

DEA, 4 OCB2d 8 (BCB 2011)

(IP) (Docket No. BCB-2900-10).

Summary of Decision: The Union claimed that the City and the NYPD violated NYCCBL § 12-306(a)(1) and (4) in October 2010 by not negotiating when they changed the longstanding Duty Schedule of Detectives in the NYPD's Crime Scene Unit. The new Duty Schedule altered the hours off between tours and the hours off between sets of tours. The City argued that the Union has failed to establish the claimed violations because the creation of the program at issue was not subject to bargaining but was an exercise of management's statutory rights as set forth in NYCCBL § 12-307(b). The Board found that altering the hours off between sets of tours and the hours off between tours are mandatory subjects of bargaining. Accordingly, the Union's petition is granted. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

THE DETECTIVES' ENDOWMENTS ASSOCIATION,

Petitioner,

-and-

**THE CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,**

Respondents.

DECISION AND ORDER

On October 8, 2010, the Detectives' Endowment Association ("Union") filed a verified scope of bargaining/improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD").¹ The Union alleges that in October 2010, the City and the

¹ The Union also filed a petition for injunctive relief, which was denied by the Board on October 26, 2010.

NYPD violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) and (4), by unilaterally changing the longstanding Duty Schedule of Detectives in the NYPD’s Crime Scene Unit (“CSU”) without bargaining. The new Duty Schedule alters the number of hours off between sets of tours (*i.e.* the time off between the end of one work schedule and the start of the next) and the number of hours off between the tours. The City argues that the Union fails to establish the claimed violations because the new Duty Schedule is not subject to bargaining but is an exercise of management’s statutory rights as set forth in NYCCBL § 12-307(b). The Board finds that by altering the number of hours off between sets of tours and the number of hours off between tours the City unilaterally changed mandatory subjects of bargaining. Accordingly, the Union’s petition is granted.

BACKGROUND

The CSU consists of approximately 50 Detectives who respond to crime scenes to identify, collect, and forward evidence. The Union represents CSU Detectives employed by the NYPD. The pre-October 2010 Duty Schedule of CSU Detectives and the Pilot Program Duty Schedule are undisputed. Both are classified as “4x2 work schedules” in which each CSU Detective works a repeating six day work schedule consisting of two eight hour tours and two nine hour tours over four calendar days followed by two calendar days off, for a total of 34 working hours and 110 non-working hours in a six day schedule.

Prior to October 1, 2010, Tour 1 was from 7:00 a.m. to 3:00 p.m. on day 1 (eight hours); Tour 2 was from 7:00 a.m. to 3:00 p.m. on day 2 (eight hours); and Tour 3 was from 2:00 p.m. to 11:00 p.m. on day 3 (nine hours); and Tour 4 continued immediately after Tour 3 at 11:00 p.m. on day 3

to 8:00 a.m. on day 4 (9 hours). That is, CSU Detectives worked the last 18 hours straight, followed by two days off. Thus, under the pre-October 2010 Duty Schedule, CSU Detectives had 16 hours off between the Tours 1 and 2; 23 hours off between Tours 2 and 3; no time off between Tours 3 and 4; and 71 hours off between the end of Tour 4 and the start of the next set of tours. Also, prior to October 1, 2010, CSU Detectives were divided into six squads, with each squad beginning their tours on a different day of the week to ensure continuous coverage. The pre-October 2010 Duty Schedule had been in effect since the late 1980s. It is undisputed that since then, the duties of CSU Detectives have grown exponentially more complicated, detail-oriented, and data-intensive.²

According to the City, in the wake of a November 2006 shooting incident, the NYPD took a fresh look at CSU operations. The City states that outside consultants recommended changing the CSU Detectives' Duty Schedule because fatigue from working 18 hours straight hindered the ability of CSU Detectives to work effectively and efficiently. The City decided to experiment with a Pilot Program that eliminated the 18 consecutive hour work period. Prior to doing so, the Union, the NYPD, and the Office of Labor Relations met twice. According to the Union, but denied by the City, during these meetings the Union objected to any change in the longstanding CSU Duty Schedule and to any variation from existing schedules that CSU Detectives worked.

The City implemented the Pilot Program on October 1, 2010, eliminating the back-to-back tours that resulted in CSU Detectives working 18 hours straight.³ Under the Pilot Program, CSU

² Examples of new technologies introduced since the late 1980s include forensic mapping equipment, DNA testing, and ballistic alignment lasers. Also subsequent to 1980, the NYPD implemented the Enterprise Case Management System, into which CSU Detectives enter all relevant data before the end of their shift.

³ The Pilot Program was to be only for 90 days. On January 14, 2011, the City informed the Office of Collective Bargaining that Pilot Program continues and that no end date has been set.

Detectives were assigned to three platoons, instead of six squads. Each Platoon worked four tours consisting of two nine hour tours followed by two eight hour tours: for the First Platoon, Tours 1 and 2 were 11:00 p.m. to 8:00 a.m. and Tours 3 and 4 were 11:00 p.m. to 7:00 a.m.; for the Second Platoon, Tours 1 and 2 were 7:00 a.m. to 4:00 p.m. and Tours 3 and 4 were 7:00 a.m. to 3:00 p.m.; and for the Third Platoon, Tours 1 and 2 were 3:00 p.m. to 12:00 a.m. and Tours 3 and 4 were 3:00 p.m. to 11:00 p.m. Under the Pilot Program Duty Schedule, CSU Detectives have 15 hours off between the Tours 1 and 2; 15 hours off Tours 2 and 3; 16 hours off between Tours 3 and 4; and 64 hours off between the end of Tour 4 and the start of the next set of tours. Thus, under the Pilot Program Duty Schedule, while CSU Detectives continue to work 34 hours over four days followed by two days off, the number of hours off between sets of tours and the number of hours off between tours has changed.

The Union filed the instant verified scope of bargaining/improper practice petition on October 8, 2010. The Union requests an order declaring Respondents' deviation from an agreed-upon work schedule to be violative of the NYCCBL and that the *status quo ante* be restored until the City bargains with the Union.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that by implementing the Pilot Program the City unilaterally altered the number of hours off between sets of tours and the number of hours off between tours. The Union cites to Board decisions going back 30 years, holding that the City must negotiate over schedule changes where the changes alter the total number of hours worked per day and the time off between

tours. The Union characterizes the pre-October 2010 Duty Schedule as three appearances in which the CSU Detectives worked eight hours on day one, eight hours on day two, and 18 consecutive hours over days three and four, followed by two days off. It is undisputed that the Pilot Program eliminated the 18 consecutive hours that CSU Detectives had worked and thus altered the number of hours worked per day and the time off between tours. Respondents' unilateral changes in these mandatory subjects of negotiations and their refusal to bargain in good faith over these changes, despite a long history of doing so, violates NYCCBL § 12-306(a)(1) and (4).⁴

City's Position

The City argues that the instant petition fails to allege facts sufficient as a matter of law to constitute an improper practice. The petition fails to set forth relevant and material documents, dates, or facts. Because the Union failed to provide any detail, its petition must be dismissed for failure to satisfy the standards set in forth in § 1-07(c)(1)(i)(D) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules").⁵

⁴ 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 section 12-305 of this chapter . . ." NYCCBL § 12-305 provides, in pertinent part, that "[p]ublic 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"

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 with certified or designated representatives of its public employees"

⁵ OCB Rules § 1-07(c)(1)(i)(D) states that a petition shall include:

A clear and concise statement, in numbered paragraphs, of the facts constituting the claim under § 1-07(b) of these rules. The statement shall include the nature of the controversy and specify any provisions

The City argues that scheduling is a management right, not a mandatory subject of bargaining. The Board has previously interpreted NYCCBL § 12-307(b) to grant authority to employers to unilaterally adjust work schedules as long as there is no change in the total number of hours worked.⁶ In the instant case, the NYPD has merely altered the times that CSU Detectives arrive for their tours. This is a management right and a not a mandatory subject of bargaining. Further, there is no NYPD rule, regulation, or written policy restricting the NYPD's broad managerial authority to unilaterally implement adjusted work assignments or schedules as it deems necessary. The City argues that "[t]o the contrary, although the parties *may* negotiate the subject of

of the contract, executive order, or collective bargaining agreement involved; a copy of such provisions should be provided. If the controversy involves an alleged improper practice, the statement shall include but not be limited to the names of the individuals involved in the particular act specifically alleged and the date, time, and place of occurrence of each particular act alleged. Such statement may be supported by affidavits, documents, and other evidence that may be relevant and material but may not consist solely of such attachments, and any attachments or exhibits shall be specifically identified and referred to in the petition;

⁶ NYCCBL § 12-307(b) provides, in pertinent part:

It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

employee schedules, the Detective Contract, the parties' collective bargaining agreement, only proscribes rescheduling of days off, thus authorizing NYPD to reschedule employee work tours within a given day, as they have done in this instance." (Ans. ¶ 34) (emphasis in original).

The City also argues that it did not refuse to bargain in good faith with the Union when it implemented the Pilot Program because there has been no change to a term or condition of employment that requires bargaining. Thus, there is no violation of NYCCBL § 12-306(a)(4). The burden is on the Union to establish that a unilateral change has occurred and that the change is material, substantial, and significant. Assuming such changes occurred, the City has no obligation to bargain because changing schedules is a management prerogative.

The City further argues that the Union has failed to allege a practical impact and that the Board has not found a practical impact. The City describes the pre-October 2010 Duty Schedule as consisting of two eight-hour tours (7:00 a.m. to 3:00 p.m.) followed by two back-to-back nine-hour tours (Tour 3 was 2:00 p.m. to 11:00 p.m.; Tour 4 was 11:00 p.m. to 8:00 a.m.), followed by two days off. Because the Pilot Program Duty Schedule also consists of two eight hour tours and two nine hour tours, followed by two days off, no practical impact can be found, as there has been no change to the number of hours per tour (eight or nine), the number of tours per week (four), the number of total hours worked per week (34), or the number of days off between tours (two). The Union has failed to allege a specific fact demonstrating an impact on CSU Detectives resulting from the Pilot Program. Thus, the condition precedent to create a duty to bargain has not been shown, and the scope of bargaining claim must be dismissed. Finally, as the Union has failed to demonstrate a NYCCBL § 12-306(a)(4) violation, there is no derivative NYCCBL § 12-306(a)(1) violation.

DISCUSSION

The City raises a threshold objection claiming that the instant petition is facially insufficient because it lacks non-conclusory and specific factual contentions, dates, and is devoid of relevant and material documents that could cure these deficiencies. Thus, the petition should be dismissed for failure to comply with OCB Rules § 1-07(c)(1)(i)(D). However, it “is the Board’s long-established policy that the OCB Rules regarding pleadings be liberally construed.” *NYSNA*, 51 OCB 37, 5-6 (BCB 1993) (citations omitted). Where “the petition provides the respondent with sufficient information to place them on notice of the nature of the Union’s claim and enable them to formulate a response, the petition is sufficient under [OCB Rule] §1-07.” *Id.* (citations omitted); *see also Andreani*, 2 OCB2d 15, at 19-20 (BCB 2009). Although the instant petition did not provide details as to the pre-October 2010 Duty Schedule or the Pilot Program Duty Schedule, the petition clearly identified the nature of the Union’s claim and satisfied the standard set forth in OCB Rule § 1-07(c)(1)(i)(D).

To refuse to bargain in good faith on mandatory subjects of bargaining is an improper practice under NYCCBL § 12-306(a)(1) and (4). *See DC 37*, 75 OCB 10, at 7 (BCB 2005); *NYSNA*, 51 OCB 37. The City describes the instant matter as one of scheduling, which is a managerial prerogative and not subject to mandatory collective bargaining. The Union describes the instant matter as concerning whether the hours off between sets of tours and the hours off between tours are mandatory subjects of bargaining.

Hours are a mandatory subjects of bargaining, and “while the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total numbers of hours employees work per day or per week.” *UFT*, 3 OCB2d 44, at 9

(BCB 2010) (quoting *UFOA*, 1 OCB2d 17, at 10 (BCB 2008) (quotation marks and citations omitted)).⁷ For over 35 years, we have recognized that an employer must bargain over changes in a schedule that affect time off. See *PBA*, 15 OCB 5, at 17-18 (BCB 1975), and its companion case, *PBA*, 15 OCB 24, at 19-20 (BCB 1975), *affd*, *Patrolmen's Benevolent Assn. v. Bd. of Coll. Barg.*, N.Y.L.J., Jan. 2, 1976, at 6 (S.Ct. N.Y. Co.).⁸ In *PBA*, 15 OCB 5, at 17, we recognized the City's right to alter its schedule but held that it "must bargain over those aspects of the duty charts . . . which affect hours of work, including days of work and *days off*." *PBA*, 15 OCB 5, at 18 (emphasis added). In *PBA*, 15 OCB 24, the City urged that "the time off between sets of tours" was not a mandatory subject of bargaining. *Id.*, at 19. We stated that "the issue of *time off between tours* is bargainable." *Id.*, at 20 (emphasis added). The Board faced a similar situation to the instant case, in the context of an injunction request, in *FADBA*, 55 OCB 1 (BCB 1995). The employees worked 12 hour shifts, six day and six night, over a 25 day cycle. The employer unilaterally changed the employees' schedule, increasing the number of day shifts to seven and decreasing the number of night shifts to five per 25-day cycle. The total number of hours in each tour, the number of days

⁷ The distinction between scheduling and hours was recently illustrated in *UFT*, 3 OCB2d 44, where the employer implemented two distinct changes: first, that employees work during certain hours of the day and, second, that employees work at least twice a week in five-hour time blocks. We found the first change to be a matter of scheduling and not subject to mandatory collective bargaining. We found the second change, however, related to hours that must be bargained.

⁸ *PBA* concerned Patrolmen's duty charts. Prior to 1972, Patrolmen's duty charts were based on a 20-squad system, resulting in an eight hour day. In October of 1972, the NYPD changed to a 24-squad system. The number of annual hours remained the same but the work day was lengthened to eight and half hours, resulting in fewer tours per year and Patrolmen receiving more days off per year. The City sought further unilateral alterations to the Patrolmen's duty charts, resulting in *PBA*, 15 OCB 5. Subsequent to the issuance of *PBA*, 15 OCB 5, an impasse panel was created to aid in the resolution of the duty charts dispute. The City then filed an improper practice petition requesting that the Board determine the bargainability of the elements, which it contends were matters of management prerogative, including the time off between sets of tours, resulting in *PBA*, 15 OCB 24.

worked per set of tours, the number of appearances per year, and the number of tours per year all remained unchanged. However, the new schedule changed the time off between some tours in the sets of tours. Whereas before the change, employees had twenty-four hours off after two twelve hour tours, under the new schedule the employees had three twelve hour tours before having twenty-four hours off. While denying the Union's injunction request on other grounds, the Board noted that "the allegation that the new work schedule unilaterally imposed by the Fire Department change[d] the time off between certain shifts state[d] an apparently meritorious claim of an improper practice in violation of §12-306a.(4) of the NYCCBL." *Id.*, at 10-11. *See also LEEBA*, 3 OCB2d 29, at 31 (BCB 2010); *UFOA*, 1 OCB2d 17, at 10 (finding hours off between tours in a set of tours mandatorily bargainable).

In *DC 37*, 75 OCB 10, the Board addressed an employer's unilateral change to a "compressed time program" where employees "remain[ed] 45 minutes longer during every work day and [were] afforded one work day off during every two-week period." *Id.*, at 9. The Board noted that the compressed time program was not "simply a scheduling tool but a means to lengthen the work day and shorten a work week and affected an employee's number of appearances" and that "one consequence for some employees was to lengthen the . . . time off." *Id.* (citing *FADBA*, 55 OCB 1, at 10-11). The Board concluded that "the compressed time program concerns hours, which is a mandatory subject of bargaining, and the program may not be discontinued unilaterally." *Id.*

A comparison of the pre-October 2010 Duty Schedule and the Pilot Program Duty Schedule for CSU Detectives reveals that the Pilot Program changed the number of hours off between sets of tours, from 71 to 64 hours. It also changed the hours off between tours for CSU Detectives—from 16 hours off between Tours 1 and 2 to 15; from 23 hours off between Tours 2 and 3 to 15; and from

no time off between Tours 3 and 4 to 16 hours.⁹

Accordingly, we find that the NYPD violated NYCCBL § 12-306(a)(1) and (4) when it failed to bargain before implementing a change in the Duty Schedule of CSU Detectives that changed the number of hours off between sets of tours and the number of hours off between tours. We direct the NYPD to reinstate the Duty Schedule of CSU Detectives as it existed prior to October 2010, and to bargain in good faith over any change in hours and time off.¹⁰ Because of our holding, this Board need not reach the question of practical impact. *See DC37*, 75 OCB 10, at 11.

⁹ We need not resolve the parties disagreement over whether CSU Detectives, prior to October 2010, should be characterized as being required to make three or four appearances per week, as it is undisputed that the time off between tours has changed.

¹⁰ We note that this holding addresses the Crime Scene Unit Detective Duty Schedule and not the individual schedules of CSU Detective.

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, BCB-2900-10, filed by the Detectives' Endowment Association, be, and the same hereby is, granted to the extent that the New York City Police Department failed to bargain before changing of the number of hours off between sets of tours and the number of hours off between tours on the Crime Scene Unit Detective Duty Schedule; and it is further

ORDERED, that the New York City Police Department cease and desist from unilaterally changing of the number of hours off between sets of tours and the number of hours off between tours on the Crime Scene Unit Detective Duty Schedule; and it is further

ORDERED, that the New York City Police Department reinstate the number of hours off between sets of tours and the number of hours off between tours on the Crime Scene Unit Detective Duty Schedule as it existed prior to October 1, 2010; and it is further

ORDERED, that the City of New York bargain in good faith concerning any changes in the number of hours off between sets of tours and the number of hours off between tours on the Crime Scene Unit Detective Duty Schedule.

Dated: February 14, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
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