DC 37, 6 OCB2d 14 (BCB 2013)

(IP) (Docket No. BCB 3014-12)

Summary of Decision*:** The Union alleged that the City and DCAS violated NYCCBL § 12-306(a)(1) and (4) when DCAS issued a new Personnel Services Bulletin that unilaterally changed the time and leave policies in City-wide emergencies. The City argued that the petition is untimely, that no unilateral changes have occurred, and that Respondents' actions fall within their managerial rights. This Board found that the City unilaterally adopted a new comprehensive time and leave policy applicable to all City-wide emergencies. The new rule involves mandatory subjects of bargaining by requiring employees to charge absences to leave time without the opportunity for excusal, makes the ability to charge leave subject to agency approval, and changes the conditions under which employees are charged for latenesses. This Board further found that the portion of the new Personnel Services Bulletin that requires employees to report to work, to work at alternative work locations, and to work alternative schedules are management rights. Accordingly, the petition is granted, in part, and denied, in part. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Respondents.

DECISION AND ORDER

On May 15, 2012, District Council 37, AFSCME, AFL-CIO ("Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Citywide Administrative Services ("DCAS") alleging that Respondents violated §

12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The Union claims that by issuing Personnel Services Bulletin ("PSB") 440-14 concerning City-wide emergencies ("2012 City-wide Emergency PSB" or "2012 PSB"), Respondents unilaterally changed time and leave policies in City-wide emergencies.[2] The City argues that the petition is untimely, that there are no unilateral changes, and that Respondents' actions all fall within its managerial rights. This Board finds that the 2012 PSB is a new work rule that involves mandatory subjects of bargaining. This Board also finds that, the City unilaterally adopted a comprehensive time and leave policy applicable to all City-wide emergencies which requires employees to charge absences to leave time without the opportunity for excusal, makes the ability to charge leave subject to agency approval, and changes the conditions under which employees are charged for lateness. We therefore reject the City's defense that the 2012 PSB did not unilaterally change time and leave benefits. We further find, however, that the portion of the 2012 PSB that requires employees to report to work, to work at alternative work locations, and to work alternative schedules are management rights. Accordingly, the petition is granted, in part, and denied, in part.

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[1] The petition named the DCAS Commissioner as a Respondent. We have amended the caption *nunc pro tunc* because the NYCCBL is only applicable against public employers which, by definition, do not include individuals. *See* NYCCBL §§ 12-303(g) (defining public employer for the purposes of the NYCCBL) and 12-304 (scope of the NYCCBL).

[2] The petition was amended, with the consent of the City, on July 23, 2012, to allege an additional violation of NYCCBL §12-306(a)(4).

BACKGROUND

Four days of hearings were conducted in the instant matter. The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

PSB 440-14: The 2012 City-wide Emergency PSB

On March 5, 2012, DCAS issued the 2012 City-wide Emergency PSB concerning "Time and Leave Policy in the Event of a City-wide Emergency." (City, Ex. 11) The 2012 PSB defines City-wide emergencies as "includ[ing], but is not limited to, weather-related events such as storms, floods and tornados; transit strikes; and impact area-specific events such as infrastructure incidents." (*Id.*) The Union claims that the 2012 PSB is a new work rule in which the City, for the first time, requires employees to charge absences to leave time without the opportunity for excusal as well as altering the circumstances under which lateness may be charged to leave balances, and that it applies to all emergency situations..

The 2012 City-wide Emergency PSB was the first time that the City issued a comprehensive written time and leave policy for all City-wide emergencies. (*See* Tr. 165; 272; 281) The City's prior written policy statements addressed major disruptions of public transportation and were issued on an emergency-by-emergency basis, either after the emergency had occurred or in anticipation of a specific event.[3] These prior event-specific memoranda were tailored and limited to the specific event.[4] For example, the City had not, prior to the 2012 PSB, issued a written policy addressing hurricanes in general. However, in 1985 DOP issued a

[3] The Citywide Agreement does not address City-wide emergencies but instead addresses "major disruptions of public transportation, such as a widespread or total power failure of significant duration or other catastrophe of similar severity." (Union, Ex. D, p. 19)

[4] These prior event-specific memoranda consist of formal PSBs and Personnel Policy and Procedures ("PPP") statements issued by DCAS and its predecessor, the Department of Personnel ("DOP"), as well as memoranda and emails. These prior event-specific memoranda were only issued concerning major disruptions of public transportation, a sub-set of City-wide emergencies, which include blizzards, hurricanes, blackouts, and transit stoppages.

memorandum regarding "Emergency Time & Leave policy" for Hurricane Gloria; in 1999 the City's Office of Payroll Administration issued a memorandum that instructed agencies how to record time scheduled but not worked due to Hurricane Floyd ("1999 Hurricane Floyd Memo"); and in 2011 DCAS issued an email regarding latenesses and absences related to Hurricane Irene ("August 2011 Hurricane Irene Email"). (City, Exs. 12, 15, and 20) Prior event-specific memoranda were introduced for every major disruption of public transportation spanning 35 years and 17 events. City witnesses testified that the 2012 PSB does not prevent the City from issuing event-specific memoranda in the future.

COOPs, Alternative Work Locations and Alternative Schedules

The 2012 City-wide Emergency PSB is also the first time that Continuity of Operations Plans ("COOPs") were addressed in a PSB. The 2012 PSB section entitled "Maintenance of Agency's Essential Services" states that COOPs are developed by City agencies "to enable them to maintain essential agency services during a City-wide or localized emergency."[5] (City, Ex. 11) The 2012 PSB was promulgated, in part, to have a single policy that integrated COOPs.

The 2012 City-wide Emergency PSB section entitled "Alternative Work Sites/Alternative Work Schedules" states that "employees may be directed to report to authorized alternative work sites or to work staggered or flexible schedules . . ." (City, Ex. 11) The "employees may be directed" language is new to the 2012 PSB. The language common to the prior event-specific memoranda is that: "Agency heads are reminded that . . . they should explore and, wherever

[5] Agencies were required to develop COOPs by Executive Order No. 107, issued in 2007. The 2012 PSB further states that: "Employees who have been identified to support essential services will be notified by their agency heads, COOP liaisons, or human resources divisions, and given further instructions." (City, Ex. 11) The City did not negotiate the COOPs with the Union. Although the Union may have been informed of aspects of the COOPs prior to their implementation, it has not received copies of the COOPs or any list of essential employees.

feasible, institute a system of staggered work hours and flexible schedules."[6] (City, Exs. 7, 8, 9, and 10) Alternative work locations were first explicitly provided for in the 2005 Transit Stoppage PSB, which states that "[w]here feasible, agency heads may permit employees to report to authorized alternative work sites." (City, Ex. 10)

The 2012 City-wide Emergency PSB requires employees to "make every effort to report to work," including "find[ing] alternate means of reporting to work" and "allow[ing] extra time for travel." (City, Ex. 11) These requirements can be found in the prior event-specific memoranda. For example, the 1997 and 2005 Transit Stoppages PSBs both state that employees "must make every effort to overcome transportation difficulties and report to work . . . are expected to find alternate means of reporting to work [and] . . . are expected to allow extra time for travel." (City, Exs. 9 and 10) The "every effort" to report to work language can also be found in the prior event-specific memoranda issued in response to snowstorms in February 2003 ("February 2003 Snowstorm Memo") and December 2010 ("December 2010 Snowstorm Memo"). (City, Exs. 16 and 19) Article V, § 16(a), of the Citywide Agreement provides: "Every employee is obligated to report for work as scheduled." (Union, Ex. D, p. 18)

Absences Caused by City-wide Emergencies

The "Absences" section of the 2012 City-wide Emergency PSB reads, in pertinent part: "In order to be paid for the day, employees who do not report to work during the City-wide emergency must use their annual leave, compensatory time, or be advanced annual leave. Such usage is subject to agency head approval." (City, Ex. 11) As discussed below, we find that prior to the issuance of the 2012 PSB, employees were not required to either use annual leave or be

[6] This language appears in the PPPs and PSBs regarding transit stoppages issued in 1982, 1994, 1997, and 2005. *See* PPP 650-82 ("1982 Transit Stoppage PPP"); PPP 650-94 ("1994 Transit Stoppage PSB"); PSB 440-1 ("1997 Transit Stoppage PSB"); and PSB 440-1.2 ("2005 Transit Stoppage PSB"). (City, Exs. 7, 8, 9 & 10)

docked pay for absences due to Citywide emergencies. Accordingly, we reject the City's contention that the 2012 PSB did not unilaterally change mandatory subjects of bargaining.

Prior to the 2012 PSB, DCAS issued PSB 600-2 ("2011 Snowstorm PSB"), the most recent pertinent PSB, which explicitly provided a procedure for excusal of absences due to public transportation difficulties caused by snowstorms in January 2011. (*See* Union, Ex. I) This was one of at least seven prior occasions for which the City issued event-specific memoranda that explicitly excused absences related to major disruptions of public transportation. These were: 9/11; Hurricane Floyd in 1999; blackouts in 1977 and 2003; and snowstorms in 1978, 1996, and 2011. The Mayor's Office issued a memorandum regarding 9/11 that provided that "absence of employees . . . affected by the attack . . . shall be excused." (City, Ex. 23) The 1999 Hurricane Floyd Memo provided a payroll code for "Excused Absence Due to a Weather Emergency." (City, Ex. 15) PPP 650-77 provided that "[e]mployees regularly scheduled to work . . . who did not work [due to the 1977 Blackout] are excused absences with no charge to their leave balance." (City Ex. 2) DCAS issued a memorandum regarding the August 2003 blackout ("2003 Blackout Memo") that stated that "unscheduled absences . . . shall not be charged against any leave balances." (Union, Ex. N) PPP 650-78B ("1978 Snowstorm PPP") was issued to implement an arbitration award that ordered the City to establish a procedure to excuse absences related to snowstorms in January and February 1978. (*See* Union, Ex. K) PSB 600-1 ("1996 Snowstorm PSB") was issued to implement a settlement that excused absences related to the 1996 snowstorm. (*See* Union, Ex. J)

On at least seven other occasions, the City has issued prior event-specific memoranda that allowed an employee to use accrued or advance leave and did not preclude the opportunity for excusal of an absence related to an emergency. These memoranda were directed to the

following specific events: Hurricane Irene in 2011; snowstorms in February 2003 and December 2010; and transit strikes in 1982, 1994, 1997, and 2005. *See* August 2011 Hurricane Irene Email; February 2003 and December 2010 Snowstorm Memos; 1982 Transit Stoppage PPP and 1994, 1997, and 2005 Transit Stoppage PSB (City, Exs. 7, 8, 9, 10, 16, 19, and 20)

We find that, in these instances, agency heads had the discretion to excuse absences related to major disruptions of public transportation even where the prior event-specific memoranda did not explicitly provide for it. Indeed, the August 2011 Hurricane Irene Email explicitly provided that employees need not use their leave balances to be paid for an absence related to Hurricane Irene if "they have a pre-existing arrangement available to them that allows them to make up this time." (City, Ex. 20) While City witnesses differed in their testimony as to the degree of discretion agency heads had to excuse absences, we conclude that based on the testimony and documentary evidence, agency heads had discretion to excuse absences prior to PSB 2012.[7] Additionally, prior to the 2012 PSB, employees could use accrued or advanced leave time to be paid for an unexcused absence.[8] In contrast, the 2012 PSB allows an agency head to deny the use of leave. Further, the 2012 PSB does not address the needs of employees

[7] Additionally, several event-specific memoranda provided explicit guidance to agencies regarding the excusal of absences. *See* 1978 Snowstorm PPP, 1996 and 2011 Snowstorm PSBs, and the 2003 Blackout Memo. (Union, Exs. I, J, K & N) We find that these documents, consistent and in conjunction with the credible party admissions contained within the City witnesses' testimony (Tr. 206; 280) establish that the 2012 PSB represented a change.

[8] The prior event-specific memoranda either simply state that leave can be used or set specific conditions under which leave can be used. For example, the August 2011 Hurricane Irene Email states that "[i]f an employee determines that they cannot come to work, they should use annual leave or comp time to stay home." (City, Ex. 20) The 2005 Transit Stoppage PSB states that: "Agency head shall allow unscheduled absences to be charged against [leave] upon a showing by the employee that reporting to work would have caused an undue burden." (City, Ex. 10)

with disabilities, while prior event-specific memoranda explicitly provided for the excusal of absences of employees with disabilities.[9]

Latenesses Caused by City-wide Emergencies

The "Lateness" section of the 2012 City-wide Emergency PSB reads, in pertinent part: "For employees who arrive at work late, agencies shall determine whether the lateness was caused by unforeseen circumstances which arise after an employee leaves for work, which cannot be anticipated and are beyond the ability of the tardy employee to control; in these instances, lateness shall be excused." (City, Ex. 11) The "after an employee leaves for work" condition does not exist in any of the prior event-specific memoranda. The 2011 Hurricane Irene Memo quoted Article V, § 16(h), of the Citywide Agreement and provided that "[l]atenesses caused by a verified major failure of public transportation, such as a widespread or total power failure of significant duration or other catastrophe of similar severity, shall be excused."[10] (City, Ex. 20) Similarly, the 2005 Transit Stoppage PSB provides that the "latenesses found by the agency head . . . to have been caused by transportation circumstances beyond the ability of the tardy employee to control, shall be excused."[11] (City, Ex. 10)

Practical Impact

Evelyn Seinfeld, the Union's Director of Research and Negotiations, testified that the 2012 City-wide Emergency PSB will have a practical impact on the safety of bargaining unit members because it requires City employees to go to work under the same circumstances in

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[9] *See* 2005 Transit Strike Memo (referencing Article V, § 16(i) of the Citywide Agreement); 1996 Snowstorm PSB. (City, Ex. 17; Union, Ex. J)

[10] A City witness testified that latenesses which satisfy the conditions of Article V, § 16(h), of the Citywide Agreement are excusable notwithstanding the fact that the 2012 PSB does not reiterate this term of the Citywide Agreement. (*See* Tr. 288)

[11] This language is also in the 1994 Transit Stoppage PPP and the 1997 Transit Stoppage PSB. (*See* City, Exs. 8 & 9)

which the City is advising the rest of the population to stay home due to the unsafe conditions. The Union introduced a report from the MTA Inspector General regarding the December 2010 snowstorm to document the hazards that occasion reporting to work during major disruptions in public transportation in general and in a blizzard in particular. A Union member, a City employee with disabilities, also testified about his commuting difficulties and forced absences due to transportation disruptions caused by the December 2010 and January 2011 snowstorms.

Request to Bargain

It is undisputed that the City did not bargain with the Union prior to the issuance of the 2012 City-wide Emergency PSB. The Union first saw the 2012 PSB on March 12, 2012, when the City introduced it as an exhibit in an arbitration concerning the December 2010 snowstorm. On March 19, 2012, the Union wrote to the City's Office of Labor Relations ("OLR") to "demand[] a bargaining session to discuss [the 2012 PSB]. . . . As you know, time and leave are mandatory subjects of bargaining. [The 2012 PSB] should not have been issued without first bargaining with the [U]nion." (Union, Ex. E)

On March 29, 2012, the OLR Commissioner responded that the 2012 PSB "reflects the terms of the Citywide Agreement; therefore no additional collective bargaining . . . is required." (Union, Ex. F) The OLR Commissioner's letter quoted NYCCBL § 12-307(b) as providing that "[i]t is the right of the [City] . . . to . . . take all necessary actions to carry out its mission in emergencies . . ." and concluded that, "[s]ince the actual policy enacted by [the 2012 PSB] concerns matters that are within the statutory management rights of the [City], there is no duty to bargain." *Id.* (emphasis in original)

On May 15, 2012, the Union filed the instant petition. As a remedy, the Union requests that the Board order Respondents to: rescind the 2012 City-wide Emergency PSB; bargain

concerning time and leave policies and procedures governing employees reporting to work in a City-wide emergency; make whole any member affected by the 2012 PSB, including restoring any lost compensatory or annul leave time; post appropriate notices, including electronically; and order any other relief the Board deems just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the 2012 City-wide Emergency PSB is the "first generic time and leave policy" applicable to any City-wide emergency, no matter the conditions, and, thus, its unilateral issuance violated NYCCBL § 12-306(a)(1) and (4).[12] (Union Brief at 2) The prior event-specific memoranda were issued after an emergency or in response to a specific anticipated event, such as a transit strike. The 2012 PSBs also address COOPs, which have never been provided to the Union. Nor has the Union been informed as to which of its members are deemed essential for purposes of the COOPs or the 2012 PSB.

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[12] NYCCBL § 12-306(a) provides, in pertinent part, that:

> 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 [§] 12-305 of this chapter;
>
> * * *
>
> (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;

NYCCBL § 12-305 provides, in pertinent part, that: "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."

The Union argues that, as the 2012 PSB differs materially from the prior event-specific memoranda, this petition is timely. A change effected by the 2012 PSB was that it "permanently closes the door on having absences excused during emergencies." (Union Brief at 2) The Union argues that in prior City-wide emergencies, absences were explicitly excused or agency heads retained the discretion to excuse them. The 2012 PSB also does not guarantee that employees can use leave time to be paid for an absence, nor does it address the needs of employees with disabilities, and thus conflicts with prior policy statements and the Citywide Agreement. The Union argues that the 2012 PSB also changed the policy regarding lateness, as it only excuses lateness related to unanticipated events. Prior policy statements explicitly allowed lateness to be excused if caused by any event beyond the control of the employee regardless of when the event arose. The 2012 PSB also changes policy by allowing management to direct employees to work alternative work locations and schedules. Prior policy required employee consent and the Citywide Agreement required the participation and consent of the Union. The 2012 PSB imposes new requirements that employees make every effort to report to work and find alternative means of reporting to work in a City-wide emergency.

Regarding the City's management rights argument, the Union argues that its petition does not concern management's discretion to assign duties and control its workforce in emergencies and, thus, does not concern management's right under NYCCBL § 12-307(b).[13] Rather, it

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

> It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . [and] take all necessary actions to carry out its mission in emergencies . . . . Decisions of the city . . . on those matters are not within the scope of collective bargaining, but,

concerns how the City treats employees who are unable to get to work on time or at all due to a City-wide emergency, especially the procedures to be applied to absences and latenesses, which are mandatory subjects of bargaining under NYCCBL § 12-307(a).[14]

However, should the Board entertain a balancing test, the Union argues that the safety risk to employees of having to report to work in a blizzard or hurricane outweighs any interest the City has in a pre-set one-size fits all policy for all future City-wide emergencies. The Union argues that the testimony and documentary evidence it has presented establishes that the 2012 PSB results in a practical impact on safety. It requires employees to report to work in a City-wide emergency—no matter how severe or dangerous. Since it does not guarantee the use of leave, the 2012 PSB puts pressure on employees to put themselves in harm's way.

City's Position

The City argues that the petition is untimely because the Union has failed to demonstrate a change in the City's longstanding policies. The City argues that the prior event-specific memoranda demonstrate that it has had the same policy for 35 years and that policy was reiterated in response to the December 2010 snowstorm. Thus, the May 15, 2012, petition is untimely. Further, the City argues that the Union's claims are estopped by the doctrine of *res judicata* to the extent that they were addressed and rejected in an arbitration award entitled *District Council 37, AFCSME v. The City of New York and the New York City Health and*

> notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

[14] NYCCBL § 12-307(a) provides, in pertinent part, that: "Subject to the provisions of [NYCCBL § 12-307(b)] . . . public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . , hours (including but not limited to overtime and time and leave benefits), working conditions . . ."

Hospitals Corporation, A-13812-11 (February 8, 2013) ("Gaines Award").[15] The Gaines Award found that the Citywide Agreement provides for the excusal of latenesses but not absences.

The City insists that there has been no change in policy but argues that, assuming, *arguendo*, the Board finds a change, the 2012 PSB is an exercise of express managerial rights. NYCCBL § 12-307(b) authorizes the City to "take all necessary actions to carry out its mission in emergencies." The Union seeks to prevent the City from doing so unless it first bargains with the Union. NYCCBL § 12-307(b) also allows the City to "determine the methods, means and personnel by which government operations are to be conducted."

As to the alleged changes, the obligation that employees must report to work is stated in the Citywide Agreement, and nothing in the Citywide Agreement allows for the excusal of absences unrelated to a disability. With regard to the needs of employees with disabilities, the 2012 PSB's silence on this topic does not change the clear requirements of the Citywide Agreement. With respect to lateness, the 2012 PSB reflects the Citywide Agreement and the oft-stated policy that employees should anticipate transit delays and allow for extra commuting time but that latenesses caused by a verified failure of public transportation will be excused. With regard to alternative work schedules, it has clearly been the City's policy since 1980 that agency heads should explore and, whenever feasible, institute a system of staggered work hours and flexible schedules to effectively deliver services to the public. It has been City policy to allow for alternative work locations since at least 2005. Assuming, *arguendo*, that any changes exist,

[15] The Gaines Award addressed whether "the City and/or HHC violate[d] [Article V, § 16, of the Citywide Agreement] by issuing [the December 2010 Snowstorm Memo] providing Employees with the choice of using either compensatory or annual leave as the only mechanism to excuse and compensate employees who were absent from work as a result of the [December 2010 snowstorm]." (Gaines Award at 12)

the City argues that they are *de minimis* as the 2012 PSB does not represent a change or increase in employee participation.

Further, the City argues, the Union has "waived its right to demand negotiations concerning the subject matter of the [2012 PSB] and the City's time and leave policy." (City Brief at 47) (emphasis deleted) The City claims its policy regarding time and leave in an emergency has been open and notorious for over 35 years. The parties have met and negotiated the language of the Citywide Agreement, which has been unchanged since 1970. Arbitrators have found that the Citywide Agreement is unambiguous in excusing latenesses but not absences. The City argues that the Union's inaction regarding the prior event-specific memoranda coupled with the unambiguous language of the Citywide Agreement establishes that the parties have discharged their duty to bargain regarding time and leave policies. Thus, the City argues, the Board should not order bargaining over time and leave policies in City-wide emergencies.

The City argues that the Union's argument regarding a practical impact on safety is premature as there is no duty to bargain until after the Board has determined that there has been a practical impact. The Union has failed to establish a safety impact stemming from the 2012 PSB because the employees' obligation to report to work, and with it any risks of commuting, stems from the Citywide Agreement. Notably, employees are free to stay at home in a City-wide emergency without any disciplinary consequences if they feel that there is a safety risk to commuting. Assuming, *arguendo*, that the Board finds a safety impact, it must provide the City time to unilaterally relieve it before considering whether bargaining should be ordered.

Finally, the City argues that since the Union has failed to establish that Respondents violated NYCCBL § 12-306(4), there is no derivative violation of NYCCBL § 12-306(1). The City also argued that there is no independent violation of NYCCBL § 12-306(1).

DISCUSSION

The 2012 City-wide Emergency PSB is a new work rule. As discussed below, this rule differs from prior event-specific memoranda in that it applies to all City-wide emergencies. Further, it requires employees to charge absences to leave without the opportunity for excusal and limits the usage of such leave subject to agency head approval. Additionally, it sets new conditions for the excusal of latenesses. The record contains no evidence of any such prior policy and we reject the City's contention that it is not a new rule. We therefore find that the City violated NYCCBL § 12-306(a)(1) and (4) and order that it cease and desist implementation of the 2012 PSB until such time as it bargains over these issues in accordance with its obligations under the NYCCBL. However, as discussed below, we dismiss that portion of the petition which alleges a violation by requiring employees to report to work, to report to alternative work locations, and to work flexible or staggered work schedules since we find that these directives are within the City's management rights.[16]

[16] The City's argument that the petition is untimely is unpersuasive. NYCCBL § 12-306(e) provides, in pertinent part, that: "A petition alleging . . . an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . ." *See also* § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). The 2012 PSB was issued on March 5, 2012; the instant petition was filed on May 15, 2012. The petition clearly is timely. *See DC 37, L.376*, 79 OCB 20, at 8-9 (BCB 2007) (finding petition alleging failure to bargain timely when filed within four months of policy statement that allegedly changed policy).

NYCCBL § 12-306(a)(4) provides that it is "an improper practice for a public employer . . . 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." *See also DC 37, L. 436 & 768*, 4 OCB2d 31, at 18 (BCB 2011) (a violation of NYCCBL § 12-306(a)(4) is also a violation of NYCCBL § 12-306(a)(1)). NYCCBL § 12-307 defines matters within the scope of bargaining as including "wages . . . hours (including . . . time and leave benefits), [and] working conditions." The Board has consistently held that an employer commits an improper practice when it makes a unilateral change in a mandatory subject of bargaining. *See DC 37*, 3 OCB2d 5, at 8 (DCB 2010); *DC 37*, 5 OCB2d 8, at 17 (BCB 2012) (new procedures bargainable). The Board has also long held that a new work rule that involves a mandatory subject of bargain may constitute such an unilateral change and a violation of NYCCBL § 12-306(a)(4). *See UFA*, 47 OCB 63, at 17-20 (BCB 1991) (new work rule regarding reimbursement of travel expenses a unilateral change and a violation of NYCCBL § 12-306(a)(4)); *see also COBA*, 27 OCB 16, at 120 (BCB 1981) (Board finds bargainable a demand concerning work rules governing lateness).[17] Unilateral changes regarding the use of leave time are a violation of an employer's bargaining obligation. *See UFOA, L. 854 & UFA*, 67 OCB 17 (BCB 2001) (holiday leave is a mandatory subject of bargaining); *DC 37, L. 436 & 768*, 4 OCB2d 31, at 14 (change in policy

[17] *UFA* concerned a new work rule regarding reimbursement of firefighters' travel expenses. The City argued that determining a procedure for reimbursing travel expenses to firefighters falls under its management rights to determine the means and personnel by which government operations are to be conducted and, generally, to exercise complete control and discretion over its organization and the technology of performing its work. The Board held that: "Promulgation of certain work rules may be within management's statutory prerogative to direct its employees and determine the methods, means and personnel by which government operations are to be conducted. Exercise of managerial authority constitutes an improper practice, however, when it interferes with rights protected under the NYCCBL." *UFA*, 47 OCB 63, at 18.

regarding payment for "snow days"—days employees ready and able to work but unable to work because their work locations were closed due to snow—are mandatorily bargainable).

This conclusion is consistent with cases issued by New York State Public Employment Relations Board ("PERB"). In *County of Yates*, 21 PERB ¶ 3008 (1988), PERB found a violation of the duty to bargain when the County directed employees to charge an absence to leave time. In that case, the County decided to close its offices in observance of Dr. Martin Luther King, Jr., Day and directed its employees not to come to work on January 19, 1987. Employees were not entitled to this holiday under the parties' contract. The employer therefore directed employees to deduct leave time from their accruals or not be paid for the day. PERB found that the employer was required to bargain concerning the decision to direct employees to charge leave time to their accruals and that the unilateral rule was issued in violation of its duty to bargain. Similarly, in *State of New York (State University of New York at Albany)*, 16 PERB ¶ 3050 (1983), *affd., State (Governor's Office of Employee Relations) v. Public Employment Relations Board*, 497 N.Y.S.2d 491 (3d Dept. 1986), PERB found that the State violated its duty to bargain when it required employees to charge Thanksgiving to leave balances or take an absence without pay. The Court affirmed, finding that the employer "did not simply eliminate or curtail a service to the public . . . [its] decision in the instant case affected compensation, which is a term or condition of employment." *State (Governor's Office of Employee Relations)*, 497 N.Y.S.2d at 830.

The record before us establishes that the 2012 City-wide Emergency PSB is the City's first comprehensive time and leave policy applicable prospectively to all City-wide emergencies. The definition of City-wide emergency in the 2012 PSB includes, but is not limited to, major disruptions of public transportation. The scope of the 2012 PSB is broader than the prior event-

specific memoranda, all of which addressed issues that were attendant to a particular event, such as a storm or a transit stoppage. The 2012 PSB is not linked to a particular event or even type of emergency, such as a disruption of public transportation. It also differs in that the policies and procedures set forth in the prior event-specific memoranda ceased when the issues related to the particular emergency they addressed were resolved. Prior policy statements dealt with specific known events, either after they happened or after it was expected that they would happen, and were drafted with detailed knowledge of the events they addressed. The 2012 PSB addresses a full range of possible future events. We therefore reject the City's defense that the 2012 PSB is not a new policy.[18]

Further, to the extent that agency heads previously had discretion regarding absences, the 2012 PSB changes this discretion in two ways.[19] First, it provides a single way in which an employee can be paid in the event of absences caused by a City-wide emergency—the use of accrued or advanced leave. Thus, to the extent that agency heads had the discretion in a number of prior emergencies to excuse absences, such discretion no longer exists. Second, the 2012 PSB

[18] We do not find factual support for our dissenting colleague's statement that the City's "general policy provided that employees who failed to come to work in a City-wide emergency were not paid for the day unless the time was charged to the employee's leave bank." As stated above, there was no general time and leave policy which applied to all City-wide emergencies. Further, that the City may supplement or alter a policy in the future does not obviate the changes being made by PSB 440-14. Similarly, we disagree with our colleague's reliance on the Gaines and Biren arbitration awards. Those awards merely determined whether there was a violation of the terms of the parties' collective bargaining agreements and not whether the City had a duty to bargain over the implementation of a broad City-wide emergency time and leave policy like the one at issue here.

[19] In *Vanguard Fire & Supply Co.*, 345 NLRB 1016 (2005), the National Labor Relations Board ("NLRB") upheld an Administrative Law Judge holding that it was a unilateral change in the implementation of policy when a manager exercised his discretion to charge some unit members for their personal use of company cell phones when the employer had regularly forgiven or overlooked employees' personal use of company cell phones. *Id.*, at 1017. The NLRB, citing *Hyatt Regency Memphis*, 296 NLRB 259, 263-264 (1989), *enfd. sub nom.in relevant part Hyatt Corp. v. NLRB*, 939 F.2d 361 (6th Cir. 1991), held that "that a change from lax enforcement of a policy to more stringent enforcement is a matter that must be bargained over." *Id.*

vests the agency heads with discretion to approve or deny the use of annual leave or compensatory time. Thus, not only could an agency head decide not to excuse an absence due to a City-wide emergency, that employee could be required to take leave without pay. The prior event-specific memoranda either automatically allowed employees to use accrued or advanced leave time or stated specific conditions under which they would be allowed to do so.

The 2012 PSB also changes time and leave policies regarding lateness by only excusing latenesses caused by events "which arise after an employee leaves for work." (City, Ex. 11) This is in stark contrast with the prior event-specific memoranda.[20]

Part of the relief requested by the Union is that its members be made whole. Because this relief was also requested in the arbitration resulting in the Gaines Award, the City contends that the doctrine of *res judicata* precludes the Board from considering this question. We reject that argument. *Res judicata* "is applicable when a cause of action that could have been presented in a prior proceeding involves the same parties, is based upon the same harm, and arises out of the same or related facts." *UMD, L. 333, ILA*, 4 OCB2d 37, at 14 (BCB 2011). The statutory claims before the Board involve an allegation of a refusal to bargain and were outside of the jurisdiction of the arbitrator, as the Board "has exclusive non-delegable jurisdiction 'to prevent and remedy improper public employer practices'" under the NYCCBL. *DC 37, L. 1157*, 3 OCB2d 40, at 15 (BCB 2010) (quoting NYCCBL § 12-309(a)(4)); *see also Matter of Patrolmen's Benevolent Assn v. City of New York*, 293 A.D.2d 253 (1st Dept. 2002). Because our exclusive jurisdiction over improper practice claims precluded the Union from raising and the arbitrator from deciding

[20] We do not find that the 2012 PSB's silence as to employees with disabilities changes City policy as nothing in the 2012 PSB conflicts with the provisions the Citywide Agreement which explicitly allows for agency heads to excuse absences of employees with disabilities. Nor do we find that the 2012 PSB changes the employees' obligation to report to work in an emergency as the City has consistently reiterated this obligation in the prior event-specific memoranda.

these claims, we find that the standard for *res judicata* has not been met and that the Gaines Award does not preclude these claims. *See UMD*, 4 OCB2d 37, at 15.

We also reject the City's waiver argument since there is no evidence of a clear and unmistakable relinquishment of a known right. *See NYSNA*, 4 OCB2d 23, at 11 (BCB 2011); *CEA*, 75 OCB 16, at 11 (BCB 2005). The City's argument rests on two suppositions: (i) that the City has had consistent, open, and notorious time and leave policies in City-wide emergencies and (ii) that because the parties have bargained time and leave policies in the Citywide Agreement, the City has fully discharged its bargaining obligations. The record supports neither supposition. First, we find that the City did not have a consistent approach to City-wide emergencies, as demonstrated by the numerous prior event-specific memoranda spanning 35 years and 17 past emergencies. Second, the record is devoid of any evidence supporting a finding that the parties have bargained over time and leave policies applicable in City-wide emergencies. *See NYSNA*, 4 OCB2d 23, at 11-12 ("Absent evidence showing that the subject here was fully discussed or consciously explored by the parties during prior bargaining, we cannot find that the Union waived its right to bargain or that the City exhausted its duty to bargain."). Thus, we cannot find that the Union has intentionally relinquished bargaining over the 2012 PSB's impact on terms and conditions of employment.[21]

To the extent that the City argues that the Board should defer to the findings of fact in the Gaines Award, we note that her finding that the record before her "does not demonstrate any one course of conduct" undertaken by the City regarding time and leave policies during major

[21] We also could not find on the record before us that the City satisfied its duty to bargain. *See Shelter Island Union Free School District*, 45 PERB ¶ 3032 (2012) (burden of proof on respondent to establish duty satisfaction). The record is devoid of any extrinsic evidence, and we cannot conclude from the Citywide Agreement's silence on time and leave policies in City-wide emergencies and the excusal of absences for non-disabled employees that the parties negotiated these issues. *Id.*

disruptions of public transportation underscores the City's unilateral change in this matter. (Gaines Award at 13) As stated above, we find that the City adopted a uniform rule regarding time and leave policies for all future City-wide emergencies. This constitutes a unilateral change to mandatory subjects of bargaining.

We need not address whether the 2012 City-wide Emergency PSB sections regarding alternative work locations and schedules discussed herein unilaterally changed City policy in a City-wide emergency as we find such to be managerial prerogatives under NYCCBL § 12-307(b). The Board has long found assignments to work locations to be managerial prerogatives. *See UFA*, 3 OCB2d 16, at 26 (BCB 2010); *COBA*, 27 OCB 16, at 43-44 (BCB 1981); *see also Manhattan and Bronx Transit Operating Authority*, 40 PERB ¶ 3023 (2007) ("where an employer assigns an employee to perform his or her work duties is a nonmandatory subject of bargaining").[22] It is also well-established that the type of scheduling at issue here "fall[s] within the managerial prerogative and [is] not subject to mandatory collective bargaining." *UFT*, 3 OCB2d 44, at 8 (BCB 2011); *see also LEEBA*, 3 OCB2d 29, at 45-46 (BCB 2010).[23] Further, NYCCBL § 12-307(b) explicitly states that "[i]t is the right of the [C]ity . . . [to] take all necessary actions to carry out its mission in emergencies." Thus, we find that instituting alternative work locations and including flexible and staggered hours in a City-wide emergency are managerial prerogatives.

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[22] We note that no contractual limitations on the City's ability to assign its employees to work locations have been raised in this case. *Cf. UPOA*, 41 OCB 47, at 11 (BCB 1988).

[23] While it is equally well-established that the City "must bargain over the total numbers of hours employees work per day or per week" and "the time off between tours," in the instant case, it has not been alleged that any alternative work schedule instituted in a City-wide emergency would alter existing tours or the total numbers of hours employees work per day or per week. *UFOA*, 1 OCB2d 17, at 10 (citations omitted); *see also CIR*, 27 OCB 10, at 23 (BCB 1981). The 2012 PSB does not alter the established work week; thus, it does not implicate Article V, § 2, of the Citywide Agreement.

Finally, as we found the unilateral implementation of the 2012 City-wide Emergency PSB to be violative of NYCCBL § 12-306(a)(1) and (4), we order the City to rescind all actions taken under the 2012 PSB regarding absences and latenesses and to cease and desist from implementing the Absence and Lateness sections of the 2012 PSB until such time as it bargains over these issues. *See DC 37*, 77 OCB 34, at 8 (BCB 2006). As we found that the 2012 PSB was a unilateral change in violation of NYCCBL § 12-306(a)(1) and (4), we do not need to determine if the 2012 PSB also had a practical impact.[24] *See DC 37*, 75 OCB 10, at 11 (BCB 2005).

[24] We note that all the testimony and documentation offered regarding practical impact concerned the employees' obligation to report to work, which we find was not changed by the 2012 PSB. Thus, we would not find on the record before us any practical impact.

ORDER

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

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3014-12, be, and the same hereby is, granted to the extent that it involves claims that the City of New York and the New York City Department of Citywide Administrative Services violated NYCCBL § 12 306(a)(4) and derivatively violated NYCCBL § 12 306(a)(1) by failing to bargain in good faith over changes to time and leave policies regarding absences and latenesses in a City-wide emergency by the issuance of Personnel Services Bulletin 440-14; and it is further

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3014-12, be, and the same hereby is, dismissed to the extent that it involves claims that the City of New York and the New York City Department of Citywide Administrative Services violated NYCCBL § 12 306(a)(4) and derivatively violated NYCCBL § 12 306(a)(1) by failing to bargain in good faith over changes regarding alternative work locations and schedules and employees' obligation to report to work in a City-wide emergency by the issuance of Personnel Services Bulletin 440-14; and it is further

ORDERED, that the City of New York and the New York City Department of Citywide Administrative Services rescind any action taken pursuant to Personnel Services Bulletin 440-14 regarding absences and lateness and cease and desist implementation of the sections of Personnel Services Bulletin 440-14 regarding absences and lateness in a City-wide emergency; and it is further

DETERMINED, that should the City of New York seek to institute a policy regarding time and leave policies applicable to future City-wide emergencies, it must bargain over these issues in accordance with its obligations under the New York City Collective Bargaining Law; and it is further

ORDERED, that the City of New York and the New York City Department of Citywide Administrative Services post appropriate notices, including electronically, detailing the above-stated violations of the New York City Collective Bargaining Law in the same manner and to the same extent as used to notify employees of Personnel Services Bulletins.

Dated: New York, New York
May 29, 2013

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

I dissent (see attached opinion)
M. DAVID ZURNDORFER
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 6 OCB2d 14 (BCB 2013), determining an improper practice petition between District Council 37, AFSCME, AFL-CIO, and the City of New York and the New York City Department of Citywide Administrative Services.

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

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3014-12, be, and the same hereby is, granted to the extent that it involves claims that the City of New York and the New York City Department of Citywide Administrative Services violated NYCCBL § 12 306(a)(4) and derivatively violated NYCCBL § 12 306(a)(1) by failing to bargain in good faith over changes to time and leave policies regarding absences and latenesses in a City-wide emergency by the issuance of Personnel Services Bulletin 440-14; and it is further

ORDERED, that the improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Docket No. BCB-3014-12, be, and the same hereby is, dismissed to

the extent that it involves claims that the City of New York and the New York City Department of Citywide Administrative Services violated NYCCBL § 12 306(a)(4) and derivatively violated NYCCBL § 12 306(a)(1) by failing to bargain in good faith over changes regarding alternative work locations and schedules and employees' obligation to report to work in a City-wide emergency by the issuance of Personnel Services Bulletin 440-14; and it is further

ORDERED, that the City of New York and the New York City Department of Citywide Administrative Services rescind any action taken pursuant to Personnel Services Bulletin 440-14 regarding absences and lateness and cease and desist implementation of the sections of Personnel Services Bulletin 440-14 regarding absences and lateness in a City-wide emergency; and it is further

DETERMINED, that should the City of New York seek to institute a policy regarding time and leave policies applicable to future City-wide emergencies, it must bargain over these issues in accordance with its obligations under the New York City Collective Bargaining Law; and it is further

ORDERED, that the City of New York and the New York City Department of Citywide Administrative Services post appropriate notices, including electronically, detailing the above-stated violations of the New York City Collective Bargaining Law in the same manner and to the same extent as used to notify employees of Personnel Services Bulletins.

The New York City Department of Citywide Administrative Services
(Department)

Dated: _____ **(Posted By)**
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

DISSENT OF M. DAVID ZURNDORFER IN BCB 3014-12

I dissent. The Majority finds that the provision of PSB 440-14 that required employees who failed to come to work in a City-wide emergency to charge their absence to leave in order to be paid, was a departure from the status quo and, therefore, constituted a unilateral change in a mandatory subject of bargaining. In doing so, the majority uses a flawed analysis to reach an incorrect result.

The time and leave policies that have been applied to bargaining unit members in past City-wide emergencies have been a combination of the general policy ("GP") as modified and supplemented by an event-specific policy statement ("ESPS") tailored and limited to the specific event. The general policy was based on the terms of the parties' collective bargaining agreement (see Article V, Section 16) and arbitration decisions interpreting and enforcing that agreement.

With respect to absenteeism, the general policy provided that employees who failed to come to work in a City-wide emergency were not paid for the day unless the time was charged to the employee's leave bank. See DC 37 and HHC, A-13812-11 (2013) (Gaines) (collective bargaining agreement was not violated when employees who failed to come to work in a "crippling snowstorm" were not paid for the day unless their time was charged to compensatory or annual leave); OLR and OSA, A-13757-11 (2011) (Biren) (collective bargaining agreement was not violated when employee who failed to come to work in a "severe snowstorm" was not paid for the day unless she used an annual leave day).

Event-specific policy statements, issued on an emergency-by-emergency basis, were drafted with detailed knowledge of the events they addressed and tailored to those events. For example, the ESPS for 9/11 excused all absences on 9/11 and the days immediately following for those employees who worked in the area affected by the attack. A more recent example was the ESPS related to the January 2011 snow storm during which City Hall announced (incorrectly) that the City was "closed" for the day. Because of the resultant confusion, an ESPS was issued that provided that City employees who did not come to work that day would be paid without having to draw down their leave balances.

PSB 440-14, which was not issued in connection with a particular emergency, plainly was intended as merely a restatement and elaboration of the existing general policy which would be subject to modification by ESPS's issued at the time of future City-wide emergencies. There can be no doubt that PSB 440-14 would not be the last word with respect to employee absenteeism in the event of a 9/11 type emergency in which City employees were discouraged from coming to work for safety or health reasons; or in the event of a future snow storm (as in January 2011) in which there was a statement by City Hall that could lead a City-employee to reasonably believe that he or she was being told to stay home for the day.

Yet the Majority's decision is based on the fallacious assumption that in such circumstances PSB 440-14 alone would govern. That fallacious assumption provides the basis for the Majority's incorrect conclusion that in issuing 440-14, the City made a unilateral change in a mandatory

subject of bargaining by requiring employees who failed to come to work in an emergency to charge that time to leave in order to be paid. The correct analysis would have compared the terms of PSB 440-14 with those of the previously-existing general policy, which already imposed that requirement.