Local 621, SEIU, 5 OCB2d 38 (BCB 2012)

(IP) (Docket No. BCB-2964-11)

Summary of Decision*:** The Union claimed that the City and DEP violated NYCCBL § 12-306(a)(1), (3), and (4) when DEP unilaterally eliminated without bargaining its longstanding practice of having Supervisors of Mechanics (Mechanical Equipment) respond on overtime to off-hour road calls. The Union also claimed that this action was taken in retaliation for its filing of a meritorious improper practice petition and grievance. The City contended that DEP exercised its management right pursuant to NYCCBL § 12-307(b) to reduce overtime, and that no causal connection existed between the decision to eliminate the system and the Union's filings. The Board found that employees responded to these road calls on overtime and that the assignment's elimination was not a mandatory subject of bargaining. The Board further found that the Union had established a *prima facie* case of retaliation under the NYCCBL, but that the City had provided a legitimate business reason for its decision. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

***Respondents*.**

DECISION AND ORDER

On June 15, 2011, Local 621, Service Employees International Union, AFL-CIO ("Union"), filed a verified improper practice petition against the City of New York

("City") and the New York City Department of Environmental Protection ("DEP"). The Union claims that, in March 2011, the City and DEP violated § 12-306(a)(1), (3), and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when DEP unilaterally eliminated without bargaining its longstanding practice of having Supervisors of Mechanics (Mechanical Equipment) ("SMME") in its Fleet Services Division ("Fleet Services") respond on overtime to off-hour road calls. The Union also claims that this action was taken in retaliation for its filing of a meritorious improper practice petition and grievance.[1] The City contends that DEP exercised its management right pursuant to NYCCBL § 12-307(b) to reduce overtime, and that no causal connection exists between the decision to eliminate the system and the Union's filings. This Board finds that employees responded to these road calls on overtime and that the assignment's elimination is not a mandatory subject of bargaining. The Board further finds that the Union established a *prima facie* case of retaliation under the NYCCBL, but that the City has provided a legitimate business reason for its decision. Accordingly, the petition is denied.

BACKGROUND

A hearing in the instant matter was held over two days at which the President of Local 621, two SMMEs, a supervisor at the DEP Emergency Call Center ("ECC"),

[1] Although the Union did not cite the NYCCBL's relevant retaliation provisions, the retaliation claim was clearly addressed and argued by both parties. This Board "look[s] beyond statutory citations to the essence of the claims asserted in resolving improper practice claims." *SSEU, L. 371*, 1 OCB2d 20, at 12 (BCB 2008). Thus, the Board construes the Union's petition as asserting a violation of NYCCBL § 12-306(a)(1) and (3), as NYCCBL § 12-306(a)(3) is the relevant provision for a retaliation claim, and a violation of that provision constitutes a derivative violation of NYCCBL § 12-306(a)(1).

DEP's Director of Payroll, and DEP's Director of Fleet Services ("Director") testified. During the hearing, the parties presented evidence that focused largely on how DEP personnel responded formerly to road calls outside of normal operating hours ("off-hours"), which is known as "Duty Rotation," as well as how DEP addressed off-hour road calls after it eliminated Duty Rotation.[2] The Trial Examiner found that the totality of the record established the following relevant facts.

DEP is an agency of approximately 6,000 employees that manages and conserves the City's water supply; distributes clean drinking water; collects and treats waste water; regulates air quality, hazardous waste, and critical quality of life issues; and oversees large capital construction projects related to these functions. DEP consists of several divisions and offices, including Fleet Services, which is responsible for maintaining the vehicles and other automotive equipment used by DEP.

Local 621 represents employees in the SMME title at Fleet Services. SMMEs "supervise, direct, and [are] responsible for the work of assigned personnel in connection with the repair, overhaul and maintenance of various types of mechanical equipment, motor vehicles and automotive equipment." (Joint Ex. 6).

These parties appeared before the Board in a prior improper practice proceeding arising from DEP's decision to cease permitting SMMEs in Fleet Services to use City-owned vehicles for commuting. *See Local 621, SEIU*, 2 OCB2d 27 (BCB 2009). On February 26, 2009, the Union filed an improper practice petition alleging that that unilateral change in policy violated NYCCBL § 12-306(a)(1) and (4). On September 24,

[2] The parties stipulated to the term "Duty Rotation" in lieu of "stand-by" or "on-call" because of the substantive differences between those two terms as they relate a pending arbitration between the parties. In so doing, the parties did not waive any rights in this proceeding or in the arbitration.

2009, the Board found that the use of a City-owned vehicle for commuting was an economic benefit and that DEP's failure to bargain with the Union over the change in policy constituted a violation of NYCCBL § 12-306(a)(1) and (4). *Id.* Accordingly, the Board ordered DEP to restore the use of the City-owned vehicles to the affected SMMEs.

Duty Rotation was first instituted in 2002, rescinded in 2004, reinstated in 2005, and then used continuously until March 2011. Under Duty Rotation, a single SMME was responsible for supervising off-hour incidents and vehicle breakdowns for one week, every seven weeks. Road calls regarding off-hour incidents with DEP vehicles would first go to ECC, a 24-hour emergency communications hub. ECC would, in turn, contact the SMME assigned to Duty Rotation, who would then contact an appropriate mechanic from a roster list and dispatch the mechanic. Duty Rotation covered 11:30 p.m. to 6:00 a.m. on weeknights, weekends, and holidays. This was in addition to the assigned SMME's regular eight-hour shift, and, during these hours, the assigned SMME could not consume alcohol and was required to remain in the vicinity of his/her home in case he/she received a call. Each time a SMME was called by ECC, the SMME was compensated with at least four hours of overtime pay, regardless of whether he/she personally responded at the scene. In some instances, the SMME would assist the mechanic over the phone; in others, the SMME would physically go to the scene to supervise the repair. The Director testified that it was uncommon that SMMEs were required to go to the scene of an incident.

On February 27, 2009, the Union filed a Step I grievance concerning the amount of compensation SMMEs received on Duty Rotation.[3] DEP did not respond at either Step I or Step II, and, then, the Union filed at Step III. A Step III hearing was held on March 17, 2010, and the City's Office of Labor Relations ("OLR") denied the Step III grievance on July 16, 2010. The Union filed a request for arbitration on August 5, 2010, and arbitration was scheduled to commence on March 7, 2011. DEP's Director of Payroll testified that in 2011, DEP's Bureau of Legal Affairs asked him to calculate the potential cost of the Union's grievance. He calculated that, if the Union were to win the arbitration, DEP would be liable for approximately $229,000.

The Director testified, that in March 2010, in response to a directive to reduce overtime costs, DEP began discussing a possible change to Duty Rotation. In September 2010, ECC was contacted, and policy formation and training of ECC employees began. On February 28, 2011, without prior discussion with the Union, the Director promulgated a memo stating that ECC would assume responsibility for dispatching Fleet Services mechanics to off-hour road calls, thereby eliminating Duty Rotation. Under the new protocol, instead of contacting a SMME on Duty Rotation, the ECC operator receiving a road call contacts the appropriate mechanic directly. ECC operators are not required to have any mechanical knowledge or expertise and are directed to contact the Director if they encounter any problems following the protocol. The new written protocols do not provide for ECC to contact anyone other than the Director. However, a SMME testified that he could recall at least three instances where ECC contacted SMMEs for assistance

[3] In its grievance, the Union alleges that DEP violated the Citywide Agreement by not compensating SMMEs on Duty Rotation according to its standby provisions. The Board emphasizes that this dispute is important only as background in considering the Union's retaliation claim, and that the instant decision does not consider the merits of that dispute.

after the new protocols were instituted; he also testified that the ECC employees followed the SMMEs' advice.

POSITION OF THE PARTIES

Union's Position

The Union argues that by eliminating Duty Rotation without bargaining, DEP violated NYCCBL § 12-306(a)(4). It is undisputed that the City and the Union never bargained over Duty Rotation. The City had sufficient time to bargain with the Union before eliminating Duty Rotation, and DEP could easily have contacted the Union about the issue. Instead, DEP chose to surprise the Union with the information right before the arbitration date. According to the Union, Duty Rotation requires that SMMEs remain close to home, refrain from using alcohol, and remain available for an entire week at a time; these sorts of conditions are within the scope of bargaining.

The Union argues that Duty Rotation is not "garden variety" overtime because SMMEs were not only required to work additional hours, but were also required to be continually available for emergencies for a full week at a time. (Union Brief at 14) Duty Rotation was used to determine how to handle emergencies and dictated when SMMEs could take vacations. Therefore, it was as essential to the work of the SMMEs as the vehicles that were assigned to them, the elimination of which the Board has already found to constitute a unilateral change. As with the assigned vehicles, Duty Rotation also conferred an economic benefit on the SMMEs.

The Union argues that that DEP's elimination of Duty Rotation was taken in retaliation for the protected activities of (1) filing and prevailing on an improper practice

petition challenging DEP's rescission of SMME's right to use City vehicles, and (2) filing a grievance seeking different compensation under the Citywide Agreement. DEP clearly knew of the Union's protected activities as it was a necessary party to both the improper practice proceeding and the grievance. The elimination of Duty Rotation came "on the heels" of the Board's September 2009 decision finding that DEP committed an improper practice. (Union Brief at 8) As for the grievance, it was "dormant" from its filing in March 2009 until February 2010, when DEP allowed the grievance to proceed to Step III. (*Id.*) DEP's own witness testified that discussions to change Duty Rotation were occurring as of March 2010. Further, just six days before the matter was to go to arbitration, DEP rescinded its use of Duty Rotation.

Moreover, the Union argues, the record establishes that the City's proffered legitimate business reason is not valid. Under Duty Rotation, SMMEs supervised and directed emergency off-hour road calls, which is the precise work for which they are qualified. Under the new system, clerical staff, who lack the knowledge to guide and supervise mechanics, dispatch mechanics to road calls. Not surprisingly, ECC staff members have called SMMEs for help in addressing off-hour emergencies. Notably, SMMEs continue to supervise mechanics during normal business hours. Therefore, although the City argues that this role should be eliminated during nights and weekends so that unqualified clerks can perform this duty, this argument is unfounded.

City's Position

The City argues that the Union is unable to establish that by ceasing Duty Rotation, DEP violated NYCCBL § 12-306(a)(4). Duty Rotation allowed Union members a chance to earn overtime pay. Pursuant to NYCCBL § 12-307(b), the City has

a statutory management right to assign overtime, and thus, overtime is not a mandatory subject of bargaining. The Union's argument that a reduction in overtime effectively reduced wages does not create a duty to bargain.

The City also argues that the Union has not established that DEP's actions were taken in retaliation for protected activity in violation of NYCCBL § 12-306(a)(3). According to the City, the only evidence presented by the Union is proximity in time; it has not presented any other facts tending to show improper motivation. Indeed, the Union relies entirely on inference to create a circumstantial case of anti-union animus. Temporal proximity alone is insufficient to establish a *prima facie* case. Further, DEP had a legitimate business reason. Until the filing of the grievance in February 2009, SMMEs on Duty Rotation were paid four hours of overtime only for those instances when they were called to respond to road calls. In its February 2009 grievance, the Union claimed that the parties' contract required that SMMEs be paid regardless of whether or not they responded to a call. DEP examined the grievance and determined there was a possibility that its method of calculating the compensation for Duty Rotation might be at odds with the contract, increasing costs. Therefore, DEP re-evaluated its use of Duty Rotation and determined that, instead of involving SMMEs, mechanics would be dispatched directly by ECC, which was already in operation 24-hours per day, reducing costs. Thus, clearly, DEP's decision to cease using Duty Rotation was based upon a legitimate business reason as DEP would have taken the same action once it became aware of the possible additional costs, regardless of how the possible costs were discovered.

The Union attempted to refute the business necessity of the City's action by presenting testimony that, at times, an ECC operator reached out to a SMME for guidance on handling calls. However, the fact that ECC operators may have called SMMEs for guidance represent only an incidental deviation from the protocol and does not undermine the effectiveness or safety of the new system. Moreover, DEP is in the best position to decide whether ECC operators are competent to respond to road calls; any inference otherwise would be speculative.

Finally, the City argues that Petitioners have not established that ending the Duty Rotation system independently or derivatively violated NYCCBL § 12-306(a)(1).

DISCUSSION

Failure to Bargain

It is 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." NYCCBL § 12-306(a)(4). Such mandatory subjects of bargaining include wages, hours, and working conditions. *See DEA*, 2 OCB2d 11, at 12 (BCB 2009); *UFA*, 71 OCB 19, at 6 (BCB 2003). A public employer may not unilaterally implement a change in a mandatory subject before bargaining on the subject has been exhausted. *See UMD, L.* 333, 2 OCB2d 44, at 24 (BCB 2009).

When a petitioner asserts that a unilateral change in a term or condition of employment resulted from an employer's refusal to bargain in good faith, the petitioner must first demonstrate that the matter over which it seeks to negotiate is or relates to a

mandatory subject of bargaining. *See DC 37, L. 3631*, 4 OCB2d 34, at 11 (BCB 2011). The petitioner then has to demonstrate the existence of a change from the existing policy or practice. *Id.* It is undisputed that no bargaining took place over DEP's elimination of the Duty Rotation. Therefore, the issue before the Board is whether Duty Rotation is a mandatory subject of bargaining.

The Union argues that Duty Rotation was a part of the SMME's regularly assigned duties, and, therefore, the wages earned from Duty Rotation constitute a mandatory subject of bargaining. The Board does not find this argument persuasive. The evidence establishes that Duty Rotation was an assignment of overtime to SMMEs. The assignment was performed outside of regular work hours and was compensated separately from the regular work performed by SMMEs. The Board has construed NYCCBL § 12-307(b) to permit management to make unilateral changes to the "methods, means, and personnel" by which governmental operations are conducted; assignment of duties falls within this section. *See, e.g., UFA*, 4 OCB3d 3, at 10-11 (BCB 2011), *affd., Matter of Uniformed Firefighters Assn. v. City of New York*, Index No. 101817/2011 (Sup. Ct. N.Y. Co. Feb. 6, 2012) (Huff, J.).[4] In addition, the Board has consistently held that the decision regarding whether or not to assign overtime falls squarely within the employer's statutory right to determine how its operations are to be

[4] Our dissenting colleague, Member Moerdler, renews his previous contention that NYCCBL S 12-307(b) 'lacks statutory and constitutional foundation and is plainly void as matter of law." (Dissent at 1, citing dissent in *UFA*, 4 OCB2d 3, at 13-16 (BCB 2011). As the majority opinion in UFA, as affirmed by the Supreme Court, explained in declining to adopt this contention, no authority for an administrative agency to annul part of its enabling statute has been identified by the dissent, and, in any event, the Court of Appeals and other courts in this State have affirmed the Board's holdings pursuant to NYCCBL S 12-307(b). *UFA*, 4 OCB2d 3, at 9-11

conducted. *See Local 924, DC 37*, 1 OCB2d 3, at 9-10 (BCB 2008); s*ee also Local 2507, DC 37*, 67 OCB 3, at 6-7 (BCB 2001); *UPOA*, 39 OCB 29 (BCB 1987).

The Union argues that the hours worked on Duty Rotation are different from the kind of overtime contemplated in the cases cited above. The Board finds this argument unpersuasive. Regardless of whether one characterizes the hours worked under the Duty Rotation system as "standby" or "on call," for the purposes of the issue herein, these hours fall under the Citywide Agreement overtime provision and are compensated separately from regular work hours. Notably, the Union cited the "Overtime" provisions of the Citywide Agreement in its grievances and its requests for arbitration. Therefore, the Board concludes that the elimination of the Duty Rotation system was not a mandatory subject of bargaining. Thus, we find no violation of NYCCBL § 12-306(a)(4).

Retaliation

To determine if an employer's action constitutes retaliation under NYCCBL § 12-306(a)(3), the Board first requires a petitioner to establish a *prima facie* case by demonstrating 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.

Bowman, 39 OCB 51, at 18-19 (1987) (adopting test from *City of Salamanca*, 18 PERB ¶ 3012 (1985)); *see also Colella*, 79 OCB 27, at 53 (BCB 2007). If the petitioner establishes a *prima facie* case, the employer "may attempt to refute this showing on one or both elements or demonstrate that legitimate business reasons would have caused the

employer to take the action complained of even in the absence of protected conduct." *DC 37, L. 1113*, 77 OCB 33, at 25 (BCB 2006).[5]

This Board has held that the filing of contractual grievances and improper practice petitions constitutes activity protected under our law. *Colella*, 79 OCB 27; *Fabbricante*, 61 OCB 38 (BCB 1998). An employer's knowledge of such activity can be sufficiently established by its participation in those proceedings. *See Colella*, 79 OCB 27, at 53. It is undisputed that DEP had knowledge of the Union's grievance and improper practice petition; therefore, the first prong of the test is satisfied.

The second prong of the test requires proof of a causal connection between the alleged improper act and the protected Union activity. *See SBA*, 75 OCB 22, at 22 (BCB 2005). The petitioner may carry its burden of proof "by deploying evidence of proximity in time, together with other relevant evidence." *CWA, L. 1180*, 77 OCB 20, at 14 (BCB 2006). This proof must rely on "specific, probative facts rather than on conclusions based on surmise, conjecture or suspicion." *Feder*, 1 OCB2d 27, at 17 (BCB 2008).

The evidence establishes that the process of eliminating the Duty Rotation system coincided with the Union's protected activity. Both the improper practice petition regarding rescinding the use of DEP vehicles for commuting and the grievance regarding proper compensation for Duty Rotation were filed in late February 2009. The Board issued its decision on the improper practice petition in September 24, 2009. The Step III hearing took place on March 17, 2010, OLR's decision was rendered on July 16, 2010, and the Union filed a request for arbitration on August 5, 2010. The Director testified

[5] Although the Board concluded that the elimination of Duty Rotation was not a mandatory subject of bargaining, we have consistently held that an employer cannot exercise its managerial rights "for a retaliatory purpose." *SBA*, 4 OCB2d 50, at 25 (BCB 2011); *see also DC 37*, 61 OCB 13, at 17 (BCB 1998).

that DEP management's internal conversations about Duty Rotation began in March 2010, which was six months after the Board's decision was issued and the same month that the Step III hearing took place. The conversations regarding a change to Duty Rotation intensified in June 2010, immediately preceding the Step III ruling. In September 2010, one month after the arbitration request was filed, DEP contacted ECC and began preparing to eliminate Duty Rotation.

Thus, the Board finds that the Union has established a *prima facie* case of retaliation. We recognize that in our 2009 decision regarding the Union's previous improper practice petition, we did not find that DEP's actions were motivated by anti-union animus. However, we cannot ignore the temporal proximity between the Union's grievance concerning overtime payment under Duty Rotation and DEP's decision to eliminate Duty Rotation. That the grievance and the alleged retaliatory action both concern Duty Rotation, in combination with our finding against DEP regarding this same group of employees, offers evidence of a causal connection sufficient to establish the Union's *prima facie* case of retaliation.

Although the Union established a *prima facie* case, the City put forth a compelling legitimate business reason for its decision to eliminate Duty Rotation. The Director credibly testified that Fleet Services was under a directive to reduce the amount of overtime, and no evidence was presented to rebut this assertion. The new procedure allowed ECC operators to directly contact the mechanics that would respond to off-hour road calls, reducing costs. Further, the record establishes that the physical supervision of road call responses was not regularly necessary and that when mechanical knowledge or expertise was needed, ECC operators could contact the Director who would respond

accordingly. There was no evidence presented to support the Union's argument that the new system required clerical employees, namely ECC operators, to "supervise" mechanics. This new system eliminated SMME participation in the process. Therefore, consistent with the agency-wide directive, the decision to discontinue Duty Rotation eliminated a source of overtime expenses for DEP.

We find that the record does not support a finding that the City's asserted legitimate business reason was pretextual. The evidence does not establish that ECC operators are unqualified to contact mechanics directly. Further, it is undisputed that a majority of off-hour road calls do not require on-site supervision, and that extraordinary circumstances can be handled by the Director. Accordingly, we find that DEP's stated reason for the most recent elimination of Duty Rotation constitutes a legitimate business reason, and, thus, we find that DEP did not violate NYCCBL § 12-306(a)(3).

Finally, as we find no violation of NYCCBL § 12-306(a)(3) or (4), we likewise find no derivative violation of NYCCBL § 12-306(a)(1). Accordingly, the improper practice petition is denied in its entirety.

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 Local 621, Service Employees International Union, AFL-CIO, docketed as BCB-2964-11, be, and the same hereby is, denied.

Dated: December 18, 2012
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

(I dissent; see attached opinion)

CHARLES G. MOERDLER
MEMBER

(I dissent; see attached opinion)

PETER PEPPER
MEMBER

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 621, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

(Docket No. BCB-2964-11)

DISSENT

As the majority correctly notes, prior to the dispute at issue here and since at least 2005, Duty Rotation was continuously in practice. Under Duty Rotation, a single supervisor of mechanics was on duty every 7 weeks and was then responsible for supervising off-hour inspection of vehicle breakdowns. Duty Rotation, as the record indisputable demonstrates, involved a number of factors impacting on the lives of the supervisors, including their need to be available for an entire week, their vacations and their social behavior. The task carried with it an overtime opportunity, which was inherent in the assignment.

Contemporaneously with the filing of an improper practice petition by the collective bargaining unit of the supervisors, the employer determined to eliminate the Duty Rotation and attendant overtime benefits. The majority cites cases such as *Local 924, DC 37,* 1 OCB2d 3 at 9-10 (BCB 2008) for the proposition that the determination "whether or not to assign overtime falls squarely within the employer's statutory right to determine how its operations are to be conducted." However, those cases are not in point. Equally, inapt as a matter of law is NYCCBL Section 12-307(b), a provision that, as a we have repeatedly observed, lacks statutory and constitutional foundation and is plainly void as matter of law. See, e.g., *Matter of Uniformed Firefighters Association, Local 9, IAFF, AFL-CIO*, BCB-2958-11 (2011).

Here, unlike the cases relied upon by the majority, there was an established practice voluntarily and continuously conducted by the employer over a period of many years – a practice of employing supervisors to perform specified tasks and that task carried with it an overtime stipend. The hours worked on Duty Rotation are within the kind of overtime contemplated in the caselaw.

Under these circumstances and upon this record proscribed retaliation is evident. The excuses proffered are pretextual . This record thus compels the conclusion that the Petition was well-founded as a matter of law and fact.

I therefore dissent and would grant the petition.

New York, New York
December 2, 2012

Charles G. Moerdler

_____
Member

LOCAL 621, SERVICE EMPLOYEES

INTERNATIONAL UNION, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY

DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

(Docket No. BCB-2964-11)

I dissent. I agree with the majority when, in using the applicable *Bowman* analysis, it found the Union established a *prima facie* case once the City made the decision to eliminate the practice of Duty Rotation and the payment of overtime benefits that came with this practice. Where I find myself in disagreement with the majority is as to how the reasons for this action offered by the City could be construed as anything more than pretext. To state there was no evidence established that ECC operators were unqualified to contact mechanics does not suggest they were in fact qualified to perform this function. To also note that extraordinary circumstances could be handled by the Director is a bit puzzling. Finally, to suggest that the City had a legitimate business reason to end a long-standing practice of Duty Rotation on the heels of the filing a grievance over overtime payments on behalf of the same group of employees is particularly troublesome. It would be difficult to reason that without the filing of the earlier actions, the City would have still eliminated Duty Rotation.

I dissent and would grant the petition.

New York, New York

December 6, 2012

Peter Pepper

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Alternate Labor Member