DC 37, L. 1549, 5 OCB2d 37 (BCB 2012)

(IP) (Docket No. BCB 3026-12)

Summary of Decision*:** The Union alleged that HRA unilaterally changed the flexible schedule options available to its members and thus repudiated the Citywide Agreement, failed to bargain with the Union, and interfered with the Union in violation of NYCCBL § 12-306(a)(1) and (4). The City argued that the petition should be dismissed as the changes were directly related to scheduling, a management right, and that the Union failed to establish a *prima facie* case of failure to bargain. The City further argued that this case should be deferred to arbitration as it involves an alleged violation of the Citywide Agreement. The Board found that the Union's claims should be deferred to the parties' contractual grievance process and retained jurisdiction until the resolution of that process. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFL-CIO, AFSCME,
and its affiliate LOCAL 1549,

Petitioners,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION
Respondents.

DECISION AND ORDER

On June 22, 2012, District Council 37, AFSCME, AFL-CIO ("DC 37"), and its affiliate, Local 1549 (collectively, "Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City Human Resources Administration ("HRA"). The Union alleges that HRA unilaterally changed the flexible schedule options available to its members employed in HRA's Food Stamp Centers and thus repudiated the terms of the Citywide

Agreement, failed to bargain with the Union, and interfered with the Union in violation of § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City argues that the petition should be dismissed as the changes are directly related to scheduling, a management right, and that the Union failed to establish a *prima facie* case of a failure to bargain claim. Further, the City argues that this case should be deferred to arbitration as it involves an alleged violation of the Citywide Agreement. This Board finds that the Union's claims should be deferred to the parties' contractual grievance process and retains jurisdiction until the resolution of that process.

BACKGROUND

The Union represents clerical and administrative employees in HRA's Food Stamp Centers, which are operated by HRA's Family Independence Administration ("FIA"). The Union and the City are parties to the Citywide Agreement; Article II, § 2, provides:

> Wherever practicable, the normal work week shall consist of five (5) consecutive working days separated by two (2) consecutive days off. This shall not, however, constitute a bar to the investigation and implementation by the Employer with the Union's participation and consent of flexible work weeks, flexible work days or other alternative work schedule(s).

(Joint Ex. I)[1]

The work schedules available to HRA employees are categorized as either straight-time or flexible schedules. Straight-time schedules allow employees to choose a specific start time from a list of options (*e.g.*, one employee could choose to work from 8:15 a.m. to 4:15 p.m. while another employee could choose to work from 9:00 a.m. to 5:00 p.m.). Under flexible

[1] The Citywide Agreement covers the period of January 1, 1995, to June 30, 2001, and remains in effect pursuant to the *status quo* provision of the NYCCBL.

schedules, employees do not have a fixed start time but rather have a range of either a half-hour or hour (known as a float) in which to begin their shift. Thus, employees with a flexible schedule of a half-hour float starting at 8:15 a.m. could start their shifts anytime between 8:15 a.m. and 8:45 a.m., while employees with a one-hour float starting at 9:00 a.m. could start their shifts anytime between 9:00 a.m. and 10:00 a.m. The instant matter only concerns changes to the flexible schedule options available to Union members who work in FIA's Food Stamp Centers.

For several years prior to March 26, 2012, Union members who worked Monday to Friday at the Food Stamp Centers could choose among five flexible schedules.[2] Four out of the five flexible schedule options had a half-hour float (starting 8:15 a.m., 8:30 a.m., 9:00 a.m., or 10:00 a.m.); the fifth had a one-hour float (starting at 9:00 a.m.).

The economic downturn significantly increased the number of New Yorkers seeking assistance from HRA. Overcrowding at some facilities resulted in safety concerns, such as fire hazards and increased potential for violence. The overcrowding was at its worst in the morning. By early 2012, HRA determined that it needed to increase the morning staff at certain facilities and explored several initiatives, including revising its flexible schedule options.[3]

On February 22, 2012, HRA met with representatives of DC 37, Local 1549, and Local 1180 of the Communications Workers of America ("CWA") to discuss, among other topics,

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[2] Some Food Stamp Center employees work Tuesday to Saturday but these employees do not have any flexible schedule options.

[3] The parties disagree about the specific timing of HRA's notification of its intention to change the flexible schedule options. The City claims that HRA contacted Local 1549 and CWA Local 1180 on February 10, 2012, to request a meeting to discuss the proposed schedule changes and that, on February 14, Local 1549 requested a labor-management meeting to address a number of issues related to overcrowding at the Food Stamp Centers. The Union claims, and the City denies, that on February 14, HRA informed the Union that it was reducing the number of flexible schedule options and, thereby, eliminating flex-time for a number of its members employed at Food Stamp Centers.

changes to the flexible schedule options of Food Stamp Center employees. According to the City, but denied by the Union, at the February 22 meeting, HRA informed the unions of new flexible schedule options available to Food Stamp Center employees. The City further asserts that HRA subsequently added an additional flexible schedule option proposed by the unions. According to the Union, and denied by the City, on February 22, HRA informed the Union that, despites its protests, HRA would implement the schedule changes.

The parties agree that on March 26, 2012, the flexible schedule options for Union members who worked Monday to Friday in clerical positions at the Food Stamp Centers were changed.[4] All five pre-existing flexible schedule options, including the one-hour float, were eliminated and replaced with three new half-hour float options that started at 8:00 a.m., 8:45 a.m., and 9:30 a.m. That is, the 8:30 a.m. half-hour float and the 9:00 a.m. one-hour float were eliminated while the 8:15 a.m. half-hour float was replaced with an 8:00 a.m. half-hour float, the 9:00 a.m. half-hour float was replaced with an 8:45 a.m. half-hour float, and the 10:00 a.m. half-hour float was replaced with a 9:30 a.m. half-hour float. The pre-March and post-March 26, 2012 flexible schedule options are compared in the chart below:

[4] On February 27, 2012, HRA distributed to the Union's members a form entitled "FIA NCA Food Stamp Work Schedule Change Form" ("Food Stamp Change Form") that listed the new schedule options for those employed in clerical positions at the Food Stamp Centers. (Ans., Ex. 9) Along with the Food Stamp Change Form, HRA distributed a memorandum informing the Union's members that they had until March 5 to notify their local supervisor of their schedule preferences. Management informed the employees of their new assigned schedules on March 12. Employees were then allowed to request modifications due to hardship.

Pre-March 26, 2012	Post-March 26, 2012
Start Time (float)	Start Time (float)
	8:00 a.m. to 8:30 a.m. (½ hour float)
8:15 a.m. to 8:45 a.m. (½ hour float)	
8:30 a.m. to 9:00 a.m. (½ hour float)	
	8:45 a.m. to 9:15 a.m. (½ hour float)
9:00 a.m. to 9:30 a.m. (½ hour float)	
9:00 a.m. to 10:00 a.m. (1 hour float)	
	9:30 a.m. to 10:00 a.m. (½ hour float)
10:00 a.m. to 10:30 a.m. (½ hour float)	

On June 15, 2012, the Union filed a grievance on behalf of its members employed at the Food Stamp Centers that stated: "[HRA] is violating the Citywide Agreement, including but not limited to Articles [*sic*] II, [§] 2, by implementing a change in the alternative work schedules without the Union's participation and consent." (Union Ex. B) As a remedy, the Union seeks "[r]ecission of the current flexible time schedule that was implemented without the Union's participation and consent, reinstat[ment] [of] the prior flexible time schedule . . . and [that HRA] conduct meaningful meetings with the Union and obtain its consent before revising or changing the flexible time work schedule . . ." (*Id.*)

On June 22, 2012, the Union filed the instant improper practice petition, requesting that the Board order HRA to rescind the revisions to the flexible schedule options available to employees in the Food Stamp Centers, bargain with the Union over any such changes, post appropriate notices, and provide any other relief necessary to make their members whole.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that, by implementing new flexible schedule options without the Union's participation and consent, HRA has repudiated the terms of the Citywide Agreement in

violation of NYCCBL § 12-306(a)(4).[5] According to the Union, the reduction in the flexible schedule options resulted in fewer members being able to work a flexible schedule.

The Union also argues that by implementing new flexible schedule options without the Union's consent, HRA failed to bargain in violation of NYCCBL § 12-306(a)(4) and derivatively in violation of NYCCBL § 12-306(a)(1).[6]

In response to the City's argument that this matter should be deferred to arbitration, the Union argues that it is not asserting that the Citywide Agreement is the source of its rights in the instant improper practice. Rather, it is asserting a failure to bargain which is properly resolved by the Board.

In response to the City's argument that altering the flexible schedule options was an exercise of HRA's management rights under NYCCBL 12-307(b), the Union argues that managerial prerogatives are not unfettered.[7] The City's right to alter the flexible schedule

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

[6] NYCCBL § 12-306(a)(1) provides, in pertinent part: "It shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter." NYCCBL § 12-305 provides, in pertinent part: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

[7] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the [C]ity . . . acting through its agencies, to . . . 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 [C]ity . . . on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the

options was proscribed by Article II, § 2, of the Citywide Agreement. The City's action were "tantamount to a *fait accompli*" that violated the NYCCBL § 12-306(a)(4) as it left no room for the Union to represent its members' interest. (Rep. ¶ 41)

City's Position

The City argues that this matter should be deferred to arbitration as the alleged improper practice arises from and requires the interpretation of the Citywide Agreement. The Board has repeatedly held that arbitration is the appropriate forum for matters of contract interpretation. The City argues that arbitration would resolve the improper practice claim and that, even if some aspect of the improper practice claim survived arbitration, this matter should still be deferred to arbitration in accordance with the policy of the NYCCBL to favor and encourage arbitration.

As to the merits, the City argues that its actions with regard to scheduling constitute an exercise of its management rights under NYCCBL 12-307(b). Board precedent establishes that the City has a broad managerial prerogative to schedule its employees as it deems necessary. The scheduling changes were made to better meet the needs of HRA's clientele based on a demonstrated need for increased staff in the early morning hours.

The City also argues that the Union cannot establish a *prime facie* case of a failure to bargain claim because determinations regarding staffing and job assignments are not within the scope of bargaining. According to the City, a scheduling change is a non-mandatory subject of bargaining unless it alters the number of work hours per day or per week that employees are required to work. The flexible schedule changes only alter shift start and end times in order to increase staffing earlier in the day. The changes do not alter the number of workdays, the

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> 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.

number of appearances per week, the length of the shifts, or the total hours worked per week. Thus, the changes at issue are not bargainable. As there is no NYCCBL § 12-306(a)(4) violation, the City argues, there is no derivative NYCCBL § 12-306(a)(1) violation.

DISCUSSION

We first address the City's argument that the instant petition should be deferred to arbitration because the underlying dispute involves an interpretation of the Citywide Agreement.[8] Pursuant to NYCCBL § 12-302, it is the declared "policy of the [C]ity to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." Accordingly, "[a]lthough this Board has exclusive jurisdiction under NYCCBL § 12-309(a)(4) to prevent and remedy improper practices, we will typically defer disputes 'where the circumstances are such that the contractual arbitration procedure provides an appropriate means of resolving the matter, consistent with the declared policy of the NYCCBL [§ 12-302].'" *SSEU, L. 371*, 4 OCB2d 27, at 7 (BCB 2011) (quoting *DC 37, L. 1508*, 79 OCB 21, at 21 (BCB 2007)). This Board considers arbitration to be the appropriate means of resolving a matter "where the allegations 'arise from and require interpretation of a collective bargaining agreement and in cases where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement.'" *Id.*, at 7-8 (quoting *DC 37, L. 1322*, 1 OCB2d 4, at 8-10 (BCB 2008)). However, "where an improper practice claim exists that would not be resolved by the arbitration of the contractual claims arising out of the same transactions, we have held that

[8] Under the facts of the instant matter, we find that the City's disputed actions, which were undertaken after notice to the unions in which the City is participating in the parties' grievance procedures, do not constitute a "systematically disregarding a quintessential aspect of the parties' collective bargaining agreement" as to be a constitutes repudiation. *SSEU, L. 371*, 77 OCB 35, at 21 (BCB 2006); *see also DC 37, Local 1508*, 67 OCB 11, at 6 (BCB 2001) (citing *Addison Central School District*, 17 PERB ¶ 3076 (1984)).

'such statutory claims are committed to adjudication under the NYCCBL rather than the arbitral forum.'" *Id.*, at 8 (quoting *ADW/DWA*, 3 OCB2d 8, at 12 (BCB 2010)). When this Board defers to arbitration, we retain jurisdiction in case "any argument [is raised] during the arbitration that forecloses a determination on the merits of the grievance or should any award be repugnant to rights under the NYCCBL." *Id.*, at 8-9 (citing *NYSNA*, 3 OCB2d 36, at 12 (BCB 2010)).

The issue raised by the Union in its contractual grievance is whether HRA "is violating the Citywide Agreement . . . by implementing a change in the alternative work schedules without the Union's participation and consent." (Union Ex. B) The grievance identifies the "alternative work schedules" at issue as the "flexible time schedule." (*Id.*) The claims raised by the Union in the instant improper practice petition also all concern the HRA's implementation of the new flexible schedule options without the Union's consent.[9] Thus, the "exact issue" raised in the grievance "is the subject of the parties' dispute in the instant improper practice petition." *SSEU, L. 371*, 4 OCB2d 27, at 8. Resolution of both the grievance and the instant improper practice petition concern Article II, § 2, of the Citywide Agreement. Therefore, deferral is warranted as "it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement." *DC 37, L. 1322*, 1 OCB2d 4, at 8-10; *see, e.g., PBA*, 1 OCB2d 14, at 14 (BCB 2008).

The City argues that the instant matter should be dismissed because it has a managerial prerogative to schedule employees. Scheduling is a permissive subject of bargaining. *See Local*

[9] The Union raised three claims: whether "in implementing its new flex schedule . . . HRA repudiated the Citywide Agreement . . . in violation [NYCCBL § 12-306(4)]" (Pet. ¶ 10); whether "[b]y unilaterally implementing a brand new flex schedule without the Union's consent, HRA has breached its duty to bargain in violation of [NYCCBL § 12-306(4)]" (Pet. ¶ 11); and whether "HRA's unilateral implementation of flexible schedules without the consent of the Union" derivatively violated [NYCCBL § 12-306(1)]." (Pet. ¶ 12)

237, IBT, 57 OCB 13, at 7-8 (BCB 1996). In *Local 237, IBT*, a City employee was transferred from the Department of Transportation ("DOT") to the Department of Finance ("DOF"). [10] At DOT, the employee had a flexible schedule with a three-hour float. When transferred, DOF assigned the employee to a flexible schedule with a one-hour float. The City challenged the arbitrability of the grievance, arguing that it had managerial prerogative to schedule its employees. We found that while "management generally is within its statutory rights to set starting and finishing times . . . scheduling is still a lawful subject of bargaining and may be negotiated on a permissive basis." *Id.* at 7-8. We then held that "the parties may negotiate and agree to embody in the collective bargaining agreement an express limitation on management's right to schedule employees. If this occurs, management's prerogative is limited and its right to take unilateral action has been waived for the length of the collective bargaining agreement." *Id.* at 8. Thus, we found the grievance to be arbitrable. Similarly, here the parties bargained over work schedules in the Citywide Agreement. *See DC 37*, 75 OCB 10, at 11 (BCB 2005).

Thus, we defer this matter to arbitration. *See SSEU, L. 371*, 4 OCB2d 27, at 8. However, "this deferral is without prejudice to reopen the charge should [HRA] raise any argument during the arbitration that forecloses a determination on the merits of the grievance or should any award be repugnant to rights under the NYCCBL." *Id.* (citing *NYSNA*, 3 OCB2d 36, at 12 (BCB 2010); *DC 37*, 79 OCB 21, at 21(BCB 2007) (other citations omitted).

[10] *Local 237, IBT*, concerned a provision in the precursor to the current Citywide Agreement whose language was identical to Article II, § 2, of the current Citywide Agreement. *See Id.* at 2.

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, docketed as BCB-3026-12, filed by District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 1549, against the City of New York and the New York City Human Resources Administration be, and the same hereby is, deferred to the parties' grievance and arbitration procedures without prejudice to reopen, should a determination on the merits of the contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

Dated: December 18, 2012
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
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