UFT, 5 OCB2d 26 (BCB 2012)

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

Summary of Decision: In a previous decision, *UFT*, 4 OCB2d 4 (BCB 2011), the Board found that by newly enforcing a 1,000-hour cap on the aggregate number of hours Hearing Officers could work per year, the City violated NYCCBL § 12-306(a)(1), (4), and (5). Thereafter, in order to fashion a remedy, the Board ordered the parties to submit records concerning all Hearing Officers' hours of work in previous years. The Board then permitted the parties to submit written positions and held oral argument on remedy. The Board considered the data and the parties' positions and developed a formula to determine a reasonable approximation of the number of hours a Hearing Officer would have worked but for the City's improper practice. The Board further directed the Trial Examiner to take reasonable steps in her discretion to compile a record of evidence relevant to the questions of mitigation and the affected Hearing Officers' availability to work. ***(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,

Respondent.

INTERIM 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 against the City of New York ("City"). The Union alleged, among other things, that the City unilaterally imposed new limits on the number of hours worked by Hearing Officers (Per Session) ("Hearing

Officers") in violation § 12-306(a)(1), (4), and (5) of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). In a previous decision, *UFT*, 4 OCB2d 4 (BCB 2011), issued on January 5, 2011, the Board found that by newly enforcing a 1,000-hour cap on the aggregate number of hours Hearing Officers could work per year, the City violated NYCCBL § 12-306(a)(1), (4), and (5). Thereafter, in order to fashion a remedy, the Board ordered the parties to submit records concerning all Hearing Officers' hours of work in previous years. The Board then permitted the parties to submit written positions and held oral argument on remedy. The Board has considered this information and developed a formula to determine a reasonable approximation of the number of hours a Hearing Officer who lost wages as a result of the City's improper practice would have worked during the calendar year of 2010. The Board directs the Trial Examiner to take reasonable steps in her discretion to compile a record of evidence relevant to the questions of mitigation and the affected Hearing Officers' availability to work.

BACKGROUND

In our previous decision in this matter, *UFT*, 4 OCB2d 4, we found that the City made a unilateral change in a mandatory subject of bargaining when it began enforcing a 1,000 hour cap on the total number of hours of work across all City agencies employing Hearing Officers.[1] This unilateral change in a mandatory subject of bargaining

[1] In its argument on remedy, the Union asserts that the Board's decision in *UFT*, 4 OCB2d 4, could be interpreted to apply not only to employees working at more than one agency, but also to employees working at a single agency. Although the Union acknowledges that the claim it asserted concerned the implementation of the 1,000 hour cap as it applied to employees who worked in more than one agency, the Union asks

constituted a violation of NYCCBL § 12-306(a)(4). Because this change occurred during a period of contract negotiations, it also violated NYCCBL § 12-306(a)(5).

Because the initial record was insufficient to determine remedial relief, we 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." *Id.* at 25. Thereafter, pursuant to the Board's request, the City submitted data concerning hours worked by all Hearing Officers in all agencies during 2007, 2008, 2009, and 2010. The parties then agreed upon the accuracy of the tabulated total hours worked by each individual Hearing Officer. The Board's calculations show that, in total, Hearing Officers worked: 197,753.80 hours in 2007; 213,433.17 hours in 2008; 233,543.23 hours in 2009; and 222,668.67 hours in 2010. The data also reflects that the City employed 282 Hearing Officers in 2007, 302 Hearing Officers in 2008, 306 Hearing Officers in 2009, and 338 Hearing Officers in 2010. Further, among the Hearing Officers employed in 2010, 44 of them worked over 1,000 hours at more than one agency in at least one of the three preceding years. Of those 44 Hearing Officers, the parties stipulated that five should be removed from consideration for a financial remedy because they worked only a few hours in 2010 and, therefore, the evidence demonstrated that they could not have reasonably expected to work more than 1,000 hours in these agencies during 2010. (Union's Written Position at 3; Transcript at 18, 23)

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whether the Board intended to grant a remedy to employees working in a single agency. As clarification, we reiterate that we did not expand the class of affected employees beyond those on whose behalf the Union brought the improper practice petition. Therefore, the employees being considered for a remedy include only those employees who could reasonably have been expected to work over 1,000 total hours at more than one City agency during 2010.

After this data was compiled, and its accuracy confirmed by both parties, the parties were given an opportunity to submit written statements regarding their position on remedy. Thereafter, the parties were given an opportunity to appear before the Board to further articulate their positions. Oral argument was held on March 6, 2012.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that in order to fairly resolve this matter, the Board should make whole those Hearing Officers who could reasonably have been expected to work more than 1,000 hours in 2010 if the City had not unilaterally imposed the cap on hours. According to the Union, such individuals are ascertainable and include, with certain exceptions, those Hearing Officers who, while working in more than one agency, worked 1,000 hours or more in any year from 2007 through 2009. Most such dually employed Hearing Officers consistently exceeded the 1,000 hour cap in those years prior to the cap's imposition.

Although no methodology would result in a perfect remedy, the Union argues its method would result in a fair and equitable resolution well within the power of the Board. This method is consistent with the process used by the National Labor Relations Board ("NLRB") and set forth in its Casehandling Manual for Compliance Proceedings. While not binding upon the Board, the Board has found NLRB precedent to be persuasive, as has the New York State Public Employment Relations Board ("PERB"). The Union notes that the NLRB routinely calculates back pay based upon earnings that are much less consistent than those of the Hearing Officers. For example, the NLRB includes tips in its

back pay calculation despite the difficulty of documenting and calculating them. It also includes the loss of non-mandatory overtime opportunities. Similarly, PERB has rejected an employer's argument that lost overtime wages could not be calculated. *See Village of Buchanan*, 22 PERB ¶ 3001 (1989).

As to the methodology the Board should employ, the Union suggests that, first, the Board should determine the average number of hours that a Hearing Officer worked in more than one agency by adding the total number of hours worked by the Hearing Officer at more than one agency from 2007 through 2009 and dividing those hours by the number of years that the Hearing Officer worked for more than one agency. Then, from that average the Board should subtract the total hours that the employee actually worked in 2010. The resulting figure approximates the total number of hours an employee lost due to the implementation of the cap.

The Union contends that the City withheld hours from Hearing Officers in 2010 to ensure that they did not reach the cap, and therefore, many individuals were unable to reach 1,000 hours in 2010. The Union notes that one Hearing Officer testified that, because of the imposition of the cap combined with the increased hiring of new Hearing Officers, "he was 'not even going to come close to a thousand hours this year' despite his availability for work." (Union's Written Position at 2) Thus, the number of hours actually worked, and not the amount of the cap (*i.e.* 1,000 hours), is the proper figure to subtract from the average to determine the damages caused by the cap.

The Union notes that some employees had variations in the number of hours that they worked during 2007 through 2009; however, it argues that those years in which an individual worked in two agencies, but worked only a minimal number of hours, should

be excluded from the average. For example, the Union asserts that two Hearing Officers were hired late in 2008. They did not work as Hearing Officers in 2007, and they worked only 144.50 and 251.25 total hours, respectively, in 2008. Therefore, these low-earning years should be excluded from their average. The Union recognizes that five employees should be removed from consideration because either they are no longer employed by the City or they reduced their overall hours of work and cannot be reasonably expected to have worked more than 1,000 hours in 2010. The Union asserts that the 39 Hearing Officers remaining after these eliminations all reasonably could have been expected to work at more than one agency for at least 1,000 hours during 2010 if not for the cap. Further, the hours worked each year by these Hearing Officers do not vary significantly from the average of the hours worked in years in which they worked over 1,000 hours in more than one agency.

In 2010, the total number of Hearing Officers employed by the City increased to 338 from the 306 employed in 2009, which resulted in fewer hours being available to existing Hearing Officers. By its decision to hire additional Hearing Officers, the City diluted the work force, and, according to the Union, this is a "fruit of the poisonous tree." (Union's Written Position at 4) Therefore, the Board's remedy should account for this increased hiring and the ensuing loss of hours by subtracting the actual hours worked in 2010—and not a discounted figure, as advocated by the City—from the averaged hours of work during 2007 through 2009.

Finally, the remedy should also include lost pension benefits as well as interest on the lost earnings. Citing *Frankfort-Schuyler Teachers Association*, 26 PERB ¶ 3057

(1993), the Union notes that interest is routinely included in PERB remedies, and it is fixed pursuant to *New York Civil Practice Law & Rules* § 5004.

City's Position

The City asks that the Board reject the "unusual and extraordinary remedy" requested by the Union, which would result in paying Hearing Officers for hours they did not work and for hours that were reassigned and worked by other members of the bargaining unit. (City's Written Position at 1) The City notes that the Court of Appeals has held that an administrative agency has only the powers that it has been expressly or impliedly given. *See Matter of Department of Personnel v. N.Y. Civ. Serv. Commn.*, 79 N.Y.2d 806, 807 (1991). The City underscores that NYCCBL § 12-309 does not provide the Board with explicit or implicit authority to impose a back pay remedy for hours not worked. The City asserts that the legislative history of Civil Service Law ("CSL") § 205(5)(d), which delineates the powers of PERB to impose remedies in improper practice proceedings, does not contemplate the type of remedy at issue here.

Should the Board determine that it has the authority to impose the type of remedy sought by the Union, that remedy should be denied in this case as unduly speculative. Citing *Colella*, 79 OCB 27 (BCB 2007), the City notes that the Board has denied a make-whole monetary remedy where "no rational basis exists to make any such finding with an acceptable degree of certainty." (City's Written Position at 2) Any such remedy could amount to several hundred thousand dollars and would violate public policy; it would also be unduly speculative. The City also argues that the amount of money involved amounts to exemplary or punitive damages, which are explicitly forbidden by the CSL.

The City underscores that Hearing Officers do not have fixed schedules and that they have significant discretion regarding their work schedule. Many Hearing Officers hold other employment and/or have their own law practices. As a result, the number of hours they work each year varies. At the hearing, Hearing Officers testified that they have rescheduled or cancelled work for the agencies in order to pursue other work or handle personal matters. Therefore, it would be impossible for the Board to ascertain accurately the number of hours a Hearing Officer would have worked in 2010. Because the Board cannot determine an accurate remedy, and the Board is not empowered to issue an award on another basis, the Board must deny the Union's request for a make whole financial remedy.

To the extent that the Board rejects this argument, strict guidelines should be imposed to ensure that only Hearing Officers who had an "unmistakable economic loss" would receive any financial remuneration. (City's Written Position at 2) Any remedy must be limited to those Hearing Officers who could reasonably be expected to have worked at more than one agency for a total of more than 1,000 hours in 2010, and it must be limited to those Hearing Officers employed in more than one agency in the years prior to the 2010 implementation of the cap. Further, dually employed Hearing Officers who never exceeded 1,000 total hours per year should not be awarded any financial remedy because they were not adversely affected by the cap.

Hearing Officers differ from employees with fixed schedules because their hours of work can vary from year to year based on many factors such as their family situation, the availability of other employment, and changes in the agencies' needs. The City argues that the "wide variations" in the number of hours worked by Hearing Officers

during 2007 through 2009 "underscores the speculative nature" of any attempt to determine a remedy in this case. (City's Written Position at 3) According to the City, a weighted average of hours worked in previous years would have no probative value. The City notes that, in 2009, most Hearing Officers worked a number of hours outside the range that they worked during 2007 and 2008. Therefore, just as averaging the 2007 and 2008 hours would have little or no value in predicting the number of hours worked in 2009, averaging the data from 2007, 2008, and 2009 would be equally problematic in terms of predicting the number of hours Hearing Officers would have worked in 2010.

Although the City argues that the Union's request for a financial remedy should be rejected, it argues that, if the Board is to award a monetary remedy, rather than averaging the three years prior to 2010, the data for 2009 would more closely reflect the factors that might have affected the number of hours an employee would have worked in 2010. Further, as discussed above, the City and the Union stipulated that some Hearing Officers should be ineligible for a remedy because they worked few hours in 2010.

Asking the Board to consider whether the employees mitigated their damages through outside employment, the City notes that many Hearing Officers have private law practices and serve as neutral hearing officers or arbitrators for other employers. For example, one hearing officer testified that although he worked fewer hours as a Hearing Officer in 2010 because of the 1,000 hour cap, he had more time to pursue his other employment as a finance arbitrator and as a special education hearing officer. It is likely that other Hearing Officers increased their outside employment because of their decrease in hours working for the City. Since, in determining a make-whole remedy, the Board should consider any additional outside work as a mitigating factor, it should obtain from

the employees notarized forms indicating their outside work and whether they worked more hours at, or earned more income from, that employment in 2010 than in 2009. The Board should also order additional discovery where necessary. Further, the Board should consider evidence that affected employees were less available for assignments in 2010 than in 2009.

Finally, the City notes that between 2009 and 2010, the number of hours worked by all Hearing Officers was reduced, and the number of Hearing Officers employed at all agencies was increased. Thus, the Board should reduce accordingly its estimate of the affected employees' lost wages to reflect the decrease in hours and increase of employees.

DISCUSSION

This Board is empowered to remedy violations of the NYCCBL, and NYCCBL § 12-309(a)(4) entrusts the Board with determining and issuing a proper remedial order for an improper practice.[2] In exercising that authority, we are to use our expertise, guided by our understanding of the concrete realities of relations between the parties, which is why

[2] NYCCBL § 12-309(a) states in pertinent part:

> The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty: . . . .
>
> **(4)** to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders.

"[r]emedies for improper employer practices are peculiarly within the administrative competence" of PERB or of the Board. *Matter of Buffalo Police Benevolent Assn. v. N.Y. State Pub. Empl. Rel. Bd.*, 8 A.D.3d 958, 959 (4th Dept. 2004) (citing, *inter alia*, *Matter of City of Albany v. Helsby*, 29 N.Y.2d 433, 439 (1972)); *see also Matter of Civ. Serv. Empl. Union v. Pub. Empl. Rel. Bd.*, 180 Misc.2d 869, 871 (Sup. Ct. Alb. Co. 1999) (same); *Matter of Civ. Serv. Empl. Union v. N.Y. State Pub. Empl. Rel. Bd.*, 2 A.D.3d 1197, 1199 (3rd Dept. 2003). Moreover, [an adjudicative body] "has considerable discretion in selecting a method reasonably designed to approximate the amount of pay [to which] a wrong[ed] employee" is entitled. *N.L.R.B. v. Velocity Exp., Inc.*, 434 F.3d 1198, at *1202 (10th Cir. 2006) (citing *Angle v. NLRB*, 683 F.2d 1296, 1302 (10th Cir. 1982)).[3]

The City argues that if this Board were to order a financial remedy, it would violate public policy. In support, it cites *Matter of Department of Personnel v. N.Y. Civil Service Commn.*, 79 N.Y.2d 806, 807 (1991), for the proposition that "an administrative agency has only those powers expressly or impliedly given it." (City's Written Position at 1) We reject this argument, as belied by the express statutory grant of just such remedial power to this Board. CSL § 205(5)(d), which is directly applicable to this Board, explicitly provides that remedies in improper practice cases may include "make whole" relief, including but not limited to, an award of "back pay." When an improper

[3] The Union asserts that "Hearing Officers can receive pension benefits based upon hours worked in the year," and Affected Hearing Officers should be made whole for such lost benefits. (Union's Written Position at 5). The Union has not called to our attention any authority entitling this Board to determine pensionable service credit. Whether the award of back wages, in a case such as this, would be pensionable is beyond the jurisdiction of this Board.

practice has resulted in lost earnings, this Board, like PERB, has historically ordered that employers compensate employees for that loss by awarding back pay. *See DC 37, L. 436 & 768*, 4 OCB2d 31 (BCB 2011); *UFT*, 4 OCB2d 2 (BCB 2011); *DC 37, L. 376*, 1 OCB2d 40 (BCB 2008); *SSEU, L. 371*, 79 OCB 34 (BCB 2007); *DC 37, L. 376*, 77 OCB 12 (BCB 2006); *Local 376, DC 37*, 73 OCB 15 (BCB 2004); *see also Matter of Fashion Inst. of Tech. v. N.Y. State Pub. Empl. Rel. Bd.*, 68 A.D.3d 605 (1st Dept. 2009); *Matter of Civ. Serv. Empl. Assn. v. Pub. Empl. Rel. Bd.*, 276 A.D.2d 967, 969-970 (3rd Dept. 2000), *lv. denied*, 96 N.Y.2d 704 (2001)); *Hannibal Cent. Sch. Dist.*, 14 PERB ¶ 3076 (1981).[4] A make-whole order is intended to compensate an employee for earnings the employee would have had but for the improper practice; as such, a "make-whole order is inherently remedial, not punitive." *City of Troy*, 29 PERB ¶ 3004, 3010 (1996).

The same statutory grant of the power to award make whole relief, including "back pay" also negates the contention of the dissent that "given the City's dire financial straits, this constitutes a give-away of public funds that is contrary to public policy." The dissent has identified no public policy whether set forth in statute, decision, or ordinance which would be contravened by an award of back pay pursuant to the NYCCBL and CSL § 205(5)(d). Moreover, it is well established that the prohibition against making a gift of public funds has consistently been deemed to not prohibit make whole relief. *Fashion Inst. of Tech*, 41 PERB ¶ 3010, 3067 (2008), *affd*., *Matter of Fashion Inst. of Tech. v.*

[4] In addition to its request for remedial relief, the Union asserts that Affected Hearing Officers who receive an award of back pay should also receive interest on that award. While this Board has a history of awarding back pay, it generally does not order interest on such awards. *See DC 37, L. 436 & 768*, 4 OCB2d 31 (BCB 2011); *UFT*, 4 OCB2d 2 (BCB 2011); *DC 37, L. 376*, 1 OCB2d 40 (BCB 2008); *SSEU, L. 371*, 79 OCB 34 (BCB 2007); *DC 37, L. 376*, 77 OCB 12 (BCB 2006); *Local 376, DC 37*, 73 OCB 15 (BCB 2004). Thus, we have considered the Union's request for interest, and decline to do so now.

N.Y. State Pub. Empl. Rel. Bd., 68 A.D.3d 605 (1st Dept. 2009) ("where there is a legal obligation for a public employer to pay public employees, whether as a result of an arbitration award, a court decision, contractual language or the continuation of a past practice under the Act, such payment does not constitute a prohibited gift."); *see also Matter of Antonopoulou v. Beame*, 32 N.Y.2d 126 (1973).

Nor are we convinced that the hourly nature of these employees' schedules prohibits an order of make-whole relief. Simply because "the amount of money owed may prove difficult to ascertain does not warrant a finding that no 'make whole' order is appropriate." *State of N.Y. Unified Court Sys.*, 33 PERB ¶ 3043, 3113 (2000) (*revd. other grounds, Matter of Lippman v. Pub. Empl. Rel. Bd.*, 296 A.D.2d 199 (3rd Dept. 2002), *lv. denied*, 99 N.Y.2d 503 (2002)); *see also City of Rochester*, 21 PERB ¶ 3040 (1988), *confd., Matter of City of Rochester v. Pub. Empl. Rel. Bd.*, 155 A.D.2d 1003 (4th Dept. 1989) (upholding PERB's rejection of the argument that a back pay remedy would be impossible due to the of inability to determine which employees would have worked overtime because the "identity of [employees] who lost wages or benefits as a result of the [unilateral change] is ascertainable with a reasonable degree of certainty"). We find persuasive that "any uncertainty about how much backpay should be awarded to [an employee] is resolved in his or her favor and against the respondent whose violation caused the uncertainty." *The Lorge School and Linda Cooperman*, 355 NLRB 94, at *5 (2010).

Moreover, we are not persuaded that a financial remedy would be unduly speculative because the Hearing Officers work flexible hours. Nothing in the NYCCBL or the Taylor Law suggests that these employees are excluded from the law's protection

based on their particular working conditions. The City may not preclude a remedy for an improper practice by claiming that one would be too difficult to ascertain. *State of N.Y. Unified Court Sys.*, 33 PERB ¶ 3043, 3113 (2000) (*revd. other grounds, Matter of Lippman v. Pub. Empl. Rel. Bd.*, 296 A.D.2d 199 (3rd Dept.), *lv. denied*, 99 N.Y.2d 503 (2002)); s*ee also City of Troy*, 29 PERB ¶ 3004, 3010 (1996) ("To insulate the City from the standard make-whole order would allow the City to profit from its violation of the Act and would encourage other respondents . . . to simply disregard their statutory obligations, a result which is entirely inconsistent with the purposes and policies of the Act").

It has been recognized in the context of private sector labor law that a "backpay award is only an approximation of what is owed [and a] formula does not have to achieve perfection; it need only be non-arbitrary." *Intermountain Rural Elec. Assn. v. N.L.R.B.*, 83 F.3d 432, at *6 (10th Cir. 1996). Therefore, "[a] formula which closely approximates what the [employees] would have earned had they not been [injured] is acceptable if it is not unreasonable or arbitrary under the circumstances." *Center Construction Co., Inc.*, 355 NLRB 198, at *3 (2010); *see also, e.g., Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35, at *36 (1991), *enfd.* 952 F.2d 1393 (3d Cir. 1991).

It is clear that because of distinctions between private and public employment, private sector precedents are not controlling in determining issues arising under the NYCCBL. CSL § 209-a(6). However, in considering how to fashion the appropriate remedy, we find the analysis of back pay used in other adjudicative forums to be instructive. For example, where an employer made a unilateral change in the assignment of non-mandatory overtime work, and there was no means to determine exactly how

much overtime any particular employee lost, the NLRB found that back pay could reasonably be calculated by averaging the total amount of overtime that an employee worked during the three years immediately preceding the employer's unilateral change, which the Board deemed a "representative period." *Intermountain Rural Elec. Assn.*, 317 NLRB 588 (1995), *enfd.*, 83 F.3d 432, 1996 WL 193148 (10th Cir. 1996). Thereafter, the NLRB determined the proportional amount of overtime hours an employee worked as compared to the entire unit. Although the resulting value could not perfectly reflect the hours an employee might have worked, the NLRB found that the formula adequately considered the vagaries of the voluntary nature of overtime, and the three-year representative time period was likely to produce a "fairly accurate picture of the amount of overtime, on average, that individual employees were willing to work." *Id.* at 591.

In determining how best to create a formula that would yield a reasonable approximation of damages, we considered the raw data on hours worked agreed to by the parties, the parties' written submissions, and the parties' positions at oral argument. We also considered the fact-driven examples provided by both parties to illustrate how various methods could result in an arguably inequitable outcome in certain anomalous situations. To determine which employees may be eligible for back pay and a formula for estimating the number of hours an eligible Hearing Officer would have worked, we examined the hours worked by Hearing Officers during 2007, 2008, and 2009, the three-year period preceding the improper practice.

Before deciding upon the chosen method to determine back pay, we considered possible alternatives. For example, we considered the City's discussion of a methodology based solely on hours worked by Hearing Officers in 2009, the year

immediately preceding the improper practice. However, after considering that both parties highlighted the fluctuations in the hours worked by these employees from year to year, we deemed a one-year period an insufficient basis on which to approximate damages. We ultimately concluded that a methodology that considers hours worked in the three years preceding the improper practice better takes into account the variations in hours worked from year to year. Thus, we deemed the three preceding years to be a "representative period" upon which to estimate which Hearing Officers would have worked more than 1,000 hours in more than one agency in 2010. *Intermountain Rural Elec. Assn.*, 317 NLRB 588, at 591. We used the three-year representative period to calculate a reasonable approximation of the amount of hours these Hearing Officers would have worked, were they not deprived the opportunity because of the improper practice.

In reaching this conclusion, we acknowledge that even a sound and reasonable formula might not yield a perfect result. Nevertheless, after reviewing the record before us, including the raw data on hours and the parties' arguments, we believe that the formula we devised is a proper remedy for the affected employees and will result in a reasonable approximation of the damages resulting from the City's improper practice.[5]

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[5] The dissent states that there was "a reduction of 13.6%" of hours worked per Hearing Officer from 2009 to 2010 based upon an increase in the number of hearing officers in 2010 and a decrease in the total number of hours worked. The Board does not find this statistic probative because the record clearly indicates that hours were not evenly distributed among Hearing Officers, a premise upon which the dissent's assertion is based. To the contrary, the record shows that individual Hearing Officers worked varying hours. Moreover, we note that in 2007 and 2008, prior to the implementation of the cap, numerous Hearing Officers worked over 1,000 hours despite the fact that fewer overall hours were worked in those years than in 2010, after the cap's implementation (in 2007 and 2008, Hearing Officers worked 197,753.80 total hours and 213,433.17 total hours, respectively, well below the 222,668.67 total hours in 2010).

Prior to reaching this result, we gave the parties ample opportunity to be heard regarding the development of this formula, including the opportunity to submit written briefs of their positions and participate in oral argument before the full Board of Collective Bargaining. In crafting the formula discussed below, we have been aided by the thoughtful arguments that the parties presented. We now order further proceedings relevant to the calculation of back pay, and our final award will consider evidence elicited during such process.

We find that the Hearing Officers who are eligible to be considered for back pay pursuant to our Order are those who we can reasonably expect would have worked more than 1,000 hours while employed at more than one agency in 2010. We have determined that the employees who would have worked additional hours in 2010 if not for the City's improper practice are those Hearing Officers employed during 2010 who meet the following criteria:

1) worked over 1,000 hours at more than one agency in at least one of the preceding three years (*i.e.* 2007-2009),

and

2) whose average annual work hours (at more than one agency) was more than 1,000 hours per year.

Hereinafter, a Hearing Officer that meets these criteria will be referred to as an "Affected Hearing Officer"; 36 of the 338 Hearing Officers employed in 2010 meet these two criteria.[6]

To reasonably approximate the number of hours each Affected Hearing Officer would have worked in 2010 if the City had not committed the improper practice, first, we

[6] The 36 Affected Hearing Officers do not include the five Hearing Officers as to whom the parties stipulated should not be eligible to be considered for a back pay remedy.

will use the average number of hours worked by each Affected Hearing Officer during the previous three years. This figure is represented in the formula as "Average Number of Hours Worked." Thus, for an Affected Hearing Officer who worked at more than one agency in all three years (2007, 2008, and 2009), we would add the number of hours worked in each of those three years and divide by three. For an Affected Hearing Officer who only worked at more than one agency for two of the three years, we would add the number of hours worked in those two years and divide by two. For Affected Hearing Officers who worked at more than one agency for only one of the three years preceding 2010, this "average" is merely the total hours worked in that year, or the total number of hours worked divided by one.

Next, we will reduce the Affected Hearing Officer's Average Number of Hours Worked by the greater of either:

1) the actual number of hours an Affect Hearing Officer worked in 2010 ("2010 Hours Worked")

or

2) 1,000 hours (*i.e.*, the amount of hours that they could have worked but for the 1,000 hour cap).

The resulting difference between the Average Number of Hours Worked and the greater of the Affected Hearing Officer's 2010 hours or 1,000 hours is a reasonable approximation of the number of hours that the Affected Hearing Officer was prevented from working in 2010 ("Estimated 2010 Hours"). This formula is set forth numerically below:

(Average Number of Hours Worked in Previous Years) –
[the greater of (2010 Hours Worked or 1,000 Hours)]
= Estimated 2010 Hours

We are aware that a number of the Affected Hearing Officers worked less than 1,000 hours in 2010. The Union contends that all Affected Hearing Officers should be compensated for the incremental difference between the hours that they actually worked in 2010 and the improperly implemented 1,000-hour cap, arguing that these employees were prevented from reaching the cap. That is, the Union argues that if the affected Hearing Officer worked less than 1,000 hours in 2010, the actual hours worked should be subtracted from the average, not 1,000 hours. We decline to do so as we find that the Union's argument is undercut by the fact that approximately 25 percent of the Affected Hearing Officers worked at least 1,000 hours during 2010.

We believe that using the formula discussed above will result in a fair and reasonable approximation of the amount of hours that each Affected Hearing Officer would have worked in 2010 but for the City's unilateral implementation of the 1,000 hour cap on total hours worked. However, at this juncture, the Board will not render a final determination of the appropriate make-whole relief for the individual Affected Hearing Officers. Rather, we order further proceedings to develop a record as to the question of mitigation and as to the availability of the individual Affected Hearing Officers to work in 2010. *See Deming Hosp. Corp. v. N.L.R.B.*, 665 F.3d 196, 201 (D.C. Cir. 2011); *Ogle Protection Service*, 183 NLRB 682 (1970).

The dissent raises a series of questions which it contends could shed light on the hours Affected Hearing Officers might have worked in 2010 in the absence of the imposition of the cap, and which thus could affect the amount of back pay awarded in specific cases. Those areas include availability (which the Board takes to encompass both ability to work in 2010 and the desire to work), and the hours worked by the

Affected Hearing Officers in 2011. While we do not find the hours worked in 2011, after nearly a year of the cap's being in effect, in and of itself to be a reasonable predictor of work hours in 2010, such evidence might yield testimony bearing upon availability or mitigation in 2010. In our judgment, these questions present reasonable areas for exploration at the hearing we are ordering, should the parties deem such exploration probative.

Accordingly, we direct the Trial Examiner to take reasonable steps in her discretion to compile an evidentiary record with respect to these issues.

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 Union and the City participate in further proceedings as directed by the Trial Examiner for the purpose of compiling a record with respect to the question of mitigation and the availability of Affected Hearing Officers to work during 2010.

Dated: July 10, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

I dissent in a separate opinion attached hereto.

M. DAVID ZURNDORFER
MEMBER

I dissent in a separate opinion attached hereto.

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

Dissent of M. David Zurndorfer and Pamela Silverblatt in Docket No. BCB 2849-10

We dissent because the Board's interim decision in this matter is based upon an incomplete and inadequate factual record. To make matters worse, this erroneous decision will ultimately result in the payment of hundreds of thousands of dollars to City employees for time in which they performed no work. Especially given the City's dire financial straits, the award of such monies based on an incomplete record would constitute a give-away of public funds that is contrary to public policy.

In a previous decision in this matter (UFT, 4 OCB2d 4 (BCB 2011)), the Board found that "by newly enforcing a 1,000-hour cap on the aggregate number of hours" hearing officers working in two or more agencies could work in 2010, the City violated NYCCBL Sec. 12-306(a)(1), (4), and (5). That decision further found that the record was insufficient to determine remedy, and the Board retained jurisdiction to determine remedy at a later date.

In this interim decision, the Board concludes that back pay should be provided to 36 hearing officers who in the Board's view could reasonably have been expected to have worked more than 1,000 hours in 2010. The Board announces a formula which based solely on the number of hours that each worked in the preceding three years, purportedly approximates the number of hours that each of the 36 would have worked in 2010 were it not for the City's improper practice. The Board then orders further proceedings to develop a record with respect to "mitigation and as to the availability of the individual [hearing officers] to work in 2010." Thus the Board makes clear its intention to order back pay for the hours approximated by the formula subject only to reduction based on mitigation and/or a hearing officer's unavailability to work.

This approach to determining back pay is erroneous because it makes that determination on an incomplete record. Even worse, the Majority would calculate back pay by utilizing a formula based upon a number of assumptions that are dubious at best and then denies the City the opportunity to present evidence that the assumptions are incorrect.

As an initial matter, it must be noted that attempting to calculate damages based solely upon the number of hours that a particular hearing officer worked in prior years is fraught with peril in light of the employment at issue here. These are part-time jobs being performed by attorneys, many of whom also have private law practices or hold other employment. Moreover, according to evidence presented by the City, hearing officers do not have fixed schedules and have significant discretion to accept, reject, cancel or reschedule scheduled hours. Indeed, the number of hours that a hearing officer works can vary from year to year based on many factors such as his or her family situation, the availability of other employment, and changes in the agencies' needs. This is illustrated by the wide variations in the number of hours that most hearing officers worked during 2007, 2008, and 2009, when there was no cap.

One of those dubious assumptions is that the formula need not take into consideration the fact that many of the 36 hearing officers who according to the Majority would have

worked more than 1000 hours in 2010 were it not for the City's cap and therefore are entitled to back pay, in actuality worked far fewer than the 1000 hours that were permitted that year. In fact, 6 of the 36 worked less than 900 hours in 2010. That a hearing officer who could have worked 1,000 hours worked fewer than 900 should at least raise an inference that that employee would not have worked more than 1000 hours had there been no cap -- an inference that the Union should have been required to rebut in a hearing.

The formula also assumes that the hours a hearing officer worked in 2011 need not be taken into consideration in determining back pay. Yet a sharp drop in hours worked in 2011 at least warrants an inquiry whether the cause of the drop also would have reduced the hours that individual would have worked during 2010. In fact, a number of the hearing officers to whom the Majority would grant substantial amounts of back pay under its formula worked far fewer than even 1000 hours in 2011 when there was no cap. For example, Beth Badner who would be awarded more than 434 hours in back pay under the Board's formula (on the assumption that were it not for the cap she would have worked 1434.17 hours in 2010) actually worked only 378.75 hours in 2011. Depending on the reason why Ms. Badner worked so few hours in 2011, it may well be that she would have worked far fewer than the 1434 hours in 2010 that are the basis for the Board's back pay determination. Obviously this could have been determined one way or the other had the Board sent the matter back for a hearing to complete the record as it should have.[1]

Yet another deficiency in the formula is its assumption that the number of hours that the 36 hearing officers could have been expected to work in 2010 would not have been affected by either the increase in the number of hearing officers or the drop in the number of hours available to be worked in 2010. According to the interim decision, the number of hearing officers employed by the City jumped from 306 in 2009 to 338 in 2010; while the total number of hours worked by all hearing officers combined fell from 233,543.23 in 2009 to 222,668.67 in 2010. (Decision at 3-4.) The combined effect of the increase in hearing officers and the decrease in hours to be worked resulted in a reduction in average hours worked per hearing officer from 763 in 2009 to 659 in 2010, a reduction of 13.6%.

These deficiencies are not corrected by the Board's affording the parties the opportunity to present evidence on the availability of individual hearing officers to work during 2010. As noted above, hearing officers exercise great discretion over their schedules and may elect not to work during periods when they are "available" to do so. Alternatively the department or departments for which a hearing officer worked may have had less need for his or her services during 2010, especially in light of the increase in the number of hearing officers and the decrease in the number of hours. The Board's decision to disregard these changes is especially problematic in light of a) the fact that so many of

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[1] Others of the 36 hearing officers whose hours dropped precipitously in 2011 were Deena Greenberg (408.50), Leonard Margolis (519.50), Igor Oberman (660.30), Geanine Towers (275) and Susan Valvic (401.50). These hours worked in 2011 are all taken from Exhibit A of the position statement submitted to the Board by the UFT (see page 3, footnote 5 of the position statement).

the 36 hearing officers worked fewer than 1000 hours in 2010, and b) the fact that a number of the 36 experienced a sharp reduction in their hours in 2011.

Finally, the Majority attempts to defend its decision to rely upon its flawed formula and an incomplete record by citing to the Tenth Circuit's decisions in a case entitled Intermountain Rural Elec. Assn. v. NLRB for the proposition that a "backpay award is only an approximation of what is owned [and a] formula does not have to achieve perfection; it need only be non-arbitrary." (Decision at 14). However, in Intermountain Rural Elec. Assn., there had been a hearing dedicated to the back pay issue and thus a complete factual record on the damages issue had been compiled.[2] The same was true in the other two NLRB cases cited by the Board in support of this proposition.[3] It is one thing to use such a formula to approximate what is owed when the record is complete and the facts do not allow any greater precision. It is quite another where as here the factual record is incomplete to use such a formula as a substitute for facts that could easily be elicited were the parties and the trial examiner afforded an opportunity to do so.

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[2] See Intermountain Rural Elec. Assn., 317 NLRB 588 (1995), enfd., 83 F.3d 432 (10th Cir. 1996).

[3] Center Construction Co., Inc., 355 NLRB 198 (2010) and Laborers Local 158 (Worthy Bros.), 301 NLRB 35 (1991), enfd. 952 F2d 1393 1991).