DC 37, L. 436 & 768, 4 OCB2d 31 (BCB 2011)

(IP) (Docket No. BCB-2866-10).

Summary of Decision*:** The Unions claimed that the City and DOHMH violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the longstanding past practice of paying members assigned to City schools for unscheduled school closings due to snow emergencies. The City argued that the Board should not find a past practice as DOHMH had an *ad hoc* approach to unscheduled school closings. Further, the City argued that nothing in the parties' collective bargaining agreements mandates payment to hourly paid school-based employees for days when the schools are closed and that there is no obligation to bargain during the term of an unexpired contract. The Board found that DOHMH had a past practice of paying the employees at issue for days that they were scheduled and ready to work but did not work because their schools were closed due to snow emergencies and they were not reassigned. Accordingly, the Unions' Petition is granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and its affiliated LOCALS 436 and 768,

Petitioners,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

DECISION AND ORDER

On June 9, 2010, District Council 37, AFSCME, AFL-CIO ("DC 37"), and its affiliated Locals 436 and 768 (collectively, "Unions"), filed a verified Improper Practice Petition against the City of New York ("City") and the New York City Department of Health and Mental Hygiene

("DOHMH"). The Unions allege that the City and DOHMH violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") in February 2010 by unilaterally changing DOHMH's longstanding past practice of paying members employed by DOHMH and assigned to City schools who were scheduled and ready to work for days the schools were closed due to snow emergencies. The City argues that the Board should not find a past practice because DOHMH had an *ad hoc* approach to unscheduled school closings. Further, the City argues that nothing in the parties' collective bargaining agreements mandates payment to hourly paid school-based employees for days when the schools are closed and that there is no obligation to bargain during the term of an unexpired contract. The Board finds that DOHMH has a past practice of paying the school-based employees at issue for days that they were scheduled and ready to work but did not work because the schools were closed due to snow emergencies and they were not reassigned. Accordingly, the Unions' Petition is granted.

BACKGROUND

The Trial Examiner held two days of hearings and found that the totality of the record established the following relevant facts.

DC 37 and the City are parties to the Citywide Agreement, the 2005-2008 Health Services Unit Agreement, and a 2008 Memorandum of Economic Agreement ("2008 MEA"), which extended the term of the 2005-2008 Health Services Unit Agreement through March 2, 2010.[1] Local 436

[1] Section 3 of the 2008 MEA, entitled "Prohibition of Economic Demands," provides that: "No party to this agreement shall make additional economic demands during the term of the [2008 MEA] or during the negotiations for the applicable *Successor Separate Unit Agreement*. Any disputes hereunder shall be promptly submitted and resolved." (City Ex. 5) (emphasis in original).

represents employees in the Public Health Nurse (School Health) and Junior Public Health Nurse (School Health) titles; Local 768 represents employees in the Public Health Assistant (School Health) and Public Health Advisor (School Health) titles (collectively, the "School Health titles"). Currently, approximately 1,000 employees in the School Health titles are employed by DOHMH's Office of School Health. Since 1997, the majority of these employees have been assigned to work in the City's public schools.

Employees in the School Health titles are paid on an hourly basis, but neither the 2005-2008 Health Services Unit Agreement nor the 2008 MEA address scheduling or contain any provisions regarding payment for scheduled or unscheduled school closings. The work hours of employees in the School Health titles correspond to the operation of classes at their assigned schools, with the majority working 35 hours per week between the hours of 8:00 a.m. and 4:00 p.m. The school calendar is set by the Department of Education and is provided to the employees by DOHMH at the beginning of the school year. Those Public Health Nurses (School Health) and Junior Public Health Nurses (School Health) who work 35 hours or more per week are paid for Citywide holidays, but, otherwise, employees in the School Health titles are not paid for scheduled school closings unless they have, and use, accrued leave. Most employees in the School Health titles work ten months per year and employees in the Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) titles are eligible to receive unemployment benefits during the summer.[2] Since 2006, employees in the Public Health Nurse (School Health) title have had 20% of their pay held in abeyance during the school year to be paid

[2] Approximately 35% of the employees in the School Health titles work the summer session.

out over the summer.[3] Public Health Nurses (School Health) remain on the payroll year round and maintain their health benefits, but are not eligible to receive unemployment during the summer.

Since 1996, City schools have been closed on six occasions due to snow emergencies; once each in 1996, 2001, 2004, and 2009, and twice in February 2010. For the four school closings due to snow emergencies that preceded February 2010, employees in the School Health titles who were scheduled to work but did not work due to the snow emergencies were paid for these days. These employees were not paid for the two school closings due to snow emergencies in February 2010.

Pre-February 2010 Unscheduled School Closings

Michele Trester, DC 37's Assistant Director of Research and Negotiations, and Judith Arroyo, Local 436's President and a Junior Public Health Nurse (School Health), both testified that employees in the School Health titles were paid for all unscheduled school closings due to snow emergencies prior to February 2010. Regarding school closures due to snow emergencies on March 5, 2001, January 28, 2004, and March 2, 2009, their testimony was corroborated by printouts from the City's payroll management system, pay stubs, and emails.[4] Additionally, Trester's unrebutted

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[3] In 2006, DC 37 and the City entered into a Memorandum of Agreement ("2006 Memorandum") stating that: "Nurses whose standard school year work schedule is 30 or 35 hours per week will remain on payroll for 12 months, *i.e.* their salary for 10 months will be paid out over 12 months, so that they may receive the benefits described [in the 2006 Memorandum] throughout the year." (City Ex. 4, 2006 Memorandum, p. 1, § 3(A)).

[4] The printouts show that the overwhelming majority of employees in the School Health titles–between 93.8% and 96.25%–were listed as having an excused absence and paid for the unscheduled school closings due to snow emergencies on March 5, 2001, January 28, 2004, and March 2, 2009. The printout for March 5, 2001, lists the pay status of 776 employees in the School Health titles, with 728 listed as "other excused absence." (City Ex. 13). The printout for January 28, 2004, lists the pay status of 705 employees, with 677 listed as "excused absence for snow emergency." (City Ex. 14). The printout for March 2, 2009, lists the pay status of 923 employees, with 870 listed as "excused absence for snow emergency." (City Ex. 1). On March 5, 2001, and January 28, 2004, only seven out of, respectively, 776 and 705 employees in the School Health titles

testimony was that employees in the School Health titles were paid for an unscheduled school closing due to a snow emergency in 1996, but a specific date was not provided. Trester testified that the Unions had not presented a request to bargain over the issue of payment for snow days "[b]ecause we don't negotiate things that we . . . already have." (Tr. 53).

Both Arroyo and Trester testified that employees in the School Health titles were paid for unscheduled school closings due to Hurricane Floyd in September 1999 and an outbreak of the H1N1 virus in May 2009.[5] The City offered testimony regarding only the March 2, 2009, snow emergency and the May 2009 H1N1 virus outbreak; the City neither offered testimony, nor disputed the Unions' witnesses' testimony, regarding the payment of employees in the School Health titles for the school closures due to snow emergencies in 1996, 2001, and 2004, or due to Hurricane Floyd in 1999.

Regarding the March 2, 2009, school closure due to a snow emergency, the City acknowledged that employees in the School Health titles were paid for that day. However, David Brandwein, DOHMH's Controller, testified that these employees were paid in error due to a misunderstanding by his staff. Brandwein joined DOHMH in 2008, and the March 2, 2009, snow emergency was the first to occur since he started. All entries into the City's payroll system require a code, and those codes are provided by Office of Payroll Administration ("OPA"). Brandwein testified that he had one of his "junior staff members" contact OPA to obtain a code to excuse people

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worked; on March 2, 2009, only sixteen out of 923 employees in the School Health titles worked. Thus, for the 2001, 2004, and 2009 snow emergencies, less than 2% of the employees in the School Health titles worked on these days, between 93.8% and 96.25% were excused due to the snow emergencies and were paid for these days, and the remaining employees did not work on these days for reasons unrelated to the school closings due to the snow emergencies.

[5] Approximately a dozen schools were closed for several days between May 16 and 23, 2009.

for the snow emergency. (Tr. 123). OPA provided the requested code, and all employees in the School Health titles scheduled to work on March 2, 2009, were excused and paid for that day. However, according to Branwein, OPA cannot authorize DOHMH to pay its employees for a day that they did not work; such authorization must come from DOHMH's "oversight agencies"–the Office of Labor Relations ("OLR") and the Department of Citywide Administrative Services ("DCAS"). (Tr. 113). Since DOHMH never received authority from DCAS or OLR to excuse its employees, it was, according to Brandwein, an error to pay employees in the School Health titles who did not work on March 2, 2009, for that day.

Regarding the May 2009 H1N1 virus outbreak, when it began on May 16, DOHMH did not initially pay employees in the School Health titles when their schools were closed. On May 19, Brandwein announced that employees whose schools were closed prior to May 19 would be paid for those days and that, from May 19 forward, employees in the School Health titles would be temporarily reassigned when their work locations were closed due to the outbreak. An employee so reassigned could refuse the reassignment, and either not be paid for the day or use annual leave. Brandwein testified that this decision was "based on the immediate requirements of the emergency that the City was faced with," not on any contract provision. (Tr. 98). The 2009 H1N1 virus outbreak was a "health care crisis" and "the healthcare system of the City was under duress and stressed, so we needed these assets to report to different locations." (Tr. 97). Brandwein agreed that DOHMH's decision to pay for May 16 through May 18 was based, in part, on DOHMH's failure to provide proper guidance as to reassignments prior to May 19.

OLR Assistant Commissioner Patricia Sleschrchik, the City's negotiator for the 2005-2008 Health Services Unit Agreement, testified that a committee consisting of several City agencies,

including DOHMH and the Department of Education, was formed to address the 2009 H1N1 crisis, including payroll implications. The committee was aware that Department of Education employees would be paid for the school closings and determined "that all the employees whose school was closed should be compensated for that time." (Tr. 142-3).

February 2010 School Closings

On February 10, 2010, and again on February 26, 2010, City schools were closed due to snow emergencies. At 4:29 p.m. on February 9, DOHMH issued the following email announcement:

> A severe snow storm is expected to hit New York City. All City agencies, however, will be open tomorrow and employees are expected to come to work. If an employee cannot get to work due to storm-related or child care issues, s/he can take annual leave. If the employee does not have sufficient leave balance, the agency will advance the employee annual leave to cover their time.
>
> In anticipation of the storm, the City has decided to close public schools. School-based employees should be available tomorrow to be reassigned to another location. [The Office of School Health] will contact employees when reassignments are determined. Any school-based employee who does not want to be reassigned can take annual leave. All school-health and regional office staff are expected to report to their work locations.

(Unions Ex. A). Although DOHMH's email mentioned possible reassignment, no employees in the School Health titles were reassigned. Employees who were scheduled to work but did not work on February 10 either used accrued leave or were not paid for the day.

Again at 5:00 a.m. on February 26, 2010, the City announced that schools would be closed that day due to a snow emergency. The City claims that DOHMH handled the February 26 school closing in the same manner as the February 10 school closing, in that it first explored reassigning employees in the School Health titles, but did not actually reassign these employees. No email,

however, was sent by DOHMH to its employees in the School Health titles prior to the February 26 school closing. Employees scheduled to work but who did not work on February 26 either used annual leave or were not paid for the day.

Both Trester and Arroyo testified that they contacted DOHMH and OLR regarding the February 2010 snow emergencies. Trester testified that she called and exchanged emails with Sleschrchik. Several DOHMH representatives were copied on these emails. Trester testified that she reminded Sleschrchik that DOHMH's past practice was to pay employees in the School Health titles for days that they were scheduled to work but did not work because the schools were closed due to snow emergencies. Trestor forwarded Sleschrchik an email regarding the March 2009 unscheduled school closure due to a snow emergency in which DOHMH instructed employees in the School Health titles on how to fill out their time cards to ensure that they were paid for the day. Arroyo testified that she also contacted Sleschrchik, as well as DOHMH's Director of Human Resources.

On March 1, 2010, Sleschrchik forwarded to Trester an email from DOHMH's Director of Human Resources that stated that employees in the School Health titles would not be paid for the February 2010 snow emergencies because there was no provision in their contract that required such payment.[6] Brandwein testified that DOHMH's policy is not to pay school-based employees when schools are closed and that DOHMH does not distinguish between snow emergencies and any other closure. According to Brandwein, DOHMH cannot authorize payment to its employees without approval from its oversight agencies–OLR and DCAS. In February 2010, Brandwein contacted

[6] This email was not introduced into evidence, and DOHMH's Director of Human Resources did not testify.

DCAS and OLR regarding whether its school-based employees were to be paid for the school closings, and OLR informed him that "[t]here are no snow days in the contract." (Tr. 122). Thus, Brandwein explained, his "hands were tied." (Tr. 122).

The Unions filed the instant Improper Practice Petition on June 9, 2010. For relief, the Unions request that the Board order Respondents to compensate the respective employees for the time off from work, with interest, and restore accrued leave time used, post appropriate notices, and order any other remedy necessary and proper to make Petitioners whole.

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue that the City violated NYCCBL § 12-306(a)(4) by unilaterally changing a past practice, which has existed since at least 1996, of paying employees in the School Health titles who are scheduled, ready, and able to work–that is, ready for possible reassignment–but do not work due to an unscheduled school closing due to a snow emergency.[7] The record establishes that employees in the School Health titles were paid for unscheduled school closings due to snow emergencies in 1996, 2001, 2004, and 2009, as well as for unscheduled school closings due to Hurricane Floyd in 1999 and the 2009 H1N1 virus outbreak. Respondents refused to bargain with the Unions prior to forcing its members to take time off on two days when City schools were closed due to snow emergencies in February 2010. These furloughs affected mandatory subjects of bargaining; specifically, wages, hours, and working conditions. Given the existence of this

[7] NYCCBL § 12-306(a)(4) provides, in pertinent part, 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 . . ."

longstanding past practice, the refusal to pay is a unilateral change to the affected employees' terms and conditions of employment.

In response to the City's argument that the Unions failed to make a formal demand to bargain this issue, the Unions argue that Board precedent holds that where, as here, there is unilateral change to a mandatory subject of bargaining, no such demand is necessary. Regarding the City's argument that it was under no obligation to bargain during the term of an unexpired contract, the Unions argue that the City produced absolutely no evidence to indicate that the parties ever negotiated over the issue of payment for unscheduled school closings. To the contrary, the testimony of both the City's and the Unions' negotiators establishes that this matter had never been discussed. Indeed, based on the City's past practice, the Unions reasonably believed that their members already had the right to be paid for unscheduled school closings and, therefore, had no reason to raise this issue.

Finally, the Unions argue that Respondents' refusual to bargain before imposing unpaid furloughs, which forced their members to use leave accruals or forgo pay, interfered with members' rights to be represented by the collective bargaining representative of their choice, an independent violation of NYCCBL § 12-306(a)(1).[8] Respondents also derivatively violated NYCCBL § 12-306(a)(1) when they violated NYCCBL § 12-306(a)(4).

City's Position

The City argues that the NYCCBL § 12-306(a)(4) claim must be denied because there has

[8] NYCCBL § 12-306(a)(1) provides, in pertinent part, that: "It shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter . . ." NYCCBL § 12-305 provides, in pertinent part, that: "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 . . . ."

been no unilateral change in DOHMH's policy that school-based employees must use accrued leave in order to be paid for a day that they do not work due to an unscheduled school closing. Neither the 2005-2008 Health Services Unit Agreement nor the 2008 MEA address unscheduled school closings. Thus, the Unions' claim relies exclusively on the assertion of a past practice. However, the "record is wholly insufficient" to establish an unequivocal past practice. (City Brief at 15). Accepting that DOHMH paid school-based employees in 2001, 2004, and 2009 when they did not work due to unscheduled school closings, the Unions are asking the Board to confer "a separate, independent benefit of payment for hours not worked, solely on the basis of *three instances* over a period of nine years." (*Id.* at 17) (emphasis in original). The City argues that its handling of the 2009 H1N1 virus outbreak "is compelling evidence that [DOHMH] has not treated all unscheduled school closures the same and has no practice of compensation under those circumstances." (*Id.* at 18).

Further, the City argues that the Board should require that, to establish a past practice in this case, the Unions satisfy the same requirements necessary to establish a past practice in an arbitration. Thus, the Board should require that the Unions establish that the alleged past practice has the "characteristics of mutuality sufficient to justify incorporation in the parties' agreement." (*Id.* at 15-16) (citing *Labor & Employment Arbitration*, Matthew Bender & Co., Chapter 10, § 10.02; Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1018, 1032 (1961)). The City argues that the instant case lacks the requisite indicia of mutuality as "three instances over nine years is wholly insufficient to infer a deliberate commitment to a particular way of doing things." (*Id.* ta 20). Rather, the record establishes that DOHMH had an *ad hoc* approach to unscheduled school closings. Indeed, Brandwein's testimony established that the payments for the 2009 snow emergency did not represent an established DOHMH policy, but was

an error, "the consequence of a series of misunderstandings." (*Id.* at 16).

The City further argues that it was under no obligation to bargain during the term of an unexpired contract. The 2005-2008 Health Services Unit Agreement has extensive provisions regarding payment and the 2006 Memorandum addresses payment for when the schools are closed, as it provides for payment to Public Health Nurses (School Health) over the summer. As valid collective bargaining agreements were in place at the time of the alleged improper practice, the Unions must establish "a significant change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement." (*Id.* at 19) (quoting NYCCBL § 12-311(a)(3)).[9] However, the hourly nature of the School Health titles means "that there is no presumptive obligation for the City to pay wages for time not worked." (*Id.*). Consequently, there was no "significant change." Further, it cannot be said that these circumstances "could not reasonably be anticipated by the parties." Another barrier to bargaining exists in the 2008 MEA, which provides that additional economic demands will not be made during the term of the 2008 MEA or during the negotiations for the successor to the 2005-2008 Health Services Unit Agreement. Payment for time not worked during a snow emergency is clearly

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[9] NYCCBL § 12-311(a)(3) provides that:

> Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreements arose and (b) there shall have arisen a significant change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement.

an economic demand. The Unions should not be permitted to circumvent their obligation to bargain through the use of an improper practice petition. They remain free to raise this issue in negotiations for a successor agreement. Thus, the Board should reaffirm its holding in *ADW/DWA*, 3 OCB2d 8 (BCB 2010), and find that there was "no unilateral change justifying mid-term bargaining" nor a "change in circumstances sufficient to satisfy NYCCBL § 12-311(a)(3)." (*Id.* at 21).

DISCUSSION

NYCCBL §12-306(a)(4) makes it an improper practice to fail to bargain in good faith "on matters within the scope of collective bargaining, which generally consist of certain aspects of wages, hours, and working conditions." *Local 621, SEIU*, 2 OCB2d 27, at 10 (BCB 2009); *see also UFA,* 39 OCB 21 (BCB 1987). We have long held that "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] will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice." *DC 37*, 79 OCB 20, at 9 (BCB 2007); *see also NYSNA*, 4 OCB2d 23, at 10 (BCB 2011); *PBA*, 63 OCB 4, at 10 (BCB 1999). A party asserting that such a unilateral change has occurred must demonstrate that (i) "the matter sought to be negotiated is, in fact, a mandatory subject" and (ii) "the existence of such a change from existing policy." *Id.* (citing *Doctors Council, SEIU*, 67 OCB 21, at 7 (BCB 2001); *PBA*, 73 OCB 12, at 17 (BCB 2004), *affd*, *Matter of Patrolmen's Benevolent Assn. v. NYC Bd. of Collective Bargining*, No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd*, 38 A.D.3d 482 (1st Dept 2007), *lv denied*, 9 N.Y.3d 807 (2007)) (other citations omitted).

Mandatory subjects of bargaining included wages: "However, what constitutes 'wages' is

not limited to base pay; it includes other monetary benefits." *UFT*, 4 OCB2d 2, at 10 (BCB 2011) (pay for jury service hours considered wages); *see also PBA*, 3 OCB2d 18 (BCB 2010) (college loan repayment program); *PBA*, 1 OCB2d 14 (BCB 2008) (uniform allowances). There is no dispute that the matter of payment for "snow days" not worked is a matter affecting wages, and thus is a mandatory subject of bargaining. Rather, the dispute here centers on whether the facts make out a change.

This Board, like the Public Employment Relations Board ("PERB"), will accept evidence of a past practice when determining whether or not a change has taken place. In determining whether the union has established a past practice to which the employer has allegedly made a unilateral change, we look at whether the "practice 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 10 (quoting *County of Nassau*, 38 PERB ¶ 3005 (2005)); *see also UFT*, 4 OCB2d 2, at 10-11 (noting that the standard to establish a past practice under the NYCCBL differs from what is "needed to establish a formal 'past practice' in the context of arbitration or contract interpretation").

The City contends that we should not find a past practice where the Unions cannot establish a third element, that of mutuality, which it derives from the showing required to make out a past practice in arbitration. However, neither we nor PERB have deemed mutuality relevant in establishing a past practice as part of an improper practice alleging a unilateral change. *See Chenango Forks Central Sch. Dist.*, 40 PERB ¶ 3012 (2007) (in unilateral change cases, under the Taylor Law, a "mutual understanding between a public employer and an employee organization [is not] required for a past practice to be binding"). In *Chenango Forks Central School District*, PERB

clarified its prior decisions, explicitly overruling any prior decision to the extent that it could be interpreted to require "proof of mutuality of agreement and/or knowledge or acquiescence by a managerial or high level supervisory employee." *Id.*; *see also City of Kingston*, 40 PERB ¶ 3015 (2007) (mutuality not required).

The reason for this distinction between what is required to make out a past practice in the unilateral change context and in arbitration is that the inquiry in a unilateral change case is significantly different than that in arbitration. In an improper practice case, past practices are a means of establishing whether a change occurred in a subject defined by statute as a mandatory subject of bargaining. In arbitration, past practices are relevant as parol evidence to interpret ambiguous or unclear contractual terms to establish the intent of the parties. The added element of mutuality ensures that the past practice bears upon the parties' intent, and thus the meaning of the agreement at issue. *See Village of Mount Kisco*, 43 PERB ¶ 3029 (2010) (in contract interpretation, evidence of a past practice is admissible to determine the intent of the parties); *District No. 1, MEBA/NMU*, 49 OCB 24, at 17 (BCB 1992) (recognizing that, in an arbitration, a party may introduce evidence of a past practice to "clarify the parties' intent."); *see generally* Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1018 (1961). In the improper practice context, however, the intent of the parties is not relevant to establishing a past practice as our inquiry is limited to determining if there has been a change in a mandatory subject.

We, like PERB, find that under the NYCCBL, it would be "antithetical to the language and intent of the Act to require additional proof of an agreement between a public employer and an employee organization . . . to find a past practice to exist." *Chenango Forks Central Sch. Dist.*, 40

PERB ¶ 3012; *see also UFT*, 4 OCB2d 2, at 10-11 (standard to establish a past practice under NYCCBL differs from that in arbitration or contract interpretation).

Applying the standard to the instant matter, we find that pay for days that employees were scheduled and ready to work but did not work because their work locations were closed and they were not reassigned, is a mandatory subject of bargaining. The City argues that DOHMH approached each unscheduled closing on an *ad hoc* basis and thus the alleged practice lacked the characteristics of mutuality sufficient to justify incorporation into the parties' agreement. However, as discussed above, mutuality is not necessary to establish a past practice in an improper practice proceeding. We find that the Unions have established that there is a past practice of DOHMH paying school-based employees in the School Health titles for days that they are scheduled and ready to work but do not work because the schools are closed due to a snow emergency and they have not been reassigned. It is undisputed that in the nine years prior to February 2010 there were three instances of unscheduled school closings due to snow emergencies and that school-based employees in the School Health titles who were scheduled and ready to work but did not work were paid for those days. In addition, the City did not rebut the testimony of the Unions' witness that employees in the School Health titles were paid for unscheduled school closings due to a snow emergency in 1996. The record establishes that in all of the instances from 1996 through 2009, DOHMH paid school-based employees in the School Health titles for the days that they were scheduled and ready to work but did not work because their work locations were closed due to a snow emergency. Thus, we find that the past practice was unequivocal. We also find that this practice existed for several years, and accordingly was long enough for the employees to reasonably expect that it would continue unchanged. *See Local 621, SEIU*, 2 OCB2d 27, at 13 (three years sufficient to establish

past practice); *City of Rochester*, 21 PERB ¶ 3040 (1988), *affd*, *Matter of City of Rochester v. New York State Pub. Empl. Relations Bd.*, 155 A.D.2d 1003 (4th Dept 1989) (13 months sufficient to establish past practice).

The City argues that the initial denial of payment for the unscheduled school closings due to the 2009 H1N1 virus outbreak is compelling evidence that DOHMH has not treated all unscheduled school closings the same. However, DOHMH ultimately decided to pay employees in the School Health titles whose schools were closed due to the H1N1 virus outbreak for the days that they were scheduled to work and no reassignments were offered. Further, the 2009 H1N1 virus outbreak differed in several aspects from the snow emergencies at issue herein. The snow emergencies closed all City schools for one day with little or no notice, while the H1N1 virus outbreak closed only a handful of schools, spread over a week.

The City's reliance on *ADW/DWA*, 3 OCB2d 8, and NYCCBL § 12-311(a)(3), is misplaced. *ADW/DWA* turned on a factual finding that there was no unilateral change. *See Id.*, 3 OCB2d 8, at 14 ("[T]he City submitted concrete evidence that during the life of the CBA, and indeed prior to the CBA's term, the City's policy with respect to these issues had not changed."). In the instant case, we find that the City has unilaterally changed its past practice. A unilateral change by management to a mandatorily bargainable past practice qualifies as a "significant change in circumstances that could not have been anticipated by the parties." NYCCBL § 12-311(a)(3). Thus, the prohibition against mid-term bargaining encompassed in NYCCBL § 12-311(a)(3) is not applicable. *See UFA*, 71 OCB 19, at 15-16 (BCB 2003) (explaining NYCCBL § 12-311(a)(3)).

Accordingly, we find that, under the circumstances here, the City breached its duty to bargain in violation of NYCCBL § 12-306(a)(4). When an employer violates its duty to bargain in good

faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See Local 621, SEIU,* 2 OCB2d 27, at 14; *USCA*, 67 OCB 32, at 8 (BCB 2001).

For the reasons stated above, the Unions' Improper Practice Petition is hereby granted. Under the circumstances here, to remedy the violation, we find it appropriate to order the City and DOHMH to make school-based employees in the School Health titles whole by paying back pay or restoring leave balances for days that these employees were scheduled to and were ready to work but did not work because their assigned schools were closed due to a snow emergency and they were not reassigned.

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 filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 436 and 768, docketed as BCB-2866-10, against the City of New York and the New York City Department of Health and Mental Hygiene be, and the same hereby is, granted; it is further

DETERMINED, that the City of New York and the New York City Department of Health and Mental Hygiene have violated NYCCBL § 12- 306(a)(1) and (4) by making a unilateral change to the past practice of paying employees in the titles of Public Health Nurse (School Health), Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) for days that these employees are scheduled to, and are ready to, work but do not work because their assigned schools are closed due to a snow emergency and they are not reassigned, a mandatory subject of bargaining; it is further

ORDERED, that the City of New York and the New York City Department of Health and Mental Hygiene rescind the new practice of denying payment of wages to employees in the titles of Public Health Nurse (School Health), Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) for days that these employees are scheduled to, and are ready to, work but do not work because their assigned schools are closed due to a snow emergency and they are not reassigned, and reinstate the *status quo* regarding payment of wages to such employees under such circumstances; it is further

ORDERED, that the City of New York and the New York City Department of Health and

Mental Hygiene cease and desist from implementing new changes in the payment of wages at issue herein until such time as the parties negotiate either to agreement or to impasse with respect to such changes; it is further

ORDERED, that the City of New York and the New York City Department of Health and Mental Hygiene make whole by awarding back pay or restoring leave balances to employees in the titles of Public Health Nurse (School Health), Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) for days that these employees were scheduled to, and were ready to, work but did not work because their assigned schools were closed due to a snow emergency and they were not reassigned; and it is further

ORDERED, that the City of New York and the New York City Department of Health and Mental Hygiene post the attached notice for no less than thirty days at all locations used by the Department for written communications with employees represented by the Unions.

Dated: New York, New York
June 29, 2011

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. 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 31 (BCB 2011), in final determination of the Improper Practice Petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 436 and 768, against the City of New York and the New York City Department of Health and Mental Hygiene.

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 filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 436 and 768, docketed as BCB-2866-10, against the City of New York and the New York City Department of Health and Mental Hygiene be, and the same hereby is, granted; it is further

DETERMINED, that the City of New York and the New York City Department of Health and Mental Hygiene have violated NYCCBL § 12- 306(a)(1) and (4) by making a unilateral change to the past practice of paying employees in the titles of Public Health Nurse (School Health), Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) for days that these employees are scheduled to, and are ready to, work but do not work because their assigned schools are closed due to a snow emergency and they are not reassigned, a mandatory subject of bargaining; it is further

ORDERED, that the City of New York and the New York City Department of Health and Mental Hygiene rescind the new practice of denying payment of wages to employees in the titles of Public Health Nurse (School Health), Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) for days that these employees are scheduled to, and are ready to, work but do not work because their assigned schools are closed due to a snow emergency and they are not reassigned, and reinstate the *status quo* regarding payment of wages to these employees under such circumstances; it is further

ORDERED, that the City of New York and the New York City Department of Health and Mental Hygiene cease and desist from implementing new changes in the payment of wages at issue herein until such time as the parties negotiate either to agreement or to impasse with respect to such changes; and it is further

ORDERED, that the City of New York and the New York City Department of Health and Mental Hygiene make whole by awarding back pay or restoring leave balances to employees in the titles of Public Health Nurse (School Health), Junior Public Health Nurse (School Health), Public Health Assistant (School Health), and Public Health Advisor (School Health) for days that these employees were scheduled to, and were ready to, work but did not work because their assigned schools were closed due to a snow emergency and they were not reassigned.

The City of New York
Department of Health and Mental Hygiene
(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