shoes. Not only will the maintenance cost of the new uniforms be higher, but the nurses will have to replace their scrubs and shoes at much faster rates than would be the case under the current policy.

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[4] NYCCBL § 12-306(a)(1) 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;
* * *
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.

The change in color required by the new policy will render the nurses' current compliment of scrubs and shoes useless and require that they expend significant sums to replace otherwise serviceable shoes and purchase an entire new wardrobe to comply with the new policy. The average nurse will generally need to maintain at least four to six sets of good condition scrubs–tops and bottoms–and at least two pairs of shoes. The cost of a scrub top ranges approximately from $16 to $27, depending on the quality. The cost of a scrub bottom ranges approximately from $17 to $29, depending on the quality. The cost of work shoes for nurses ranges approximately from $60 to $115. Using these estimated ranges as an example, a nurse who would have to purchase five sets of scrubs and two pairs of shoes to comply with the new policy would thus expend a minimum of $285 for lower-quality scrubs and shoes in order to comply with the new policy. Higher quality scrubs and shoes would cost at least $510. (Pet. Aff., ¶¶ 8-9).

The Union argues that the two affected hospitals employ approximately 1,114 nurses. The vast majority are employed as staff nurses and would be directly affected by the new uniform policy. Based upon the number of nurses employed in those two facilities and the range of estimated costs of purchasing new scrubs set forth above, the net direct cost to the bargaining unit arising from initial compliance with the new policy will range at a minimum from $317,490 to 568,140. As a result, HHC's new uniform policy will have a practical financial impact on nurses in the bargaining unit.

City & HHC's Position

The Respondents argue that the determination and prescription of a new color scheme for nurse uniforms is a managerial prerogative recognized under NYCCBL § 12-307(b). The City points to the Union's recognition of its managerial authority to prescribe the appearance of authorized uniforms and disputes the Union's argument that § 12-307(b) is entirely without effect and that the

Board's prior decisions on the subject should be overruled. The City contends that the Board has already entertained this argument and unequivocally rejected that argument in *UFA*, 4 OCB2d 3, at 9-11 (2011), *quoting Matter of Levitt v. Bd. of Coll. Barg.*, 79 N.Y.2d 120, 126-127 (1992); *see also County of Erie v. NYS Pub. Empl. Rel. Bd.*, 12 N.Y.3d 72, 78 (2009) (recognizing managerial prerogative under the Taylor Law). Since the City has not violated NYCCBL § 12-306(a)(4), it cannot have derivatively violated § 12-306(a)(1).

The City further argues that the Union has not provided sufficient facts to establish that a practical impact, *per se* or otherwise, has occurred as a result of the new uniform policy. Here, the Union fails to articulate any impact upon working conditions beyond vague and conclusory assertions that differently-colored uniforms will make nurses less comfortable and will result in additional financial burden. Petitioner's arguments regarding comfort are unsupported by any clearly-articulated facts within the pleadings.

Additionally, the Union's claim of a financial impact is based solely upon the conclusory speculation of a lone Union member, claiming that he will have to purchase six entirely new uniforms as a result in this change in policy. These are prospective impacts which are based entirely upon the speculation of a single employee and his assumptions that none of his scrubs or shoes conform to the new policy. Thus, the Union fails to allege specific facts showing that the selected uniform will be any more expensive than the uniforms in other colors.

To the extent that the Board may find a practical impact involving the cost and maintenance of uniforms, the City still has no duty to bargain over that impact because it has already satisfied its duty to bargain over the cost of maintaining and purchasing uniforms through its bargaining over a uniform allowance. As demonstrated by more than 35 years of collective bargaining agreements

between the City, HHC, and NYSNA which have included a provision regarding a uniform allowance for the purpose of compensating nurses for the purchase and maintenance of uniforms, the parties have consistently bargained over the cost of purchasing and maintaining uniforms. As the parties have repeatedly negotiated the subject of a uniform allowance to completion and reduced the subject to written agreements on numerous occasions, the City has no obligation to bargain over the cost of the purchase and maintenance of uniforms as it is a settled matter between the parties. Accordingly, the Board must dismiss the petition as it fails to allege a practical impact.

DISCUSSION

The Board has held that "the determination and prescription of authorized uniforms is a management prerogative" pursuant to the rights granted to the employer in NYCCBL § 12-307(b), and the Union recognizes that the Board's decisions have consistently adhered to this holding. *Local 211, IUOE*, 51 OCB 25, at 4-5 (BCB 1993); *see also COBA*, 27 OCB 16, at 109-111 (BCB 1981); *UFA*, 43 OCB 4, at 66-67 (BCB 1989). The Union contends however, that the management rights provision on which this holding is based is not "substantially equivalent" to the Taylor Law and that, accordingly, the provision is invalid. In addressing the argument that we should, in effect, ignore this portion of § 12-307(b), in *UFA*, 4 OCB2d 3 (BCB 2011), we explained that "[w]e are unaware of any grounds upon which an administrative agency is permitted to declare invalid, or decline to follow, a provision of its enabling statute." *Id.,* at 9-10.[5] Additionally, in *UFA*, 4 OCB2d 3, we

[5] We note, further, that by statute, only the Public Employment Relations Board ("PERB") has standing to seek a ruling on the question of the NYCCBL's substantial equivalence to the Taylor Law. Taylor Law § 212(2); *see Mayor of the City of New York v. Council of the City of New York*, 9 N.Y.3d 23, 28-29 (2007).

observed that the Court of Appeals has expressly recognized without reservation the NYCCBL's inclusion of a "management rights" provision:

> Consistent with the Taylor Law, the New York City Collective Bargaining Law imposes a duty on public employers and certified employee organizations to bargain in good faith on wages, hours and working conditions (Administrative Code § 12-307(a)). . . . Specifically excluded from the scope of collective bargaining, however, are certain fundamental managerial decisions-management prerogatives-such as the methods by which an operation will be performed (*see*, Administrative Code § 12-307(b)). Although these decisions are excluded from bargaining, their practical impact on employees may be bargainable (Administrative Code § 12-307(b)) [citations omitted].

Id., at 10, *quoting Matter of Levitt v. Bd. of Coll. Barg*, 79 N.Y.2d 120, 126-127 (1992) (*affg. in part*, *UFA*, 39 OCB 7 (BCB 1987).

Significantly, it has not been asserted that PERB has reached a different conclusion than the Board on the issue of whether the determination and prescription of employee uniforms is a mandatory subject of bargaining. In *UFA*, 4 OCB2d 3, where we more fully discussed the issue of the consistency between PERB's concept of managerial prerogative and ours, we noted that "PERB has itself relied upon the concept of and even the phrase 'managerial prerogative' in delineating exclusions from the duty to bargain encompassed in the Taylor Law equivalent to those set forth in NYCCBL § 12-307(b)" *Id.*, at 10-11. Indeed, in a law enforcement context, PERB has recognized management's prerogative to determine the color characteristics of uniforms for identification purposes. *City of Buffalo*, 15 PERB ¶ 3027 (1982). Therefore, we find no basis upon which to deviate from our long-established holding that the determination and prescription of authorized uniforms is a management prerogative in this instance.

Here, the primary dispute has been characterized by the parties as the issue of whether the

change in uniforms mandated by certain HHC facilities will create a practical economic impact upon the Union's members. However, the Union's concerns relate to the cost the employees will incur because of the required change in uniforms. Therefore, we find that the question that the parties wish us to resolve is better characterized as whether there is a duty to bargain over the cost of new uniforms in order to comply with the new policy. NYCCBL § 12-307(a) provides, 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 . . .

See also *Local 1157*, 1 OCB2d 10, at 13; *Local 237, CEU*, *IBT*, 67 OCB 37, at 6; *see, e.g., CIR*, 49 OCB 22, at 13-14 (BCB 1992) (the term "wages" includes wage rates, pensions, health and welfare benefits, uniform allowances, and shift premiums). As we explained in Municipal Highway Inspectors Local Union 1042, 2 OCB2d 12 (BCB 2009), "if a unilateral change is found to have occurred in a term and condition of employment which is determined to be a mandatory subject, then this Board of Collective Bargaining will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice." See also Local 1182, CWA, 26 OCB 26, at 4 (BCB 2001); PBA, 63 OCB 4, at 10 (BCB 1999).

In the instant matter, prior to the promulgation of the new policy, HHC did not mandate the colors of nurses' scrubs or shoes. The prior policy's primary requirement was that nurses wear scrubs and appear neat and professional. It was under the prior policy that the parties negotiated uniform allowances and also negotiated the elimination of the uniform allowance in order to receive the value as part of members' wages in the 2006 MOA. In September 2010, HHC announced that

nurses would be required to wear specific-color uniforms, and the Union has alleged facts sufficient to show that the new policy would require nurses to purchase new scrubs or shoes in order to comply with that policy and that the cost to maintain those new uniforms would be greater. Therefore, the new uniform policy created an economic issue that did not exist under the old policy. Thus, HHC and the City are required to bargain over the unilateral change as announced in September 2010.

The City argues that the Union waived its right to bargain over the subject because it was fully discussed in bargaining over the MOA. We have said that a union can waive its right to bargain if prior discussions indicate that the matter was "fully discussed or consciously explored and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter." *CEA*, 75 OCB 16, at 10 (BCB 2005). In *DC 37*, 15 OCB 21, at 18-19 (BCB 1975), *aff'd, City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 18, 1976), this Board found that certain subjects over which the union sought to bargain had been carefully explored in contract negotiations, and thus, the union waived its right to bargain over them mid-contract; there was no waiver as to other subjects which had not been fully discussed. *Id*. at 19.

Here, the MOA negotiations contemplated the value of the uniform allowance as it was to be incorporated into general wage increases as the uniform policy existed then–without mandates as to the color of the uniform. The value of the uniform allowance was bargained for the purpose of the initial purchase and maintenance of uniforms under the old policy. The new policy will require that many nurses purchase new uniforms with differing care and maintenance costs from their prior uniforms. In short, the value of the uniform allowance under the new policy was not contemplated by the parties when negotiating the MOA. Absent evidence showing that the subject here was fully discussed or consciously explored by the parties during prior bargaining, we cannot

find that the Union waived its right to bargain or that the City exhausted its duty to bargain. *CEA,* 75 OCB 16, at 11 (BCB 2005); *DC 37,* 69 OCB 23, at 14 (BCB 2002).

Therefore, we find that the Union has shown that HHC and the City are obligated to bargain over implementation of the new policy as announced. Accordingly, we order HHC and the City to bargain with the Union over the new policy.

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 City of New York and the New York City Health and Hospitals Corporation bargain with the Union over the implementation of the policy that requires nurses at Jacobi Medical Center and North Central Bronx Hospital to wear color-coded uniforms.

Dated: New York, New York
April 28, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

Partial Concurrence (see attached).

CHARLES G. MOERDLER
MEMBER

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
- between -	:	
NYSNA and HHC,	:	BCB-2924-11
Petitioner,	:	
- and -	:	
THE CITY OF NEW YORK,	:	
Respondent.	:	

CONCURRENCE OF CHARGES G. MOERDLER

I concur in the order entered by the Board. However, I do not join in so much of the majority opinion and reasoning as pertains to the supposed "Management Prerogative." Time and again I have noted in dissent that there is no valid "Management Prerogative" under the NYCCBL. See, e.g., Matter of UFA Local 94 and City of NY and FDNY. The majority's view is contrary to statute and legislative intent. While this Board has persisted in invoking the so-called "Management Preorgative," mere repetition does not serve to validate the invalid neither does it serve to create power where the Legislature deliberately chose to deny such power (and with good reason). The simple fact remains that NYCCBL § 12-307(b) was adopted and has been applied by this Board without lawful authority and is therefore a nullity. It remains only to note that while PERB is given authority to challenge the majority's aforementioned excesses, it is not alone; for, the Attorney General is also authorized to intercede where a government entity acts without lawful authority. Perhaps more to the point, no court is bound to sanction

lawlessness. Instead, the Courts in a democratic society must, in an appropriate proceeding, be free at all times to declare or hold that governmental action taken in excess of lawful authority is utterly void.

Dated: New York, New York
April 28, 2011

CHARLES G. MOERDLER
Member