UFT, 4 OCB2d 4 (BCB 2011)

(IP) (Docket No. BCB-2849-10).

***Summary of Decision*:** The Union alleged that the City unilaterally imposed new limits on the number of hours worked by Hearing Officers (per session), and that by such action, engaged in direct dealing by directly notifying bargaining unit members of the change by a letter and asking bargaining unit members to negotiate their hours at each agency directly with management, and imposing the policy in retaliation for protected activity, violating NYCCBL § 12-306(a)(1), (3), (4), and (5). The City asserted that the limit on hours was longstanding, that the letter it sent to bargaining unit members clarified an existing policy, and that the City's actions were not motivated by anti-union animus, but by a legitimate business reason. The Board found that the Union established that the City violated NYCCBL § 12-306(a)(1), (4), and (5), but not NYCCBL § 12-306(a)(3). Accordingly, the petition was granted in part, and denied in part. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

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

Petitioner,

-and-

THE CITY OF NEW YORK, and THE OFFICE OF LABOR RELATIONS,

Respondents.

DECISION AND ORDER

On March 29, 2010, the United Federation of Teachers, Local 2, AFL-CIO ("Union" or "UFT") filed a verified improper practice petition on behalf of Hearing Officers (per session) ("Hearing Officers") against the City of New York ("City"). The Union alleged that the City unilaterally imposed new limits on the number of hours worked by Hearing Officers and, further,

engaged in direct dealing by directly notifying bargaining unit members of the change and asking bargaining unit members to negotiate their hours at each agency directly with management, and, finally, that it imposed the policy in retaliation for protected activity, in violation of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a), subdivisions (1), (3), (4) and (5). The City asserts that the limit on hours was longstanding, that the letter it sent to bargaining unit members clarified an existing policy, and that its actions were not motivated by anti-union animus, but by a desire to control benefit eligibility. The Board finds that the Union established that the City violated NYCCBL § 12-306(a)(1), (4), and (5), by making a unilateral change in the hours worked by Hearing Officers during negotiations for a first collective bargaining agreement and by inviting bargaining unit members to negotiate directly with the City over the change. The Board also finds that the Union did not establish that the City's actions were motivated by anti-union animus, in NYCCBL § 12-306(a)(3). Accordingly, the petition is granted in part, and denied in part.

BACKGROUND

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

The Union is the certified representative of Hearing Officers. *UFT*, 80 OCB 14 (BOC 2007); *see CSBA*, 64 OCB 10 (BOC 1999). These employees work at the Environmental Control Board ("ECB"), the Taxi & Limousine Commission ("TLC"), and the Department of Health and Mental

Hygiene ("DOHMH").[1] They adjudicate violations of rules and laws within these agencies' jurisdiction, conduct hearings and render determinations. Hearing Officers are not full-time employees, but are paid an hourly rate. While the majority of Hearing Officers work at one agency, about one quarter of them work at more than one.

In 1971, the title of Hearing Officer was classified in the non-competitive class by the City Civil Service Commission and approved by the New York State Civil Service Commission. Since the creation of this title in 1971, the job specification has been revised and reissued several times. The current job specification issued by the New York City Department of Citywide Administrative Services ("DCAS") on December 9, 1998, contains a "Note" which states: "No incumbent shall work more than 17 hours per week in any two consecutive weeks, or more than 1,000 hours per year." (Joint Ex. 3). Job postings for additional hires into the title include the text of this "Note." To the present time, Hearing Officers do not receive health insurance benefits.

Pursuant to the New York City Administrative Code § 12-126, employees who regularly work at least 20 hours per week are entitled to health insurance benefits. DCAS, which has the authority to create a job title, drafted the Hearing Officer job specification to include a limitation on the maximum number of working hours in order to ensure that employees in the title do not work sufficient hours to require the City to provide health benefits. Sherrie Schultz, DCAS's Director of Classification and Compensation (DCAS Director"), testified that the Hearing Officer title was not intended to be a full-time *per annum* position. She testified that the City created the title in order to allow agencies to hire Hearing Officers *ad hoc* instead of hiring on a full-time basis. She also

[1] In August 2008, pursuant to Local Law No. 35 of 2008, ECB was functionally transferred from the New York City Department of Environmental Protection to the City of the New York Office of Administrative Trials and Hearings ("OATH").

stated that DCAS was mindful of the hourly nature of the position when it set the initial pay rate, which it determined to be equitable given that such employees would not receive benefits.

When a Hearing Officer is hired by more than one agency at a time, each agency establishes its scheduling practice for Hearing Officers, and each agency issues its own vacancy notices that prescribe job descriptions specific to each particular agency. When a Hearing Officer is hired to work at more than one agency, the employee must submit to DCAS a dual employment form with approval from both agency heads. (Joint Exs. 9, 10). In addition, TLC, one of the employing agencies, requires that Hearing Officers obtain approval to work as a Hearing Officer at another agency, which the Hearing Officer reports on a document referred to as "Taxi & Limousine Commission Outside Employment Form" (Joint Exs. 12, 13). Hearing Officers receive separate pay stubs for each agency and have the option to contribute to tax deferred savings plans separately from each agency. However, Hearing Officers are each assigned a single employee identification number, which is used in the City's Payroll Management System. This single employee identification number is associated with that Hearing Officer's work for all the agencies. Regardless of whether a Hearing Officer works for multiple agencies, the City issues that employee a single W-2 form.

In 1995, the International Brotherhood of Teamsters, Local 237, Civil Service Bar Association ("Local 237") petitioned the Board of Certification to request that Hearing Officers be accreted to their bargaining unit, Certification # CWR-44/67. L. 237, IBT, 64 OCB 1 (BOC 1999). The Board of Certification added the title to Local 237's unit on January 21, 1999. *Id.* Later that year, Local 237 sought an election to determine whether the Hearing Officers wished to continue to be represented by Local 237. *CSBA*, 64 OCB 9 (BOC 1999). An election was held, resulting in the decertification of Local 237. *CSBA*, 64 OCB 10 (BOC 1999). Hearing Officers remained

unrepresented until 2007. In February 2007, the UFT filed a petition to represent Hearing Officers in a separate bargaining unit, and the Board of Certification ordered an election. *UFT*, 80 OCB 12 (BOC 2007). On September 25, 2007, the Union was certified as the exclusive representative for Hearing Officers. *UFT*, 80 OCB 14 (BOC 2007). Since January 2008, the UFT has been negotiating with the City to establish a first collective bargaining agreement. The parties have yet to reach an agreement.

On January 30, 2006, by Executive Order Number 84, the Mayor created the position of Administrative Justice Coordinator, reporting to the Deputy Mayor for Legal Affairs. David Goldin was thereafter appointed as the Mayor's Administrative Justice Coordinator and began serving in 2006. At the hearing, he testified that his goal is to increase professionalism, efficiency and standardization among the City's administrative tribunals. He has worked on multiple initiatives, particularly focusing on issues that concern all the tribunals and where function can be improved by addressing the tribunals collectively. One such initiative was the development of Rules of Conduct for Administrative Law Judges, mandated by a 2005 Charter amendment, which governs Hearing Officers, and became effective in early 2007 (Title 48, Rules of the City of New York ("RCNY"), Appendix A). His office has also worked to improve the experience of people appearing at the tribunals that lack legal sophistication. Further, he also sought to improve the use of information technology within the tribunals, improved communication with the public by developing websites and printed materials, and also worked on recruiting and training staff.

The Mayor's Administrative Justice Coordinator stated that soon after his appointment, he visited the City's tribunals that employ Hearing Officers. During conversations with senior administrators from ECB, TLC, and DOHMH, he learned of the requirement that Hearing Officers

not work more than 1,000 per year ("1,000 hour cap"). These senior administrators also told him that over the past few years, they had been instructed to and had applied the 1,000 hour cap much more rigorously within their own agencies. In early 2007, the Mayor's Administrative Justice Coordinator spoke with other agencies including the Office of Labor Relations ("OLR"), Office of Management and Budget ("OMB"), DCAS, and the New York City Law Department about the 1,000 hour cap, through which he learned the purpose of the 1,000 hour cap, and that the actual limitation in the job specification was intended to be applied in the aggregate to all work across tribunals. Thereafter, the Mayor's Administrative Justice Coordinator held ongoing discussions with the agencies about how to best apply the 1,000 hour cap, "recognizing that the then current practices of tribunals were not consistent with it and that there would be a burden on both the tribunals and individual [H]earing [O]fficers as we [] transitioned to compliance with the legal requirement." (Tr. 374-75). The Mayor's Administrative Justice Coordinator stated that he became aware of the Union's petition to represent Hearing Officers within days after it was filed on February 2, 2007. He testified that the unionization of the Hearing Officers did not motivate in any way the drafting, or sending, of the March 26, 2010 letter.

Records provided to the Union by the City during the course of negotiations indicate the following: in 2008, the City employed approximately 298 Hearing Officers; 57 of these Hearing Officers worked more than 1,000 hours. Of the 298 Hearing Officers, 49 worked in more than one agency; 38 of the dually employed Hearing Officers worked over 1,000 hours. In 2009, the City employed approximately 289 Hearing Officers; 39 of these Hearing Officers worked more than 1,000 hours. Also, 47 of the 289 Hearing Officers worked in more than one agency; 39 of the dually employed Hearing Officers worked over 1,000 hours.

On February 25, 2010, the Office of Labor Relations ("OLR") sent an email to the Union stating that it "proposed a meeting to discuss Hearing Officers[']hours of work." (Union Ex. 8). On March 3, 2010, a meeting was held between the Union and the City at which the 1,000 hour cap was discussed; the City informed the Union that it planned to enforce the 1,000 hour cap in the aggregate. On March 26, 2010, the agencies that employ Hearing Officers issued letters, which stated:

> Unless you worked at least 50 hours for each of two tribunals during the past 12 months, your employment as a judge/hearing officer at the [DOHMH], ECB or TLC for the remainder of 2010 will be limited to the tribunal at which you were solely employed or primarily employed during the past year. Your employment as a judge/hearing officer at [DOHMH], ECB or TLC will be limited to 1,000 hours for the entire calendar year of 2010, including hours already worked this year.
>
> If you are currently on the judge/hearing officer rosters of two administrative tribunals and worked at least 50 hours for each of them during the past 12 months, you may continue to work at both tribunals during 2010. However, your total time at those two tribunals will be limited so that it does not exceed 1,000 hours over the year. Generally, that means you will be limited to working not more than 500 hours a year nor more than one day per week for each of the two tribunals. If you would like to work at two tribunals but would like to devote more of your time to one tribunal than the other, you may propose an unequal allocation of time, which the tribunals will consider. Alternatively, you may choose to work at only one of the tribunals. By April 2, you should inform the appropriate supervisor of each of the tribunals of your decision–whether you want to continue to split your time between two tribunals (on a 50/50 basis or some other basis) or to work only at one tribunal during the rest of 20l0.

(Joint Exs. 17, 18, 19). The record contains no evidence of the existence of any requirement that there be a 500 hour split, or any other specified allocation, between two agencies prior to this letter. After receiving the letter, Hearing Officers contacted their supervisors at the various tribunals to

discuss allocating their hours.

Contemporaneous with the issuance of the March 26, 2010 letter, the City issued job vacancy notices and hired additional Hearing Officers at each of the three agencies. ECB hired at least 50 new Hearing Officers; TLC hired 45. DOHMH posted a job vacancy notice for 46 new Hearing Officers positions.

Richard Yates, OLR's Deputy Commissioner testified that the March 26, 2010 letters restated the pre-existing limits on hours to ensure that employees were aware that they were required to comply with the limits. He characterized the letter as a "reminder" to these employees that they had to adhere to the cap. OLR's Deputy Commissioner also stated that the letter told the employees that "they should be prepared to make any adjustments that have to be made to comply with [the cap]." (Tr. 230). The Mayor's Administrative Justice Coordinator testified that the letters resulted from lengthy deliberation, which included examining data on hours worked by Hearing Officers. He stated, "[w]e spent a considerable amount of time figuring out how we would actually implement the cap given the fact that there were so many Hearing Officers who were working at multiple tribunals. I think by the end of 2009, it was 47 Hearing Officers out of a total of 289." (Tr. 374-375).

The three City witnesses, the Deputy Commissioner of OLR, the Director of Classification and Compensation of DCAS, and the Mayor's Administrative Justice Coordinator, all underscored that the 1,000 hour cap is included in the job description. They opined that, as a result, the title itself limits the number of hours that an individual can work for the City in the aggregate; the limitation does not concern the number of hours that an employee can work at each agency separately. According to the witnesses, to construe the 1,000 hour cap as being as a limit on the number of hours a Hearing Officer could work at an agency would not follow the purpose of the rule, which is to

ensure that health or other benefits are not required for employees in the title.

The Deputy Commissioner of OLR stated that the City may decide to assign employees to work on an *ad hoc* basis and therefore it has the right to assign work according to the City's needs. The Deputy Commissioner also stated that the job description for this position was created with a "built-in limitation" on hours so that they would not be "entitled to health insurance, welfare fund contributions or other benefits, including time and leave benefits and things of that type." (Tr. 228-229). He also testified that, at unspecified times, he discussed the 1,000 hour cap with the agencies' representatives, reminding them that "the caps are there for a purpose and they were expected to adhere to them." (Tr. 220-222). As to whether Hearing Officers were aware of the 1,000 hour cap, the Deputy Commissioner noted that many Hearing Officers "only work a couple hundred hours in a year," and opined that this demonstrates that they have "an implicit understanding that there is a cap in effect." (Tr. 238).

Four Hearing Officers testified at the hearing: Arthur Scott Kegelman, Joan C. Silverman, Robert Nisely, and Andrea Pfeiffer. All four have served in this title for at least seven years. They all worked consistently at two of the agencies and regularly worked over 1,000 hours in total per year. Prior to the issuance of the March 26, 2010 letter, the four Hearing Officers worked regularly scheduled days at each agency, for example, three days per week at ECB and one day at TLC. The Hearing Officers each testified that, in some years, but not others, individual agencies made efforts to limit Hearing Officers to 1,000 hours at that agency. Hearing Officer Kegelman previously served as Deputy Legal Director at ECB from 1989 to 1991. He testified that, in 1990, while serving in that capacity, he was directed to enforce the 1,000 hour cap at ECB, which required him to keep track of the Hearing Officers' hours, and to require anyone approaching the cap to reduce hours. In the course

of his effort at ECB to enforce the1,000 hour cap, he was never directed to examine the number of hours that the Hearing Officers worked at other agencies. Hearing Officer Pfeiffer testified that when she began working at ECB in 1999, she was already working for DOHMH. She stated that her supervisor at ECB told her that she was expected to work 1,000 hours at ECB, in addition to her hours at DOHMH. Further, Hearing Officer Kegelman and Hearing Officer Silverman testified that, when ECB had a need for Hearing Officers to work at a particular office, ECB would offer to waive the cap for Hearing Officers that volunteered to meet the particular need. This meant that hours worked at that location would not count towards the 1,000 hours at ECB. All of the Hearing Officers testified that until the issuance of the March 26, 2010 letter, none had ever been notified that the 1,000 hour limitation applied to their work across all city agencies. They all testified that they continue to serve in the position for many reasons, including the scheduling flexibility it provides.

The Union witnesses testified that a majority of the Hearing Officers on the Union's negotiating committee were also active in the union organizing drive, which began in the summer of 2006. Most of the negotiating committee members work at two agencies and are affected by the cap. Hearing Officer Kegelman testified that in 2009, Ray Scanlon, a Deputy Commissioner at TLC whom he identified by name, told him that the City was planning to enforce the 1,000 hour cap in the aggregate across the agencies, and that if Hearing Officers had not unionized, the City would not have enforced the cap across agencies.[2]

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[2] Another Hearing Officer who has served in this title since 1984 stated that the only other time the issue of enforcing the 1,000 hour cap across agencies arose was when Hearing Officers were represented by Local 237 in 1997. She stated that at that time, there were rumors among the Hearing Officers "that the City says it's going to impose the cap in the aggregate as long as we're in the Teamsters or if we don't get out of the Teamsters." (Tr. 357). She recalled that the negotiating committee at that time discussed the matter, but she could not recall whether the statements were attributed any particular City official. We find that this testimony, based basically upon rumor and

POSITION OF THE PARTIES

Union's Position

The Union asserts that the City violated NYCCBL § 12-306(a)(1), (3), (4) and (5).[3] Specifically, the Union contends that the City violated § 12-306(a)(1) and (4) by failing to bargain with the UFT over Hearing Officers' hours of work. Pursuant to the NYCCBL, the City has a duty to bargain mandatory subjects, including hours. The Union maintains that, where, as here, the City enforces a cap that directly impacts the number of hours worked per week, appearances/days worked per week, and the overall hours worked per year, it impermissibly imposes a unilateral change in hours worked by unit members. Likewise, the Union argues that the cap's restriction on dual employment also constitutes an impermissible change in hours. Although the Union concedes that the City may determine staffing levels and certain aspects of scheduling, the 1,000 hour cap is not

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unattributed statements is not reliable.

[3]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 . . .
> * * *
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
> (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.

merely an issue of scheduling. On the contrary, for some Hearing Officers, the cap reduces the yearly hours worked in the aggregate by as much as one-half of the hours previously worked. Further, the Union notes that OLR's Deputy Commissioner characterized the cap as indeed affecting "hours" of Hearing Officers. To view the change as permissible because Hearing Officers maintain flexible schedules, as suggested by the City, defies logic because it does not change the fact that the cap affects the hours worked by these unit members.

Further, the Union maintains that the City violated § 12-306(a)(1) and (5) by changing the "status quo." Despite the long-standing existence of the cap, the undisputed twenty-year period in which the City chose not to impose the aggregate cap on hours worked by Hearing Officers nor to restrict dual employment established an unequivocal practice of Hearing Officers working aggregate hours in excess of 1,000 per year at more than one agency. This created a different "status quo" than that set forth in the job specification. Thus, the Union argues that the City is not merely enforcing a job specification but is violating a "status quo" that developed through practice. The Union notes that the City is not merely reverting to mutually agreed upon contract terms because the City unilaterally imposed the cap and restricted dual employment.

The Union also asserts that the City interfered with the Union in violation of § 12-306(a)(1) and (3). Specifically, the City discouraged Union membership and participation by enforcing the cap, which has a disproportionate impact on bargaining committee members and reduces the number of hours during which union activity may take place. Because the City and Union are currently engaged in negotiations for a first contract, the City had knowledge of the bargaining committee members' union activity. This union activity motivated the City's actions, as suggested by the fact that the threat of applying the cap has only arisen, now and in the past, in the presence of a union. The

testimony of TLC's Deputy Commissioner confirms this motive. Further, the City fails to allege a legitimate business reason to refute this claim. The City's claim that it was motivated by budgetary constraints and sought to comply with a "the long-standing" requirement lacks merit because the City never enforced its allegedly "long-standing" cap, even in prior fiscal crises.

Last, the Union maintains that the City violated NYCBBL § 12-306(a)(1) and (4) when it engaged in direct dealing with individual Hearing Officers. In particular, the March 26, 2010 letter requires each Hearing Officer to individually negotiate with each agency their total hours without first giving the Union the opportunity to negotiate this issue on behalf of all Hearing Officers.

The Union requests that the Board order the City to rescind the March 26, 2010 letter and restore the status quo. The Union seeks payment of back pay, interest and compensation for any and all financial harm suffered by Hearing Officers because of the enforcement of the cap in the aggregate dating from March 26, 2010 forward. The Union further requests that the City pay attorney's fees and costs of this proceeding, post a notice concerning its violations. The Union requests that the Board retain jurisdiction over this matter during the remedial phase.

City's Position

The City argues that the Union has not established any violation of the NYCCBL. Regarding the claimed violations of NYCCBL §§ 12-306(a)(4) and (5), the Union has not established that the City implemented any changes in wages, hours or working conditions, which is required to find a failure to bargain in good faith. Since 1971, agencies have scheduled Hearing Officers to work as needed, and Hearing Officers may choose to work, or not. In 1998, the most recent job specification was issued, which limits employees in the Hearing Officer title to working no more than 17 hours in any two consecutive weeks and not more than 1,000 hours per year. This same job specification

remains in effect. Therefore, there have been no changes regarding a mandatory subject of bargaining.

DCAS issues job specifications, which apply to the City agencies approved by the State Civil Service Commission to use that title. Job specifications explicitly state whether any of the duties and responsibilities of the title apply to only a single agency. Absent such limitations, information listed in a job specification applies to all agencies authorized to use the title. Also, to the extent that Hearing Officers work at more than one agency, all of the agencies are part of the City of New York, an independent corporation. Therefore, the requirement not to work more than 1,000 hours per year is enforced by the single employer, the City of New York, and applies in the aggregate to all employment in the Hearing Officer title performed for City of New York.

Pursuant to the New York State Civil Service Law, the City has the managerial right to determine the contents of job classifications, to classify titles and to issue job specifications. Further, NYCCBL § 12-307(b) grants the City an express right to establish and change job descriptions. The City asserts that DCAS's revision of the Hearing Officer job specification to include the 1,000 hour cap falls within its authority to determine the contents of job classifications. As the City has the right to determine the content of job classifications, it must also have the right to enforce the content of those classifications. At the hearing, the DCAS Director testified that the 1,000 hour cap applies in the aggregate to the total number of hours that an incumbent works for the City. Therefore, the City has the right to determine and enforce the content of the Hearing Officer job classification, including the 1,000 hour cap.

The City also has the managerial right, pursuant to NYCCBL § 12-307(b), to schedule Hearing Officers in compliance with the 1,000 hour cap. Although the Union argues otherwise,

the 1,000 hour cap is a matter of scheduling, not hours, and therefore does not concern a mandatory subject of bargaining. The City notes that the Board recently held in another petition that the Union brought against the City on behalf of some of this bargaining unit's members, *UFT*, 3 OCB2d 44 (BCB 2010), that some new requirements imposed on these employees concerned hours and were required to be bargained. However, *UFT* is not dispositive here because in reaching its decision, the Board relied upon *UFOA*, 1 OCB2d 17 (BCB 2008). In that case, the employer changed the number of hours worked per day and per week of employees that were contracted to work a certain number of hours per year. The City argues that this case presents a different issue because these employees are not full-time and are not contracted to work a certain number of hours per year. As the Board has explained in *DC 37*, 41 OCB 45, at 8 (BCB 1988), the principle underlying the fact that hours of work are a mandatory subject of bargaining is that management "buys," or negotiates, a certain number of working hours. Those hours, once bought or negotiated, may not be altered unilaterally, and are, for that reason, a mandatory subject of bargaining. Here, "management has not 'bought' or negotiated a fixed number of working hours for Hearing Officers. [Therefore,] [t]heir 'hours' cannot be examined through the same rubric as the 'hours' of a civil service title with a negotiated number of working hours." (City's Brief at 21). The Board's prior rulings that the subject of "hours" are a mandatory subject of bargaining has only concerned employees with fixed schedules. However, Hearing Officers are different because they can change their availability without repercussion. Also, the title will not serve its purpose if employees are unable to change their work availability and the City cannot change their "*ad hoc*" scheduling. Because the City has the right to schedule employees as needed, and because Hearing Officers do not have a fixed schedule or guaranteed hours, the City has a right to enforce the 1,000 hour cap as it schedules Hearing Officers.

Regarding the retaliation claim, the City argues that the Union has not made its *prima facie* showing that the City violated NYCCBL § 12-306(a)(3). The City acknowledges that the petition for union representation and the certification of the Union constitute protected activity, and that the City was aware of such protected activity. However, the Union has not established that the City's decision to issue the March 26, 2010 letter was causally related to the protected activity. To make its case, the Union provides only conclusory allegations. As to the alleged anti-union motivation, the City argues that the Board should not give weight to Hearing Officer Kegelman's testimony regarding the TLC Deputy Commissioner's alleged statements that the City's actions were motivated by anti-union animus. This TLC Deputy Commissioner is not involved in labor relations and the Board has no basis on which to determine that this Deputy Commissioner had any role in the dissemination of the March 26, 2010 letters. Further, there is no temporal proximity here; the Union was certified in September 2007, and the allegedly retaliatory act did not take place until March 26, 2010. Moreover, the City has established that it enforced the 1,000 hour cap in order to avoid necessitating that the City provide benefits for Hearing Officers, which is a legitimate business reason. The OLR Deputy Commissioner and the Mayor's Administrative Justice Coordinator both testified that the March 26, 2010 letters were issued in order to ensure that Hearing Officers do not exceed the 1,000 hour cap, which would require the City to provide them various benefits including health insurance, welfare fund contributions and time and leave benefits.

Further, the Union has not established an independent violation of NYCCBL § 12-306(a)(1). It has not shown that the City's conduct was inherently destructive of important employee rights, or that the City engaged in direct dealing. The City did not make any "threat of reprisal or promise of benefit." The March 26, 2010 letter merely clarified an existing policy, the established 1,000 hour

cap, and did not even relate to any mandatory subject of bargaining. In addition, at the March 3, 2010 meeting, the City informed the Union that it intended to send the letter.

Finally, should the Board grant any part of the petition, it should refuse the Union's request for monetary damages, as it has refused similar requests from other unions. A remedy would be speculative and would likely unjustly enrich Hearing Officers. The City underscores that Hearing Officers have no guarantee of hours of employment. In fact, Hearing Officers may take month-long vacations and return to work. As these employees are scheduled *ad hoc*, it is impossible to reliably estimate how many hours Hearing Officers would have worked if the City was not enforcing the cap. Morever, even if the City tried to schedule Hearing Officers so that their hours would exceed the cap, it is impossible to determine whether they would have reported to work as scheduled; notably, all the Hearing Officers testified that they have cancelled days that they were scheduled to work.[4]

DISCUSSION

This matter presents the following issues: 1) whether the City's enforcement of the 1,000 hour policy in the aggregate across all agencies concerns a mandatory subject of bargaining and if so, 2) whether the City made a unilateral change in its enforcement of the policy in violation of NYCCBL § 12-306(a)(4); and 3) whether the City's issuance of the March 26, 2010 letter constitutes direct dealing in violation of NYCCBL § 12-306(a)(1); and 4) whether the City's actions regarding the 1,000 hour policy constitute retaliation in violation of NYCCBL § 12-306(a)(3).

[4] The City also asserts that Union also has not shown that the City dominated or interfered with the Union in violation of NYCCBL § 12-306(a)(2). However, the Union did not assert a claimed violation of NYCCBL § 12-306(a)(2).

An employer violates NYCCBL § 12-306(a)(4) by "refusing to bargain collectively in good faith on matters within the scope of collective bargaining." *UFT*, 3 OCB 44, at 8 (BCB 2010). Scheduling is a matter of managerial prerogative, and therefore does not require bargaining, while hours are generally considered a mandatory subject of bargaining. *See id.,* (citing *DC 37, L. 14457*, 1 OCB2d 32, at 26 (BCB 2008)); *LEEBA*, 3 OCB2d 29, at 5, 33 (BCB 2010).

It is well settled that the total number of hours employees work must be bargained. *UFT*, 3 OCB 2d 44, at 9 (BCB 2010), *SSEU*, 1 OCB 11, at 3-4 (BCB 1968). The question here is whether the 1,000 hour cap that limits the number of hours Hearing Officers can work in a year concerns scheduling or whether it concerns hours, which must be bargained. Although "the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total number of hours employees work per day or per week." *UFT*, 3 OCB2d 44, at 8 (BCB 2010) (quoting *UFOA*, 1 OCB2d 17, at 10 (BCB 2008)). The City argues that the inherently flexible nature of the Hearing Officer position makes the 1,000 hour cap a matter of scheduling, and not hours. The Union does not dispute the factual assertion regarding the flexibility of the Hearing Officer position, but argues that the 1,000 hour cap and the 500 hour limitation per agency constitute "hours," not scheduling, and thus are a mandatory subject of bargaining.

We find that because the 1,000 hour cap and the 500 hour split between agencies both affect the total number of hours that a Hearing Officer can work in either an agency or the City in the aggregate, they concern hours, a mandatory subject of bargaining. We are not persuaded by the City's argument that based upon the "flexible" nature of this *per diem* position, its limitation on hours is exempt from collective bargaining. While the position permits a flexible schedule, this is not

dispositive of the issue before us; it does not change the fact that the 1,000 hour cap and 500 hour limitation concern hours.

The City cites no precedent supporting the position that *per diem* employees are not entitled to bargain over subjects that would be, for full-time employees, mandatory subjects. On the contrary, the New York State Public Employment Relations Board ("PERB") has repeatedly held that an employer may not make unilateral changes to mandatory subjects of bargaining affecting part-time or *per diem* employees. *See Town of Fishkill*, 39 PERB ¶ 4607 (ALJ 2006) (employer may not unilaterally change the working hours of part-time employees)*; County of Erie*, 42 PERB ¶ 4511 (ALJ 2009) (employer violated its bargaining obligation by unilaterally increasing pay rates of *per diem nurses*); *State of N.Y. (Racing and Wagering Bd.)*, 43 PERB ¶ 4503 (Asst. Dir. 2010) (employer violated its bargaining obligation by unilaterally reducing pay rates of *per diem* employees). We find that the City's position is contrary to the NYCCBL and to precedent. *See Doctors Council v. NYCERS*, 127 AD2d 380, at 382 (1st Dept. l987) (*affd. in part*, *revd. in part on other grounds*) (stating in dicta that the public sector part time employees at issue "enjoy full collective bargaining rights").

The City also argues that, because the 1,000 hour cap is included in the job specification, the cap may not be bargained. While the City correctly points to the Board's recognition of the City's authority to unilaterally create job specifications, this right may not be used to shield the City from bargaining required under the NYCCBL. It is clear that the 1,000 hour cap's intended purpose is to permit the City to avoid providing certain benefits and incurring additional costs. Nevertheless, the cap's purpose and its effectiveness is not dispositive of the question of whether the subject of hours is mandatorily bargainable. While the record supports a finding that the 1,000 hour cap contained in the job specification was intended as a cap upon the total number of hours performed in the title

regardless of whether at one agency or multiple agencies, in fact, it was never applied in this way. The City's failure to apply the job specification in line with its intended purpose was not a matter of isolated instances; in 2008, for example, approximately 20 percent of the bargaining unit worked over 1,000 hours in the aggregate. In this regard, the evidence simply does not support the City's claim that it now is merely enforcing the 1,000 hour cap as long articulated in the Hearing Officer job specification.

The next question before us is whether the City's March 26, 2010 letter unilaterally imposed a change in a mandatory subject of bargaining. It is clear that the March 26, 2010 letter limited Hearing Officers to working no more than 1,000 hours aggregate for the City, and required that employees working in more than one agency negotiate a split of the hours between the agencies. Further, all the evidence in the record substantiates that, since the title's creation in 1971, the City has never totaled the hours Hearing Officers worked for the different agencies when calculating the limitation on their hours. It was not until March 26, 2010 that the City announced it would limit the Hearing Officers' employment for the City to 1,000 hours in total. Based upon the record, there appears to be no reason why, prior to March 26, 2010, Hearing Officers would have any notice or expectation that they could not work more than 1,000 in the aggregate. This is especially true where, as here, Hearing Officers were never denied the opportunity to work more than 1,000 hours in the aggregate. No evidence exists, and the City does not assert, that prior to the March 26, 2010 letter there was ever an effort to enforce this policy City-wide, or that Hearing Officers employed in multiple agencies were ever limited to working 1,000 hours total. The record is clear that over a prolonged period of time, each agency treated the 1,000 hour cap as applying to a single agency, not on a City-wide basis. The circumstances could give rise to no other expectation but that Hearing

Officers were permitted to work more than 1,000 across all agencies because the City itself applied the policy in this way.

Instead, of the City's witnesses consistently testified that at least since 2006, every agency was applying the 1,000 hour cap to the work performed within its own agency. Because the cap was not being applied to Hearing Officers' work for the City in the aggregate, the Mayor's Administrative Justice Coordinator spent "a considerable amount of time figuring out how [to] "actually implement the cap given the fact that there were so many hearing officers who were working at multiple tribunals" (Tr. 375). Indeed, OLR's Deputy Commissioner expected that employees would need to adjust their current practice, "mak[ing] any adjustments that have to be made to comply with [the cap]." Likewise, the Union's witnesses testified that they were never limited to working 1,000 hours in the aggregate, or ever aware of any such limitation, and often worked in excess of 1,000 hours per year.

In sum, for the first time, the March 26, 2010 letter limited Hearing Officers to working no more than 1,000 hours total in their title. The 1,000 hour cap and the related 500 hour per agency cap indisputably affect the total number of hours these employees can work. Therefore, we find that the March 26, 2010 letter represented a change to a mandatory subject of bargaining. The March 26, 2010 letter reduced the total number of hours Hearing Officers are permitted to work has been reduced. The issuance of the March 26, 2010 letter unilaterally changed a mandatory subject of bargaining and violated NYCCBL § 12-306(a)(4). Further, because we also find that the City's decision to begin enforcing the 1,000 hour rule in the aggregate changed the status quo during a period of contract negotiations, it also violated NYCCBL § 12-306(a)(5). *UFT*, 3 OCB2d 44, at 9-10 (BCB 2010).

We also find that the City's issuance of the March 26, 2010 letter constitutes direct dealing. An employer's direct communications with union members violates the NYCCBL when it "bypass[es] a certified bargaining representative and negotiat[es] directly with members." *DC 37, L. 2507*, 2 OCB2d 28, at 10 (BCB 2009). The March 26, 2010 letter invited affected Hearing Officers employed in multiple agencies to propose possible alternate divisions of their working hours if they were not satisfied with the 500 hour split prescribed in the letter. Thereafter, pursuant to the letters, managers and Hearing Officers discussed and arranged for alternative breakdown in their hours between the agencies. As we found above, the matter of the split of hours between agencies is a mandatory subject of bargaining. We find that by issuing this directive, the City bypassed the Union's statutory right and obligation to bargain on behalf of its members and clearly directed employees to negotiate individually concerning the total hours worked for an agency. As members of the Union, Hearing Officers were entitled to be represented by the Union in negotiations regarding these mandatory subjects of bargaining. Therefore, we find that the City's actions in such regard "subverted the members' organizational and representational rights" in violation of NYCCBL § 12-306(a)(1). *DC 37, L. 2507*, 2 OCB2d 28, at 10 (BCB 2009) (citing *UFA*, 69 OCB 5, at 7 (BCB 2002)).

Finally, the Union alleges that the City's implementation of the 1,000 hour cap in the aggregate was retaliatory and violated NYCCBL 12-306(a)(3). Specifically, the Union alleges that the City implemented the cap to discriminate against the Hearing Officers who serve on the negotiating committee, as they were more apt to have worked at more than one agency and worked over 1,000 hours, and thus more likely to be affected by the cap. In order to make out a *prima facie* case of retaliation and/or discrimination, a petitioner must demonstrate that "(1) the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

(2) the employee's union activity was a motivating factor in the employer's decision." *L. 1157*, *DC 37*, 3 OCB2d 40, at 16 (BCB 2010); *Bowman*, 39 OCB 51 (BCB 1987). If a petitioner makes out a *prima facie* case, the employer may refute that showing on either or both of the elements, or establish that its actions were motivated by a legitimate business motivation. *L. 1157*, 3 OCB2d 40 (BCB 2010).

The bargaining unit of Hearing Officers organized to become members of the Union in 2007. The City admits that it was aware of this protected activity. Therefore, the first prong of our test is met. Regarding motivation, the record contains uncontroverted testimony that a Deputy Commissioner at TLC told Hearing Officer Kegelman that enforcement of the 1,000 hour cap in the aggregate would not have occurred but for the unionization of the Hearing Officers. By this evidence, the Union has made its *prima facie* case.

However, the City presented sufficient evidence to establish that the decision to enforce the 1,000 hour limitation was not motivated by anti-union animus, but was in fact motivated by a legitimate business reason, that is, a desire to limit or control employee eligibility for benefits. The TLC Deputy Commissioner's expressed opinion concerning the anti-union motivation for enforcement of the hours cap is contradicted by contemporaneous events of which he may not have been aware. It is undisputed that Hearing Officers never received benefits. It is also undisputed that the purpose of the 1,000 hour limitation in the job specification was to limit eligibility for benefits. The credible testimony of the Mayor's Administrative Justice Coordinator demonstrates that the motivation for the enforcement of the hours limitation was consistent with this purpose. Specifically, he testified that soon after his appointment in 2006, he investigated the 1,000 hour cap. This investigation was undertaken as a part of his overall job responsibilities to improve the City's

administrative tribunals. Thereafter and prior to any knowledge of union activity, the Mayor's Administrative Justice Coordinator became aware of the agency's inconsistent enforcement of the hours limitation. In early 2007, he determined that the 1,000 hour cap needed to be consistently enforced in the aggregate.

Although it is not clear from the testimony that this determination preceded the Mayor's Administrative Justice Coordinator's knowledge of the Union organizing campaign, the decision significantly preceded the certification of the Union as the bargaining representative and the formation of a bargaining committee. Further, inasmuch as the investigation of the hours cap preceded any knowledge of union activity and enforcement of the cap was similar to other investigations and improvements that the Mayor's Administrative Justice Coordinator was conducting in 2006 and early 2007, we find credible the Mayor's Administrative Justice Coordinator's denial that the decision to enforce the 1,000 hour cap in aggregate was motivated by anti-union animus. Therefore, we find that the City has sufficiently rebutted the Union's case by showing that the decision to enforce the 1,000 hour cap across all agencies was motivated by the City's desire to limit eligibility for benefits. Accordingly, we deny the petition as to the alleged violation of NYCCBL § 12-306(a)(3).

Finally, we consider the Union's request for remedial relief. We decline to award attorney's fees and costs. With regard to the remainder of the Union's requests including payment of back pay, interest and compensation for financial harm, we are not satisfied that the record, as it now stands, is sufficient to fashion a remedy for all affected employees. Therefore, the parties should be prepared to provide additional information at the Board's request so that the Board can make a determination as to the proper remedy. The Board will retain jurisdiction to determine any remedy at a later date.

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 the United Federation of Teachers, Local 2, docketed as BCB-2849-10, be, and the same hereby is granted as to the violations of NYCCBL § 12-306(a)(1), (4), and (5); and denied as to the violations of NYCCBL § 12-306(a)(3); and it is further

ORDERED, that the City rescind the March 26, 2010 letter and bargain with the Union over any changes to the 1,000 hour cap; and it is further

ORDERED, that the parties provide, at the Board's direction, information regarding damages as the Board will retain jurisdiction to determine any remedy at a later date; and it is further

ORDERED, that the City of New York post notices reflecting the Board's determination in this matter.

Dated: January 5, 2011
New York, New York

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 4 (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-2849-10 be, and the same hereby is granted as to the violations of NYCCBL § 12-306(a)(1), (4), and (5); and denied as to the violations of NYCCBL § 12-306(a)(3); and it is further

ORDERED, that the City of New York rescind the March 26, 2010 letter and bargain with the Union over any changes to the 1,000 hour cap; and it is further

ORDERED, that the parties provide, at the Board's direction, information regarding damages.

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