Ass. Deputy Wardens Ass. V. City&C. Abate(Comm. Of Corr.), 55 OCB 19 (BCB 1995) [Decision No. B-19-95(IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding between

Assistant Deputy Wardens
Association,
Petitioner,

Decision No. B-19-95
Docket No. BCB-1580-93

-and-

The City of New York, Michael
McDonald, Office of Labor
Relations, Catherine M. Abate,
Commissioner of Correction,
Respondents.
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DECISION AND ORDER

On May 14, 1993, the Assistant Deputy Wardens Association ("the Union") filed a verified improper practice petition against the City of New York ("the City"), Michael McDonald of the New York City Office of Labor Relations ("OLR"), and Catherine M. Abate, New York City Commissioner of Correction. It alleged that the City and the Department of Correction ("the Department") violated § 12-306a of the New York City Collective Bargaining Law ("NYCCBL"),[1] New York State Labor Law § 704 (10),[2] United States

[1] Section 12-306a of the NYCCBL provides:

Improper public employer practices. It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging of discouraging membership in, or participation in the activities of, any public employee organization;
(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or

designated representatives of its public employees.

Section 12-305 of the NYCCBL provides:

Rights of public employees and certified employee organizations. Public employees 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. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that nothing in this Chapter shall be construed to: (1) deny to any managerial or confidential employee his rights under section 15 of the New York Civil Rights Law or any other rights; or (ii) prohibit any appropriate official or officials of a public employer as defined in this Chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment, and to make recommendations thereon to the Chief Executive Officer of the public employer for such action as he shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

[2]
Article 20 of the New York Labor Law provides, in relevant part:

§ 703. Rights of employees

Employees shall have the right of self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of rights guaranteed by this section.

§ 704. Unfair labor practices

It shall be an unfair labor practice for an employer:

(10) To do any acts, other than those already enumerated in this section, which interfere with, restrain or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

Code § 1983[3] and New York State Penal Law § 135.60(8)[4] by threatening to withhold salary parity and wage increases from Deputy Wardens unless the Union abandoned a representation petition before the Board of Certification requesting that the unrepresented title of Warden (Correction) Level II ("Deputy Warden") be added to its Certification No. 65-67 (as amended).[5] The petition also claims that the Department changed its flex time policy to the detriment of the Deputy Wardens in retaliation

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[3] 42 U.S.C. 1983 provides, in relevant part:

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulations, custom or usage,, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United or States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

[4] Article 135 of the New York Penal Law provides, in relevant part:

§ 135.60 Coercion in the second degree

A person is guilty of coercion in the second degree when he compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he has a legal right to engage, by means of instilling in him a fear that, if the demand is not complied with, the actor or another will:

(8) Use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing to refusing to perform an official duty, in such manner as to affect some person adversely; ....

[5] The certificate includes Warden Level I, the in-house title of which is Assistant Deputy Warden.

for their filing of the representation petition. It requests that the Board "enjoin and remedy the improper practices; establish rules of future conduct; and issue such other remedial orders as the Board deems just and fair." The City filed an answer on June 18, 1993.

At a pre-hearing conference held on August 4, 1993, the Trial Examiner agreed to hear evidence concerning alleged violations of § 12-306a (1), (3) and (4) of the NYCCBL. In addition, the parties agreed to postpone a hearing in this matter until the Board of Certification reached a decision on the Deputy Wardens' petition for a bargaining certificate. The Union filed an amendment to its petition in the instant case on August 24, 1993, and a second amendment to the petition on September 14, 1993.

In January 1994, the City informed the Trial Examiner that, because of imminent changes in personnel at OLR and the Department, it was necessary to proceed. Hearings were held on February 2nd, 3rd, 14th and 15th, 1994. Seventeen witnesses testified and a transcript of 419 pages was taken. Of the witnesses, twelve were Deputy Wardens, two were officers of the Union and three were labor relations professionals employed by the City. At the close of the Union's case, the City moved for dismissal on the grounds that the Union had not presented evidence constituting a prima facie case of improper practice. The Trial Examiner reserved disposition of the motion and the Deputy presented its case.

Background

The Deputy Wardens are unrepresented employees of the Department. The majority of Deputy Wardens belong to a fraternal organization known as the Deputy Wardens Association. At the time that the hearing was held, Mary Marion was the president of the Deputy Wardens Association, John Kiernan was the vice-president and Reginald Thomas was the treasurer.

Deputy Wardens Daniel Meehan and Mary Marion testified that, at a meeting with all Deputy Wardens in 1990, Allyn Sielaff, who was then the Commissioner of Correction, told the Deputy Wardens that he would write to the First Deputy Mayor, Norman Steisel, to ask that uniformed members in the Department of Correction receive wage parity with their counterparts in the Police Department ("slippage money"). When asked whether, to his knowledge, Sielaff did write such a letter, Meehan replied, "[y]es, he did."

In a letter to Steisel dated October 1, 1990, Sielaff requested that the First Deputy Mayor restore wage parity between "uniformed managerial employees" at the Department and employees in similar titles in the other uniformed services. Sielaff repeated his request for slippage money in a letter to the First Deputy Mayor dated September 30, 1991 and again in a letter dated October 11, 1991. Deputy Wardens Marion, Psomas and Kiernan stated that the Department sent copies of Sielaff's 1990 and 1991 letters to all Deputy Wardens and copies of the letters were submitted into evidence.

Michael McDonald was employed as an Assistant Commissioner at OLR from 1986 until 1994. He assisted labor commissioners in contract negotiations and administration and advised agencies on labor relations. McDonald stated that, at some time before the petition for a bargaining certificate was filed, the Department decided to grant slippage money to all uniformed managers. He was asked on cross-examination whether Deputy Wardens were originally intended to receive "their portion of the slippage money," and he answered, "sure." He recalled that there was no dispute about the amount of money the Deputy Wardens would receive, only a question as to when they would receive it.

Robert Daly is employed by the Department as General Counsel and Special Counsel to the Commissioner. He testified that all uniformed managers in the Department were included in the group for whom Sielaff sought slippage money, and that he believed that Deputy Wardens were included in the group of uniformed managers who "deserved" to receive that money.

On June 25, 1991, the Union filed a petition to represent Deputy Wardens. McDonald testified that he advised the Department that he was opposed to granting a bargaining certificate to Deputy Wardens because he considered them to be managerial employees. By letter dated October 29, 1991, the City opposed the Union's petition and requested that the Board of Certification declare the title to be managerial and/or confidential.

At a pre-hearing conference held in March 1992, hearing dates were scheduled for July and August 1992. By letter dated April 30, 1992, to James Hanley, then the Commissioner of Labor Relations, Commissioner Catherine Abate requested that OLR grant slippage money to "Correction uniformed managers." In June 1992, the City filed a motion to dismiss the representation petition, claiming that new evidence of a stipulation entered into by the parties in 1980 rendered the matter moot. In Interim Decision No. 8-92, the Board of Certification denied the City's motion. Hearings began in July, 1992.

Daly was asked whether he sought approval from OLR for slippage money for uniformed managers. He stated:

> We did, but we had a problem.... [T]he Assistant Deputy Wardens had filed for bargaining certificates to represent the Deputy Wardens and it posed for me a dilemma which I had to discuss with Mike McDonald at OLR.... I was concerned that with the bargaining certificate actively being considered, that if we paid out money to the Deputy Wardens, the Assistant Deputy Wardens would come along and say that we were trying to influence their judgment in this matter ... and that we would actually be trying to persuade them to drop their request for representation and I was concerned that might lead to an improper practice.... So we froze everything in place and we maintained the status quo while we hoped that we would get a decision on the bargaining certificate....

Because the Deputy Wardens filed a bargaining certificate, McDonald said, he advised Daly that Deputy Wardens could not receive slippage money along with other managerial employees, since their bargaining certificate was "in litigation." According to McDonald, the City's policy is not to make salary adjustments in a title when "litigation" is being pursued

regarding the title. As an example, he cited the appeal by the Uniformed Firefighters Association of an impasse award, which he claims compelled the City to withhold pay increases from firefighters until the matter was settled. McDonald testified that the reasons for following such a policy were that:

> when the smoke clears from the litigation, you could have inadvertently overpaid or underpaid the employee because of the impact of whatever the litigation is. And there are also pension implications.... The City would open itself up to individual lawsuits of pension, diminishment of pension benefits.... The other thing is, it puts me into a weird position in terms of collective bargaining strategy for the future if I'm paying out money for a particular group and in this particular instance, if that group were certified to the ADW's, they kind of get a leg up on me in terms of collective bargaining strategy.

McDonald stated that the Department was ready to grant the slippage money increases as soon as the proceeding before the Board of Certification was concluded, regardless of the outcome. He testified that a meeting was held during which the Department, OLR and the Union endeavored to find a way by which the Deputy Wardens could be paid slippage money pending the outcome of the Board of Certification proceedings; however, he said, no adequate method could be devised by which the City could grant slippage money while protecting itself against future lawsuits.

McDonald also testified that, at a negotiating session with the Union on an unspecified date after the petition for a bargaining certificate had been filed, the Union offered to withdraw the petition if the City agreed to pay slippage money to Deputy Wardens and a pension adjustment to Assistant Deputy

Wardens.[6] He recalled that he researched the question and discovered that it would be impossible to give enhanced pension benefits to Assistant Deputy Wardens because "the piece the Police Captains have is ... driven by law.... I'm clearly not going to be able to do this through collective bargaining." In addition, he stated, the City could not make such payments because of their great expense.

Daly testified that he was constantly asked by Abate and by many Wardens and Division Chiefs about the status of the proceedings before the Board of Certification, and whether the slippage money would be paid retroactively when the proceeding was concluded.[7] Daly stated:

> I was concerned there would be new increases in salary given out while our bargaining certificate was still in dispute and that our people would fall even farther behind; and I was concerned that the status quo had really unfairly prejudiced the Wardens and the Division Chiefs to a degree that they should not have been disadvantaged.... I felt that they were being disadvantaged because of the City policy on maintaining the status quo, being held hostage to that bargaining certificate, even though they didn't have a stake in the outcome at all.

Daly recalled that he asked McDonald if slippage money could be paid to the Division Chiefs and, Wardens even though the

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[6]According to McDonald, the pensions of uniformed managers in the Police Department are calculated at the salary rate of employees in the next highest rank. This is the sort of payment the Union requested for Assistant Deputy Wardens.

[7] Slippage money for Wardens and Division Chiefs was also withheld, although these titles were not the object of the Union's representation petition.

proceeding before the Board of Certification had not been concluded and that OLR agreed to do so.

On April 23, 1993, several members of the Union's executive board and Deputy Wardens attended a meeting with Abate. The Union's witnesses generally agree that Abate told them that Wardens and Division Chiefs would receive slippage money, but that Deputy Wardens would not receive it because they were pursuing a bargaining certificate. Some of the Union's witnesses testified that Abate told them that slippage money was "discretionary," and that as long as the Deputy Wardens were pursuing a bargaining certificate they would not receive it. Some testified that Abate told them that Deputy Wardens would receive slippage money if the bargaining certificate were "dropped." William Bird, President of the Union, stated that Daly "reiterated (what) the Commissioner said at the end of the meeting that ... the basic problem was as long as the certificate was pending, they would not receive their raise." Kiernan testified that both Abate and Daly stated:

> the Wardens and the Division Chiefs would be receiving the slippage money shortly, but ... we would not. The reason being that we had the petition for the bargaining certificate pending and ... as long as that petition was in ... we wouldn't receive the pay increase. We were also told that if the petition were dropped, that we would get the pay increase.

A meeting which was called at the request of the Union was held on May 7, 1993, at the George Machin Detention Center ("GMDC") at Rikers Island. Abate, Daly, Assistant Labor

Commissioner Richard Yates, Chief of Department Marron Hopkins and all Deputy Wardens attended.

According to all of the Union's witnesses who were present, Abate stated that Wardens and Division Chiefs would receive slippage money, but that Deputy Wardens would not receive it as long as they pursued a bargaining certificate. According to Daly,, Abate did not tell the Deputy Wardens that they would receive slippage money if the petition were withdrawn. However, Deputy Warden Glanville Rabsatt testified that Abate said:

> Deputy Wardens would not receive slippage money as long as the situation concerning the ADW's was still in progress and then she turned to Bob Daly and Bob Daly said there will be no slippage money and until we -- if we drop the bargaining certificate down the line, the money would not be retroactive, so we had to act on it now. And someone asked a question and then Bob Daly said ... he received a direction, it was from [James] Hanley [then Commissioner of Labor Relations].

Deputy Warden Thomas testified that Daly told the Deputy Wardens that "we want to go for a bargaining certificate and, in a very emotional manner, he indicated good luck to us. It was stated by Bob Daly that if there were no bargaining certificate, we would have our slippage money." In addition, Thomas stated, "specifically, I recall him mentioning that the City and him did not want to negotiate with the Deputy Wardens ... at $88,000 when they could negotiate at the lower rate of $84,000.... I remember Robert Daly saying that if we did get the money, it would not be retroactive."

Deputy Warden Thomas Burke testified that Abate told the Deputy Wardens that "slippage money was included in the

departmental budget and that the Wardens and the Division Chiefs would be getting the slippage money, but that the Deputy Wardens would not.... He stated further:

> Mr. Daly also reiterated the position that we would not be getting the slippage money because of our attempt to get a collective bargaining agreement. He made the statement that it ... would not be a practical approach for the Department to give us the slippage money because if we received the collective bargaining agreement we would have to bargain at $88,000 and he would prefer bargaining at $84,000. He also made the statement that regardless of how the collective bargaining agreement was made, that the slippage money, if paid, would not be retroactive.... There was a reference to Mr. Hanley and that Mr. Hanley was directing them as far as their approach with the slippage money.

Deputy Warden Errol Toulon, Sr., testified that Abate told the Deputy Wardens that they would not receive slippage money, that "a letter was going to be written on behalf of Wardens on up and they were going to get their slippage money, and Deputy Wardens were not going to get their slippage money." Toulon stated that he asked Abate if Deputy Wardens could be included in the letter, and that Abate replied that "[t]he only way the Wardens and everybody else would get it is if, in fact, she excluded the Deputy Wardens." He described the meeting as becoming "a little hot," and recalled that Abate added that, "if, in fact, we dropped the suit, then she would include us in the letter, and it really got testy." Toulon related that Daly:

> interject[ed] that it is easier and much simpler to negotiate four percent on an $84,000 salary ... as compared to four percent on $88 or $89,000 salary, which is what we would be doing if we had our slippage.... [H]e said if we do not do it soon, it is not retroactive and we were not going to get our money.

> It would not be retroactive to July 1, when the wardens get theirs. So we would be punished, and therefore we are still being punished because we took out a lawsuit, trying to get a bargaining certificate.

Deputy Warden James Bird testified that Abate told the Deputy Wardens that "slippage money was discretionary funds, which was going to be given to Wardens and the Division Chiefs." He stated further that Daly said that "they would rather negotiate with us from an $84,000 base salary, as opposed to an $88,000 base salary," and that "[h]e made a comment that the money was not going to be retroactive, and the longer we delayed on reaching some type of compromise, the longer we would be without the funding." He recalled that "the responses made by the Commissioner and Bob Daly, their responses were different, but the message was the same, that if we withdraw the bargaining certificate, we would get slippage money."

Deputy Warden Bernard McNellis testified that Abate was asked whether the Deputy Wardens would receive slippage money, and she replied that "it is discretionary. She was giving it to the Wardens and above, and as long as we pursue the bargaining certificate, we are not going to get it." Asked about Daly, McNellis recalled him saying that "they would rather bargain with us at $84,000" and "as long as we are going to keep (pursuing the bargaining certificate) that is what we are going to be up against." Asked whether the issue of retroactivity was raised, McNellis replied, "I believe someone in the back asked that....

They said if we drop it ... will we be able to get it? And Commissioner Abate did say yes, but not retroactive."

Deputy Warden James Psomas recalled that Abate told the Deputy Wardens that she wanted them to receive slippage money, but that they would not receive it as long as they were pursuing a bargaining certificate. He testified:

> [she said] she had written a letter to the Mayor's office and she apologized that she would do everything in her power to procure that money, because she thought we deserved it ... and she would do everything she can to get that money for us. So that is where we became upset, because ... the wedge in the thing was the bargaining certificate. As long as you are seeking the bargaining certificate, you cannot get the money, and then Mr. Daly chimed in at that point....
>
> Mr. Daly said, 'Look, as long as you are seeking the bargaining certificate, why should Hanley' -- I really do not know who Hanley is but that is the name he mentioned -- 'bargain with you at the higher rate, if you get the slippage money, than at the rate you are making now. So drop the bargaining certificate and you will get the slippage money.... He said, 'And you should do it immediately, but the money will not be retroactive.' He made a clear point, that is, Robert Daly.

Deputy Wardens Opeton Marshall, John Kiernan, Daniel Meehan, Mary Marion and James Lasser all testified to substantially the same events. Each of the twelve Deputy Wardens who testified recalled the following: Abate, Daly, Yates and Hopkins stood at the front of the auditorium throughout the duration of the meeting, although Daly occasionally moved into the center aisle as he spoke; Yates was introduced by Abate at the beginning of the meeting; Abate stated that slippage money was "discretionary," and that she was able to procure it for other

uniformed managers in the Department, but could not do so for the Deputy Wardens because they had filed a bargaining certificate; Abate said that slippage money could be procured for Deputy Wardens if there were no representation petition; Daly said that if there were no bargaining petition the Deputy Wardens would receive the slippage money, but, in any event, the slippage money would not be paid retroactively. Nine of the twelve Deputy Wardens who testified recalled that Daly told them that the City preferred to bargain at $84,000 rather than $88,000. When Daly was asked whether, at the meeting in question, he had told the Deputy Wardens how he preferred to negotiate with them, he answered that he had not.

A majority of the Deputy Wardens recalled Daly saying that he agreed with Hanley that he would prefer to negotiate with Deputy Wardens at the lower salary rate. In addition, a majority of the Deputy Wardens recalled that Abate tried to stop Daly from speaking at that point. Three of the Deputy Wardens testified that Yates stated that Sielaff's 1990 letter requesting slippage money had never been mailed.

The City called Richard Yates as a witness. At that time, Yates was responsible for agency-wide labor relations activities involving uniformed and civilian unions. He testified that one of his roles at labor relations meetings was to take notes, which he used when he conferred with management about issues that were raised during the course of a meeting. The City's attorney handed Yates photocopies of documents which purportedly were his

notes taken during the meetings of April 23, 1993 and the meeting at GMDC, and asked him to testify using these documents. The Union's attorney objected, on the grounds that the originals, which allegedly were in Yates' office, had not been produced. When the Union's attorney was assured by the Trial Examiner that the City could be ordered to produce the originals, he stated that he did not object to the photocopies being admitted, as long as he could have the opportunity to see and cross-examine on the original document if he chose.

Yates' testimony parallels the testimony of the other witnesses as to what transpired at the April 23, 1993 meeting. His notes concerning the meeting at GMDC differed from the testimony of the Union's witnesses in several respects. His notes indicate that Abate and Daly, not he, commented that Sielaff never sent the 1990 letter to Steisel. They do not indicate that Daly made the remarks attributed to him by other witnesses concerning a desire by OLR or the Department to negotiate at a lower salary rate or about retroactivity of the payment of slippage money.

Evidence was also heard about the City's flex time policy. In a memo dated March 10, 1993, the City Personnel Director discussed authorized leave for managers.[8] By memo dated April

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[8] The March 10, 1993 memo states, in relevant part:

Attached is a copy of Personnel order No. 92/7, dated December 21, 1992, amending Personnel Order No. 88/5, dated April 28, 1988, which contains the "Leave Regulations for Management Employees." As you know, in exceptional cases, Personnel Order No. 92/7 permits

(Continued...)

14, 1993, entitled "'Adjusted Time' for Civilian and Uniformed Managers," Abate addressed the issue of "flex time." She informed the managers that the regular work week is "not less than 40 hours for uniformed managers," and that "[m]anagers must make an appearance on each work day i.e., the 35 or 40 hour work week cannot be completed in a compressed schedule of 3 or 4 days." Previously, the Deputy Wardens had been allowed to take compensatory time during a pay period to make up for excessive time worked on a particular day. Henceforth, they would no longer be compensated for emergency or unscheduled tours with time off.

(...continued)
agency heads to grant up to four days per year of "authorized leave" to managers in recognition of their exemplary performance.

Please note the following:

> The "authorized leave" policy supersedes any policy currently in force in any Mayoral agency. This policy in no way entitles a manager to regularly work less than a five-day week.
>
> The addition of the "authorized leave" interpretation. . . does not affect the other provisions. . ., which remain in effect. While managers are expected to be present each day they are scheduled to work, they may have account taken of unusually long hours worked in a previous period when establishing reasonable hours for a particular day. However, such time is not an entitlement. It is not to be construed as compensatory time, and it is not to be used on an hour-for-hour basis.
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> "Authorized leave" days are awards for exemplary managerial performance. They should not be granted solely because of unusually long hours worked. There is not entitlement to "authorized leave" days based on unusually long hours worked, or for any other reason....

According to witnesses for the City, the Department was compelled to reexamine its flex time policy because of a directive from the Department of Personnel. On September 7, 1993, Chief Hopkins issued a memorandum to Commanding Officers entitled "Managers Tours of Duty." It states, in relevant part:

> On too many occasions recently it has come to my attention that there are no managers on duty in a facility during normal business hours.
>
> Normal business hours are defined as 0900 to 1700 hours, Monday through Friday, excluding holidays.
>
> To ensure that there is appropriate coverage, I am directing that the following procedures be implemented:
>
> (a) That there be a manager on duty from 0700 hours to 1800 hours, Monday through Friday, excluding holidays.
>
> (b) That no more than one (1) manager be absent on any type of leave at any given time. (Refer to Rules & Regulations #2.10.180) ....
>
> Division commanders shall be responsible for compliance with the outlined procedures.
>
> This memorandum supersedes any other document which conflicts with the provisions delineated above.
>
> Commanding officers shall ensure that the contents of this memorandum are made known to all managers within their command. The procedures outlined herein are effective immediately.

The City introduced into evidence a memorandum dated December 10, 1979, entitled "Flex Time for Uniformed Managers." It states, in relevant part:

> In order to regulate the hours worked by uniformed managers and to carry out the functions of the department, the following procedures shall apply:
>
> A. Whenever a uniformed manager works unusually long hours to complete an assignment or when

> exigencies of the department require excessively long hours, the immediate supervisor or uniformed manager may adjust hours worked on the next day or if that is not reasonable, then, on another day within the same pay period.
>
> B. Whenever a uniformed manager is required to work two consecutive tours of duty in one day, the manager is not expected to make a scheduled appearance during the next working day, unless directed to do so by the exigencies of their assignment.
>
> C. Uniformed managers are expected to work the number of hours and days that are reasonably required to carry out their responsibilities. Uniformed managers shall work not less than 80 hours within one pay period. NOTHING HEREIN STATED SHALL BE CONSTRUED AS AUTHORIZING AN HOUR-FOR-HOUR COMPENSATORY TIME OFF SYSTEM....
>
> Uniformed force managerial personnel are not expected to work on weekends or on the following holidays unless specifically ordered to work by the Commissioner, Chief or Operations or Head of a Facility or Unit....
>
> When a uniformed level managerial employee is required to work on any of the above holidays, he/she shall be granted a compensatory day off to be taken within the same or following pay period, as the exigencies of the Department permit....

Daly testified that the Department was compelled to change its policy on flex time because of directives from the City. In addition, he testified, the Department changed its policy and instituted off-tour inspections because Federal Court Monitors had reported that there were no managers available to discuss problems at the times when monitoring teams inspected correction facilities. The City submitted a copy of a report issued by the Office of Compliance Consultants (“OCC”) and dated September 3, 1993, which stated:

> On Friday, August 27, 1993, OCC visited the Brooklyn Correctional Facility (BCF). We briefly surveyed law library services, food service and environmental health conditions. In accordance with our regular practices, we attempted to speak with the Warden to discuss our observations and to recommend specific corrective actions. However, neither the Warden nor the Deputy Wardens of Administration or Programs were in the facility.

On May 10, 1993, the City moved to dismiss the representation petition or, in the alternative, to reopen hearings to hear new evidence. on May 12, 1993, the Union filed an affirmation in opposition to the motion to dismiss and motion to reopen. On May 14, 1993, the Union filed the instant improper practice petition. Post-hearing briefs in the case before the Board of Certification were filed in June 1993. In Decision No. 11-95, issued on September 19, 1995, the Board of Certification found that all except one of the employees in the Deputy Warden title should be accreted to the Union.

Positions of the Parties

Union's Position

The Union claims that slippage money was withheld from Deputy Wardens and their work schedule was substantially increased,'that these actions were taken to coerce the Deputy Wardens to drop the pending representation petition, and that this constitutes a sufficient showing that the Department knew of the joint efforts being made by the Union and the Deputy Wardens to add the title Deputy Warden to the Union's bargaining certificate. Consequently, the Union argues, the City's conduct

is violative of §12-306a.(1), (3), and (4) of the New York City Collective Bargaining Law ("NYCCBL"), constituting the basis for an improper practice claim.

The Union asserts three arguments in support of its claims. First, it alleges that the City used coercive and restraining tactics to discourage the Deputy Wardens from further participation in the pending petition, and that the City improperly interfered with the rights of the Deputy Wardens to engage in union activity as provided by law. The Union cites several cases [9] for the proposition that the right of management to direct its employees is limited to conduct that does not infringe upon the organizational rights of its employees. The Union states that although payment of slippage money and modification of work schedules is discretionary, the City unlawfully conditioned receipt of such payment upon abandonment of its petition to represent Deputy Wardens and bargain collectively on their behalf. The Union alleges that, while all other managerial employees were similarly subjected to schedule changes, only Deputy Wardens did not receive pay increases.

The Union asserts that it is the designated bargaining agent of Deputy Wardens and the certified representative of Assistant Deputy Wardens, and that the City committed an improper practice by refusing to bargain in good faith. The Union maintains that the City may not be excused from its obligation to bargain in

[9]Decision Nos. B-25-89; B-59-88; B-46-88; B-43-82.

good faith. It claims that the City learned that the Union represented Deputy Wardens during negotiations between the City and the Union because the Union negotiated on behalf of the Deputy Wardens.

The Union asserts that the duty to bargain in good faith does not depend upon whether the employees in question have collective bargaining rights or whether the union is certified to represent those employees. The Union cites NLRB v. Wooster Div. of Borg-Warner Corp.[10] for the proposition that it may bargain on the Deputy Warden's behalf to reach an agreement on "any lawful subject."

The Union argues that the City discriminated against the Deputy Wardens in violation of the NYCCBL. It notes that a prima facie discrimination claim is met by establishing that the employer knew of the employees' union activity and that the activity motivated the employer's subsequent discriminatory conduct.

City's Position

The City rejects the Union's allegations that it has violated §12-306a.(4) of the NYCCBL. It asserts that the Union failed to show that it is the certified or designated representative of the Deputy Wardens and that the "parties were engaged in a matter within the scope of collective bargaining".

[10]356 U.S. 342, 42 LRRM 2034 (1958).

In addition, it claims that Deputy Wardens do not have collective bargaining rights pursuant to §12-305 of the NYCCBL.[11]

According to the City, there is no obligation to bargain in good faith with a union that is not the certified or designated agent of the employees it attempts to represent. To support its position, the City cites sections 12-306a.(4)[12] and 12-307a.[13] of the NYCCBL and previous cases decided by this Board.[14] The City notes that the Union holds no certificate to bargain on behalf of the Deputy Wardens.

The City alleges further that it was not improperly motivated when it refused to pay slippage money, nor when it made changes in flex time policy in April 1993 and September 1993. The City maintains that the Union should be estopped from claiming improper motivation since it was the Union that first

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[11]Section 12-305 of the NYCCBL provides, in relevant part:

> [N]either managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however that nothing in this chapter shall be construed to: (1) deny to any managerial or confidential employee his or her rights under section fifteen of the civil rights law or any other rights. . .

[12]See footnote 1, supra.

[13]Section 12-307a of the NYCCBL provides, in relevant part:

> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) . . . .

[14]Decision Nos. B-22-87; B-4-89; B-16-81; B-21-72.

suggested that the Deputy Wardens drop the petition for accretion in exchange for the slippage payment. As a result, the City maintains, the Union received notice that slippage money would not be paid until the pending accretion matter was resolved.

The City notes that it did purposely deny slippage money, but for reasons that were not coercive or retaliatory. The City maintains that its customary practice is to await the outcome of pending litigation before granting pay increases. By maintaining the status quo, the City asserts, it hopes to avoid harmful collective bargaining and pension liabilities.

Lastly, the City claims that the changes announced in the April 14, 1993 and September 7, 1993 memoranda were implemented for legitimate reasons. It argues that the "adjustment time memorandum" dated April 14, 1993 was meant only to correct and eliminate employee behavior which abused the flex-time policy. The City states that the original purpose of the flex time policy was to allow managers to take time off following a pay period in which they were required to work an "extraordinary number of hours." However, it claims, the Department found that employees were abusing the policy by using it as an alternative to vacation so that their vacation time would accumulate. The City maintains that the policy announced in April 1993 supersedes the flex time policy so as to "reward exemplary managerial performance."

As to the September 7, 1993 memorandum regarding managers' tours of duty, the City maintains that the changes were made to insure that a uniformed manager would be on duty at all times

during the hours of 7:00 a.m. to 6:00 p.m. It states that there was no requirement that a single Deputy Warden stay on duty for an eleven-hour shift.

Discussion

The City maintains that it is not required to bargain with the Union over a matter relating to Deputy Wardens, and for this reason there can be no claim under § 12-306a of the NYCCBL. The duty to bargain in good faith exists only between an employer and a certified or designated bargaining representative.[15] The Union has not been certified or designated to represent the title of Deputy Warden.[16] For that reason, Deputy Wardens do not constitute and are not included in any bargaining unit and do not have the right to bargain collectively.[17] Although the Deputy

[15]Decision Nos. B-53-89; B-33-89; B-22-87.

[16]We note that the Union uses the term "designated representative" to refer to its relationship with the Deputy Wardens. Section 12-303.q of the NYCCBL provides, "the terms 'designated representative' and 'designated employee organization' shall mean a certified employee organization, council or group of certified employee organizations designated for the purposes specified in paragraphs two, three or five of subdivision a of section 12-307." Section 12-307a.(2), (3) and (5) concerns negotiation of matters which must be uniform for all employees subject to the career and salary plan, matters which must be uniform for all employees in a particular department, and matters involving pensions for employees other than those in the uniformed f ire, police, sanitation and correction services. We will assume that by "designated representative," the Union means that it was chosen by the Deputy Wardens to conduct negotiations on their behalf with the City.

[17]Section 12-305 of the NYCCBL.

Wardens may have requested that the Union conduct talks with the City on their behalf, this request confers neither a right on the part of the Union to bargain on their behalf nor a correlative duty on the part of the City to bargain. Furthermore, the fact that the City voluntarily entered into negotiations with the Union concerning the Deputy Wardens confers no rights or duties upon the parties. For these reasons, the Union's claim of a statutory violation based on a failure to bargain must be dismissed.

The Union has, however, raised issues of interference and retaliation which we will consider. Before doing so, we will discuss the standards of proof in improper practice cases of this nature. In NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967), the U.S. Supreme Court enunciated two tests to evaluate the effect of an employer's conduct on employees' rights. It held:

> First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is on the employer to establish that it was motivated by legitimate objectives since proof of

> motivation is most accessible to him [emphasis in the original].[18]

When considering allegations of improper practices within the meaning of § 12-306a of the NYCCBL, depending on the nature of the claim, we will evaluate the facts according to the standards set forth in the first branch of Great Dane, or by the Salamanca standard set forth by the New York State Public Employment Relations Board ("PERB"),[19] which was derived from the second branch of Great Dane.[20]

We adopted the standard set forth in the first branch of Great Dane in Decision No. B-26-93, noting that there are two categories of conduct which have been held to be inherently destructive of important employee rights. One "creates visible and continuing obstacles to the future exercise of employee rights"[21] and "jeopardizes the position of the union as bargaining agent or diminishes the union's capacity effectively to represent the employees in the bargaining unit."[22] The

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[18]See also, Decision No. B-7-89.

[19]City of Salamanca, 18 PERB 3012 (1985).

[20]Decision No. B-26-93.

[21]National Fabricators. Inc. v. NLRB, 903 F.2d 396 (5th Cir. 1990), 134 LRRM 2488, quoting NLRB v. Haberman Construction Co., 641 F.2d 351 (5th Cir. 1981) ; see also, Inter-Collegiate Press. Graphic Arts Division v. NLRB, 486 F.2d 837, 84 LRRM 2562 (8th Cir. 1973), cert. den'd, 416 U.S. 938, 85 LRRM 2924 (1974); Loomis Courier Service v. NLRB, 595 F.2d 491, 101 LRRM 2450 (9th Cir. 1979).

[22]Haberman Construction Co., supra; see also, Inter-Collegiate Press. Graphic Arts Division v. NLRB, 486 F.2d 837, 84 LRRM 2562 (8th Cir. 1973), cert. den'd, 416 U.S. 938, 85 LRRM 2924 (continued...)

second type "directly and unambiguously penalizes or deters protected activity."[23] "Generally, those courts that have addressed the question have described 'inherently destructive' conduct as that 'with far reaching effects which would hinder future bargaining, or conduct which discriminated solely upon the basis of participating in strikes or union activity."[24] In Fashion Institute of Technology, PERB held:

> [t]he Taylor Act guarantees to public employees in this State the right to participate in an employee organization and to be represented by an employee organization in the negotiation of their terms and conditions of employment. Conduct of an employer or one acting in his behalf which has a predictably chilling effect on such employee organization's activities clearly discourages membership in or participation in the activities of the employee organization. Thus, conduct of an employer which is inherently destructive of such employee rights is a violation of § 209.a-1(c) even in the absence of proof of any intention to weaken the employee organization [citations omitted]."[25]

(...continued)
(1974) ; Portland Willamette Co. v. NLRB, 534 F.2d 1331, 92 LRRM 2113 (9th Cir. 1976).

[23] Haberman Construction Co., supra; see also, Kaiser Engineers v. NLRB, 538 F.2d 1379, 92 LRRM 3153 (9th Cir. 1976); Portland Willamette Co., supra; NLRB v. Lantz, 607 F.2d 290, 102 LRRM 2789 (9th Cir. 1979); Indiana & Michigan Electric Co. V. NLRB, 599 F.2d 227, 101 LRRM 2475 (7th Cir. 1979).

[24] NLRB v. Sherwin Williams, 714 F.2d 1095, 114 LRRM 2511 (11th Cir. 1983), quoting Vesuvius Crucible Co. V. NLRB, 668 F.2d 162, 108 LRRM 3209 (3rd Cir.1981), in turn quoting Portland Willamette Co. v. NLRB, supra.

[25] Fashion Institute of Technology v. United Federation of College Teachers, Local 1460, AFL-CIO, 5 PERB 3018 (1972), rev'd on other grounds, Fashion Institute of Technology v. Helsby, 44 A.D.2d 550, 7 PERB 7005 (1st Dept. 1974).

Again, in County of Monroe,[26] PERB held that "the right to form, join and participate in an employee organization ... is intimately related to the ... right to be represented by an employee organization. Action taken for the purpose of frustrating the right of representation necessarily has a chilling effect on the § 202 right of organization and is inherently destructive of that right."

To establish improper motivation where the injury to employees' rights is "comparatively slight," the petitioner must show that the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity and that the employee's union activity was a motivating factor in the employer's decision. If the petitioner satisfies both parts of this test, the employer must present evidence that attacks directly and refutes the evidence put forward by the Union, or it may present evidence that it had other legitimate and permissible motives which would have caused it to take the action complained of even in the absence of the protected activity.[27] This test, which we adopted in Decision No. B-51-87, derives from the decision of the NLRB in Wright Line, a

[26]County of Monroe and Monroe County Sheriff v. Security and Law Enforcement Employees, 18 PERB 3081 (1985).

[27]See, e.g., Decision Nos. B-16-92; B-63-91; B-50-90; B-61-89; B-7-89; B-46-88; B-12-88; B-51-87.

Division of Wright Line, Inc.,[28] which was followed by PERB in City of Salamanca.

The Union argues that it has made a valid claim of discrimination because the Department knew of the employees' union activity, that is, the petition to be certified for inclusion in a collective bargaining unit, and that the activity in question motivated the employer in its subsequent discriminatory conduct. If a per se violation is found, the question of motive is irrelevant. Where the Salamanca principle is applied, however, the Union must also establish that the employer's conduct was, in fact, discriminatory.[29] In such an instance, the fact that an otherwise proper and legal action of the employer may incidentally have a detrimental effect upon the Union does not necessarily mean that the action constitutes an improper practice. Only where it could also be shown that management's action was intended to harm the union would we find that the element of improper motivation essential to a finding of improper practice had been established.[30]

The City has raised credible defenses on the issues of flex time and adjusted hours. Unless the Board of Certification finds that the title Deputy Warden should be placed in a bargaining

[28] 251 NLRB 1083, 105 LRRM 1169, enforced, 662 F.2d 899, 108 LRRM 2515 (lst Cir. 1981), cert. denied, 455 U.S. 989, 109 LRRM 2779 (1982) ; see also, NLRB v. Transportation Management Corp., 103 S.Ct. 2469, 113 LRRM 2857 (1983).

[29]Decision Nos. B-16-92; B-36-91

[30]Decision Nos. B-36-93; B-15-92

unit, employees in that title remain subject to the exercise of unilateral management action and enjoy no collective bargaining rights. In the absence of an express limitation set forth in a collective bargaining agreement or in a rule, regulation or written policy of the employer, the broad managerial authority to direct employees provided under § 12-307b of the NYCCBL [31] permits the employer to implement adjusted work assignments or schedules unilaterally, as it deems necessary.[32]

We have held that actions which are properly within the scope of management's statutory prerogative may constitute improper practices if taken for purposes which contravene the NYCCBL.[33] An allegation of improper motive alone, however, does not state a violation of the NYCCBL.[34] To prove that an improper practice has been committed, the petitioner must

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[31] Section 12-307b of the NYCCBL provides, in relevant part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. . . .

[32] Decision Nos. B-37-93; B-46-92.

[33] Decision Nos. B-26-93; B-63-91; B-50-90; B-7-89; B-59-88.

[34] Decision Nos. B-12-88; B-2-87; B-28-86; B-12-85; B-25-81.

demonstrate a causal connection between protected conduct and the management action in question.[35]

In the instant case, the Union has not demonstrated a causal connection between the filing of a petition for a bargaining certificate and the Department's actions in changing the flex time policy and instituting adjusted hours and off-tour inspections. The record indicates that the Department was compelled to follow the directives issued by the Mayor's Office and the Department of Personnel regarding flex time policies, and these policies were applied uniformly to all managerial personnel in City employment. The City's actions of adjusting hours and instituting off-tour inspections, based on complaints the Department received from its Federal Court Monitors, also raise a legitimate business defense. Again, the actions taken in response to these complaints affected all managerial personnel, and not the Deputy Wardens alone.

In regard to the claim concerning slippage money, the Department raises the defense that it withheld this money from Deputy Wardens in order to "maintain the status quo." Under the NYCCBL, the term status quo is a term of art which applies only when a collective bargaining agreement is already in place.[36]

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[35] Decision Nos. B-21-92; B-21-91; B-1-91; B-28-89; B-12-88.

[36] Section 12-311 of the NYCCBL provides:

d. **Preservation of status quo**. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending sixty days

(continued...)

In the instant case, the same term has a different meaning, derived not from the statute but from case law concerning the conduct of an employer during a union organizing drive and before the first collective bargaining agreement has been negotiated. This is a matter of first impression before this Board; therefore, we will consider relevant decisions of PERB and the National Labor Relations Board ("NLRB") in making our determination.

(...continued)
thereafter or thirty days after the panel submits its report, whichever is sooner, provided, however, that upon motion of the panel, and for good cause shown, the board of collective bargaining may allow a maximum of two sixty-day extensions of time for the completion of impasse panel proceedings, provided further, that additional extensions of time for the completion of impasse panel proceedings may be granted by the panel upon the joint request of the parties, and during the pendency of any appeal to the board of collective bargaining pursuant to subdivision c of this section, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purposes of this subdivision, the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.

See, Decision No. B-14-77, in which we stated, "[b]argaining for a new contract is an essential element in the status quo scheme established by ... the NYCCBL. A request for a commencement of negotiations for a successor labor agreement is a condition precedent to the invocation of the status quo provision of our law."

Several recent PERB decisions are instructive. In Hudson Valley Community College,[37] a college employed a number of non-teaching professionals ("NTP's) who were not members of a collective bargaining unit. It gave salary increases in advance of each academic year to each of the NTP's. After the union filed a certification petition on behalf of some of the NTP's, those NTP's were not granted salary increases while the NTP's not to be included in the proposed bargaining unit were granted increases. The ALJ dismissed the union's claim under § 209-a.1(e) of the Taylor Act [38] on the grounds that that provision of the Act applies only where a collective bargaining agreement already exists. As to the union's claim of restraint or coercion, however, the ALJ found:

> [a]lthough there is no evidence whatever of hostile motive, the single determinative fact is that had the representation petition not been filed, all NTP's would have been considered for salary adjustments. An attempt to seek representation cannot suffer such a consequence. The inexorable effect of the College's departure from the customary is to discourage or otherwise affect adversely the free exercise of rights guaranteed under ... the Act. In addition, those NTP's not considered for salary adjustment thereby suffered discrimination for having participated in the organizational activities of the charging parties [citations omitted].

[37] Hudson Valley Community College Nonteaching Professionals Organization v. Hudson Valley Community College, 18 PERB 4566, aff'd, 18 PERB 3057 (1985).

[38] Under that provision, it is an improper practice "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article."

The matter was brought before PERB's Board an the exceptions of the College, [39] and the Board affirmed the ALJ's decision. It held that the College's obligation, during the pendency of the organizing drive, was:

> to maintain the status quo so as not to give the impression to the employees covered by the petition that the College might take any steps to punish or reward employees for their exercise of protected rights. Section 202 of the Taylor Law; Spencerport CSD, 12 PERB 3074 (1979); State of New York (PEF), 10 PERB 3108 (1977). In the instant situation, that status quo included eligibility for salary increases each September 1.

The college argued that its conduct could not constitute a violation because it was not hostile toward the union in particular or unionization in general. The Board held:

> [a]s we said in State of New York (PEF), such hostility and/or animus is not an essential element of a violation of § 209-a.l(a) ... [or] (c). A party is presumed to have intended the consequences that it knows or should know will inevitably flow from its actions. Here, the College conveyed a coercive message to the nonteaching professionals that by seeking representation rights they had lost their eligibility for pay raises ... and it knew, or should have known, that this communicated an additional message that unionization would exact further costs which might be avoided by withdrawal of the petition or by voting against the Union should there be an election.[40]

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[39] Hudson Valley Community College Nonteaching Professionals Organization v. Hudson Valley Community College, 18 PERB 3057 (1985).

[40] See also Waverly Association of Support Personnel, NEA v. Waverly Central School, District, 19 PERB 4595, aff'd, 19 PERB 3080 (1986).

Unlike the instant case, in Onondaga-Cortland-Madison BOCES[41] the employer's coercive act of withholding wage increases occurred immediately upon the employees' accretion into a bargaining unit. It is worth noting, however, that the Board decision states:

> BOCES misconstrues its duties under the Act.... An employer's obligation to maintain (the] status quo starts on the date it is presented with a bona fide representation question and continues to the date a wage and benefit package is fixed by collective negotiations with he recognized or certified bargaining agent.[42]

We agree with PERB that, where there is no existing collective bargaining agreement, an employer's obligation to maintain the status quo starts on the date that it is presented with a bona fide representation question and continues until the date that a wage and benefit package is fixed by collective negotiations with the recognized or certified bargaining agent. This obligation parallels the obligation created under § 12-311.d of the NYCCBL, which provides that, for purposes of determining the status quo period where a collective bargaining agreement already exists, "the term 'period of negotiations' shall mean the period commencing on the date on which a bargaining notice is

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[41] Onondaga-Cortland-Madison BOCES Federation of Teachers. NYSUT v. Onondaga-Cortland-Madison BOCES, 24 PERB 4626 (1991), aff'd, 25 PERB 3044 (1992), rev'd on other grounds, Onondaga Cortland-Madison BOCES v. Kinsella, 26 PERB 7015, 198 A.D.2d 824 (4th Dept., 1993).

[42] 25 PERB 3044 (1993).

filed and ending on the date on which a collective bargaining agreement is concluded.... "

Both OLR and the Union have approached the certification proceeding as if it were an adversarial process. This is evidenced by the City's rationale for denying slippage money to Deputy Wardens, that is, that the City and the Union were "in litigation" regarding the bargaining certificate, and by the testimony of some of the Deputy Wardens that they had "filed a lawsuit" against the City. We remind the parties that the representation process is investigatory, not adversarial, and is not considered litigation.[43] Therefore, McDonald's analogy between the Union's representation petition and the UFA's appeal of its impasse award is inapt. Furthermore, the City has given us no basis for understanding its concern that it could become enmeshed in litigation about pension benefits merely because a union had filed a representation petition; rather, it makes a conclusory allegation that such an outcome is inevitable. For these reasons, we find that the City's refusal to grant slippage money because of what it characterizes as "litigation" is not a legitimate business defense in these circumstances.

Turning to relevant cases in the private sector, we find that the court in NLRB v. Dothan Eagle, Inc.[44] stated:

> It is an unfair labor practice to grant a wage increase during the campaign and bargaining periods, but at the

[43]Board of Certification Decision Nos. 51-74; 68-74.

[44] 434 F.2d 93, 75 LRRM 2531 (5th Cir. 1970).

> same time it may be an unfair labor practice to refuse to grant an increase during this same period.... We find little merit in such arguments. The cases make it crystal clear that the vice involved in both the unlawful increase situation and the unlawful refusal to increase situation is that the employer has changed the existing conditions of employment. It is this change which is prohibited and which forms the basis of the unfair labor practice charge [emphasis in the original].[45]

The NLRB and the courts agree that, when in doubt, an employer should act "as [it] would if a union were not in the picture."[46]

In NLRA v. Otis Hospital,[47] the hospital had followed a policy of granting selective wage increases. After a federal wage freeze was lifted, the hospital administrator announced that all employees would receive a cost of living increase. The announcement was posted on bulletin boards throughout the hospital. Several weeks after the notices were posted, a union

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[45] See, NLRB v. Hasbro Industries. Inc. , 672 F.2d 978, 109 LRRM 2911 (1st Cir. 1982), wherein the court held that "the presumption of illegality of wage increases and other benefits granted during the pendency of a union election is negated if the employer establishes that the conferral and announcement of such benefits are consistent with company practice or were planned and settled upon prior to the initiation of the union's organization campaign," citing Louisburg Sportswear Co. v. NLRB, 462 F.2d 380, So LRRM 2138 (4th Cir. 1972) ; NLRB v. Otis Hospital, 545 F. 2d 252, 93 LRRM 2278 (1st Cir. 1976). See also, Free-Flow Packaging Corp. v. NLRB, 588 F.2d 1124, 97 LRRM 2750 (9th Cir. 1978); Southern Md. Hospital Center v. NLRB, 801 F.2d 666, 123 LRRM 2644 (4th Cir. 1986).

[46] Great Atlantic & Pacific Tea Co., 166 NIRB 27 (1966); See also, McCormick Longmeadow Stone Co., 158 NIRB 1237 (1966) ; NLRB v. Styletek , 520 F.2d 275, 89 LRRM 3195 (1st Cir. 1975); NLRB v. Otis Hospital, 545 F.2d 252, 93 LRRM 2779 (lst Cir. 1976); Free-Flow Packaging Corp. v. NLRB, 588 F.2d 1124,, 97 LRRM 2750 (9th Cir. 1978).

[47] 545 F.2d 252, 93 LRRM 2778 (1st Cir. 1976).

began an organizing campaign and achieved the support necessary to file a representation petition. The administrator told employees that he would not grant an increase because "the union was around" and he "didn't know if it would be a proper thing to do." The union filed a charge of unfair labor practice.

The court found that the employer's promise of a wage increase "became part of the existing terms and conditions of employment prior to the Union's appearance" because "the timing and general applicability of the benefits were indicated, and the notice was posted throughout the institution." It held:

> where the prospective benefits were already incorporated in the existing terms and conditions of employment, an employer could grant the benefits without fear of violating S(a)(1). It follows, conversely, that a refusal to grant the benefits in these circumstances would likely be illegal, since withholding them would constitute a change in existing conditions.

In the instant case, the Department's existing, announced request for slippage money for all uniformed managers, including Deputy Wardens, was an element of the status quo on the day that the Deputy Wardens filed their representation petition. It is clear that the Deputy Wardens had been told by the Department since 1990 that they were among the uniformed managers for whom it was attempting to procure slippage money. Three Deputy Wardens testified that all Deputy Wardens had received copies of Sielaff's letters to Steisel, and their testimony was not contradicted by the City. Whether or not Sielaff mailed any of the letters is immaterial; what is relevant here is that the

Deputy Wardens believed, on the day that they filed a bargaining petition, that they were going to receive slippage money. Their belief was reasonable because the Department had told them that they would receive slippage money along with the other uniformed managers and had reinforced this belief by giving each Deputy Warden copies of its letters to Steisel.

The City's refusal to grant slippage money to Deputy Wardens, therefore, constituted a change in the status quo. This action contained an innate element of coercion, irrespective of motive, and constituted conduct which, because of its potentially chilling effect on the organizing drive by Deputy Wardens and the Union, is inherently destructive of important rights guaranteed under the NYCCBL. We find, therefore, that the City's denial of slippage money to Deputy Wardens constituted an improper employer practice under the NYCCBL.

We also find no legitimate justification for an action taken by a member of the Department administration at the May 1993 meeting at GMDC. Abate and Daly told the Deputy Wardens they would be granted slippage money if they abandoned their pursuit of a bargaining certificate. Abate made the comment after she was asked by a Deputy Warden whether this was the case. The record shows that Daly expanded on it and added comments concerning the City's desire to negotiate with the Deputy Wardens at a salary which did not include slippage money. His comments at the meeting reflect McDonald's testimony in which he stated that one reason for denying slippage money to the Deputy Wardens

was that granting the increase "puts me into a weird position in terms of collective bargaining strategy for the future if I'm paying out money for a particular group and ... they kind of get a leg up on me in terms of collective bargaining strategy."

We repeat a portion of the decision in Hudson Valley, since it is appropriate in considering McDonald's testimony and the remarks made by Daly:

> the [employer), in anticipation of a statutory obligation to negotiate, refused to consider employees for raises that they might have earned in order to depress the salary base for such negotiations.... [The employer's] argument is that its conduct could not be a violation because it had had no "hostile motive" ... meaning hostility to the Union in particular or to unionization in general. As we said in State of New York (PEF), such hostility and/or animus is not an essential element of a violation ....
>
> A party is presumed to have intended the consequences that it knows or should know will inevitably flow from its actions. Here, the [employer] conveyed a coercive message to the nonteaching professionals that by seeking representation rights they had lost eligibility for pay raises ... and it knew, or should have known, that this communicated an additional message that unionization would exact further costs which might be avoided by withdrawal of the petition or by voting against the Union should there be an election. Indeed, this is not far from the avowed intention of the [employer] to maintain a lower Wage floor pending unionization and negotiations.[48]

We find that the comments made at the GMDC meeting regarding the City's desire to negotiate at a lower salary were inherently destructive of important rights guaranteed under the NYCCBL to the Union and the Deputy Wardens. All of the Union's witnesses

[48]Hudson Valley Community College Nonteaching Professionals Ogrganization v. Hudson Valley Community College, 18 PERB 3057 (1985).

related substantially the same version of events, and all came away from the meeting with the impression that an attempt had been made to interfere with their intention to pursue a bargaining certificate. All of the employees in the title Deputy Warden attended the May 1993 meeting; therefore, all Deputy Wardens may have been rendered less likely to exercise their rights to participate in union activity or support the Union. The Department's language, in the context in which it was spoken, had "a predictably chilling effect on such employee organization's activities [that] clearly discourage[d] membership in or participation in the activities of the employee organization,"[49] created "visible and continuing obstacles to the future exercise of employee rights"[50] and "diminishe[d] the union's capacity effectively to represent the employees in the bargaining unit."[51]. For these reasons, we find that the Department committed an improper labor practice when, at the meeting at GMDC, it engaged in the conduct which is described above.

The City maintains that the Union should be estopped from claiming improper motivation since, according to the City, it was the Union that first suggested that the Deputy Wardens drop the petition for accretion in exchange for the slippage payment.

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[49] Fashion Institute of Technology, supra.

[50] Haberman Construction Co., supra.

[51] Id.

Whether or not the Union made such an offer is irrelevant. We have found that the City committed improper practices by its conduct in changing an element of the status quo during an organizing drive and by its conduct at the rank and file meeting at GMDC. Even if we assumed that the Union made the alleged offer, we would not find differently. In both instances, we have found per se violations of the statute and motive is not an issue. If motive were at issue, however, we still would find no causal relationship, or any other relevant relationship, between the Union's alleged offer at a bargaining session and the alleged improper practices.

Accordingly, we direct the City to pay slippage money to all Deputy Wardens retroactive to the date that each affected employee would have begun to receive that increase had the City not committed improper practices. Since the record is not clear regarding the date from which these payments should have commenced, we direct the parties to attempt to reach agreement as to the date when payment should have commenced and the amount to be paid to each Deputy Warden. We will retain jurisdiction in the instant case so that, in the event that the parties cannot reach agreement on these issues by November 6, 1995, we may adjudicate the dispute at a time and in a manner to be decided by this Board.

DECISION AND ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the Now York City Collective Bargaining Law, it is hereby,

ORDERED, that the improper practice claim concerning adjusted hours for managers ("flex time") set forth by the Assistant Deputy Wardens Association in Docket No. BCB-1580-93 be, and the same hereby is, dismissed; and it is further,

ORDERED, that the improper practice claim concerning wage parity ("slippage money") set forth by the Assistant Deputy Wardens Association in Docket No. BCB-1580-93 be, and the same hereby is, granted; and it is further,

DIRECTED, that the City pay slippage money to all Deputy Wardens employed by the Department of Correction, retroactive to the date that each affected employee would have begun to receive that increase had the City not committed improper practices; and it is further,

DIRECTED, that the parties attempt to reach agreement as to the date when payment should have commenced and the amount to be paid to each Deputy Warden; and it is further,

DIRECTED, that the Board of Collective Bargaining retain jurisdiction in the instant case so that, in the event that the parties cannot reach agreement on these issues by November 6, 1995, we may adjudicate the dispute at a time and in a manner to be decided by this Board.

Dated: New York, New York
September 19, 1995

Malcolm D. MacDonald
CHAIRMAN

George Nicolau
MEMBER

Daniel G. Collins
MEMBER

Thomas J. Giblin
MEMBER

Robert H. Bogucki
MEMBER