PBA, 6 OCB2d 33 (BCB 2013)

(IP) (Docket No. BCB 3061-12)

Summary of Decision*:** The Union alleged that the City and the NYPD violated NYCCBL § 12-306(a)(1) and (4) when the NYPD issued a new Interim Order that unilaterally changed performance evaluation procedures by imposing a 30-day deadline to appeal. The City argued that the change was not mandatorily bargainable because setting the appeal deadline fell within the NYPD's managerial rights and that the change was *de minimis*. The Board found that the institution of an appeal deadline was a procedural change that altered employee participation by shortening the time officers had to prepare and submit their appeals and, thus, was not within the NYPD's managerial rights, nor a *de minimis* change. Accordingly, the petition is granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY POLICE DEPARTMENT,[1]

Respondents.

DECISION AND ORDER

On December 10, 2012, the Patrolmen's Benevolent Association of the City of New York ("PBA" or "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). The Union alleges that the

[1] The Petition named the New York City Office of Labor Relations ("OLR") as a party. OLR is not a proper party to the instant matter and we amend the petition *nunc pro tunc* to remove OLR as a party and adjust the caption accordingly.

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") when the NYPD issued Interim Order ("IO") 41 which unilaterally changes the performance evaluation procedures by imposing a 30-day deadline to appeal. The City argues that the change was not mandatorily bargainable because setting the appeal deadline fell within the NYPD's managerial rights. The City further argues that the change was *de minimis*. The Board finds that instituting an appeal deadline was a procedural change that altered employee participation by shortening the time officers have to prepare and submit their appeals and, thus, is not within the NYPD's managerial rights, nor a *de minimis* change. Accordingly, the petition is granted.

BACKGROUND

The Union and the City are parties to the 2006-2010 Police Officers Unit Agreement, which remains in *status quo* pursuant to NYCCBL § 12-311(d). The Union represents NYPD officers. The NYPD's stated mission is to "enhance the quality of life in our City . . . . enforce the laws, preserve the peace, reduce fear, and provide for a safe environment." (Ans. ¶ 27)

The pertinent procedures for NYPD officers' performance evaluations are found in Patrol Guide Procedure ("PGP") 205-48, entitled "Evaluations-General Members of Service." (Union, Ex. B) Under PGP 205-48, NYPD supervisors are required to prepare a performance evaluation form each year for every officer that they supervise. The supervisor, referred to as the "rater," prepares the performance evaluation form of the officer being evaluated and then submits the completed form to a superior officer, referred to as the "reviewer." The reviewer comments upon the performance evaluation form, signs it, and returns the signed form to the rater. The rater then discusses the performance evaluation with the officer.

Pre-IO 41 Procedures for the Appeal of a Performance Evaluation

The performance evaluation form has a box for the officer to check if, after talking to the rater, the officer desires to appeal the performance evaluation. The pertinent procedures for NYPD officers to appeal their performance evaluations are found in PGP 205-58, entitled "Appeal of Evaluations-Uniformed Members of Service." (Union, Ex. D) Under PGP 205-58, within 30 days of the date the officer has indicated a desire to appeal, the officer's Commanding Officer ("CO") is required to schedule an interview with the officer, the rater, and the reviewer to attempt to resolve the appeal. This step is referred to as the "rater/[reviewer] level."[2] (*Id.*) If the appeal is not resolved at the rater/reviewer level, PGP 205-58 instructs the officer to submit a typed report to the personnel officer concerned. Respondents admit that the PGPs did not specify a timeline for officers to submit appeals of their performance evaluations. (*See* Ans. ¶ 18) The City, however, avers, and the Union denies, that prior to the revision of PGP 205-58, "the amount of time an officer had to appeal his or her evaluation was until the next evaluation was issued . . . subject to the discretion of individual COs" who could set appeal deadlines for the officers they supervised. (Ans. ¶ 80)

Post-IO 41 Procedures for the Appeal of a Performance Evaluation

On July 3, 2012, the NYPD suspended and replaced PGP 205-58 by issuing IO 41, entitled "Revisions to Patrol Guide 205-58, Appeal of Evaluation-Uniformed Members of Service." (Union, Ex. F) Under IO 41, the steps of the appeal process up to and including the rater/reviewer level remain the same as those found in PGP 205-58. However, regarding the submission of the typed report by an officer if the matter is not resolved at the rater/reviewer level, IO 41 requires that the report be submitted "within thirty days." (Union, Ex. F) (emphasis

[2] PGP 205-58 reads "rater/receiver." The parties agree that this is a typographical error and that the correct term is rater/reviewer.

in original) The City avers that IO 41 thus provides "clarity to the evaluation appeals process." (Ans. ¶ 47).

On December 11, 2012, the Union filed the instant petition. As a remedy, the Union requests that the Board order Respondents to: rescind any provision of IO 41 that modifies performance evaluation appeal procedures; restore the *status quo ante* with respect to its members participation in the performance evaluation appeal procedures and with respect with to there being no deadline in which to file such an appeal; make whole any member aggrieved by IO 41, including, but not limited to, accepting and processing performance evaluation appeal reports that have been or may be submitted by Union members beyond the unilaterally imposed 30-day deadline; post appropriate notices within all precincts and commands; and order any other relief the Board deems just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the NYPD violated NYCCBL § 12-306(a)(4) and derivatively NYCCBL § 12-306(a)(1) when it issued IO 41.[3] According to the Union, IO 41 unilaterally

[3] 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

created a time limit for officers to appeal their performance evaluations. It is undisputed that, prior to IO 41, there was no written time limit after the rater/reviewer level for officers to submit reports appealing their performance evaluations. The Union disputes the City's claim that, prior to IO 41, individual COs had the discretion to set a time limit on appeals and that appeals had to be filed before the next performance evaluation. However, the Union notes that, even assuming these limits existed, IO 41 still unilaterally changed performance evaluation procedures by setting a uniform 30-day deadline for all officers. It is well established that the procedural aspects of performance evaluations are mandatorily bargainable. The Board, like the Public Employment Relations Board ("PERB"), has held that the scheduling of performance evaluations are procedural and, thus, mandatorily bargainable. Respondents, the Union argues, thus have violated NYCCBL § 12-306(a)(1) and (4) by unilaterally instituting without bargaining IO 41's 30-day deadline to appeal.

The Union argues that requiring an officer to research, draft, and submit an appeal within 30 days or otherwise lose the right to appeal significantly alters the officer's participation and, thus, is not a *de minimis* change. The Union urges the Board to follow *City of Albany*, 41 PERB ¶ 3019 (2008), in which PERB found that a 30-day time limit on when requests for leave may be submitted was a mandatory subject of bargaining. The Union notes that the Board, in *DC 37, L. 3631*, 4 OCB2d 34, at 9 (2011), rejected the notion advocated by the City that a change must be "material, substantial and significant" for it not to be considered a *de minimis* change. (Rep. ¶ 49) (quoting Ans. ¶ 76)

Regarding the City's managerial rights argument, the Union argues that Respondents had previously acknowledged in other cases before the Board that procedures related to performance

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through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

evaluations are mandatorily bargainable. The doctrine of estoppel against inconsistent positions precludes a party from taking a position in one legal proceeding inconsistent with that taken in a prior proceeding. Thus, Respondents are estopped from now arguing that setting a uniform 30-day deadline for performance evaluation appeals is a managerial prerogative under NYCCBL § 12-307(b).[4]

The Union argues that performance evaluation procedures are not an enumerated managerial right, nor is there anything in NYCCBL § 12-307(b) indicating that they should be deemed a non-mandatory subject of bargaining. To the contrary, Board precedent establishes that procedural aspects of performance evaluations are mandatorily bargainable. In a balancing test, the Union argues that the interests of its members outweighs the interest of the NYPD. The officer's interests are substantial; their careers are governed by their performance evaluations. Bargaining over an appeal deadline would not interfere with the NYPD's mission or its assignment of personnel, nor would it impede its ability to fight crime. Respondents have not demonstrated that the NYPD's prior practice was ineffective or that the NYPD had an immediate

[4] NYCCBL § 12-307(b) provides that:

> It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, 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.

The Union urges that the Board adopt the dissenting opinion in *UFA*, 77 OCB 39 (BCB 2006), and find that, as no explicit managerial rights clause exists in the Taylor Law, the Board should find that NYCCBL § 12-307(b) does not meet the substantial equivalence standard.

need to act unilaterally. The Union is not challenging any aspects of IO 41 that modifies supervisory functions of non-PBA members [5]

City's Position

The City argues that the performance evaluation appeal procedure set forth in IO 41 is an exercise of express managerial rights under NYCCBL § 12-307(b). NYCCBL § 12-307(b) unequivocally guarantees the City the right to "direct its employees; [and] . . . determine the methods, means and personnel by which government operations are to be conducted." According to the City, performance evaluations are a crucial management tool in determining the deployment of personnel. The City argues that to ensure that this function is performed as efficiently as possible, performance evaluations must be completely processed, including all appeals, on a uniform basis. Thus, the City argues, performance evaluations go to the heart of the NYPD's mission.

The City further argues that the changes occasioned by IO 41 are not bargainable because they are substantive, not procedural. The City argues that the instant case is analogous to *PBA*, 63 OCB 2 (BCB 1999), where the Board found that the implementation of performance banding to the NYPD's performance evaluation system, where by officers were compared to their peers and designated to be in the top 25 percent, middle 50 percent, or lower 25 percent band, was a non-mandatory subject of bargaining. According to the City, as with the performance banding at issue in *PBA*, IO 41 places no additional responsibility upon officers, nor does it alter the steps of the appeal process. The City argues that the only difference occasioned by IO 41 is that officers "must inform supervisors of their intent to appeal sooner." (Ans. ¶ 73)

[5] The Union further argues that to the extent the City's recitation in its answer of past changes to the NYPD's performance evaluation process can be considered an implicit waiver argument, the Union cannot be found to have waived any of its rights as the City has not demonstrated that the Union intentionally relinquished a known right.

The City argues that, should the Board find the changes occasioned by IO 41 to be procedural, they are *de minimis* and, thus, not mandatorily bargainable. The City argues that the Board has repeatedly held that changes are considered *de minimis* where they "do not materially, substantially, or significantly change a term or condition of employment, are a mere change in procedure, or do not increase the level of employee participation." (Ans. ¶ 76) The City argues that there was always a time limit for officers to appeal their performance evaluations, either set by the officer's CO or until the officer's next performance evaluation. According to the City, the difference between a 30-day deadline and a number set by a CO is *de minimis*.

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).[6]

DISCUSSION

In the instant case, the Union argues that Respondents violated the NYCCBL by unilaterally instituting a 30-day deadline for officers to appeal their performance evaluations if their concerns were not resolved at the rater/reviewer level. We agree, finding that the institution of the appeal deadline was a procedural change that altered employee participation by shortening the time officers had to prepare and submit their appeals and, thus, was not within the NYPD's managerial rights nor a *de minimis* change.

Under NYCCBL § 12-307(a), "public employers and employee organizations have a duty to bargain in good faith concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *DC 37*, 3 OCB2d 5, at 7 (BCB 2010). Thus, "[i]t is an improper practice under NYCCBL § 12-306(a)(4) for a public

[6] The City also argues that there is no independent violation of NYCCBL § 12-306(1). However, the Union has not argued that Respondents independently violated NYCCBL § 12-306(1).

employer or its agents 'to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.'" *DC 37, L. 3631*, 4 OCB2d 34, at 10 (quoting NYCCBL § 12-306(a)(4)); *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)). Further, "[i]f a unilateral change is found to have occurred in a term or condition of employment which is determined to be a mandatory subject, then the Board will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice." *DC 37, L. 3631*, 4 OCB2d 34, at 11 (citing *UFOA*, 1 OCB2d 17, at 9 (BCB 2008)). Thus, a petitioner "must first demonstrate that the matter over which it seeks to negotiate is or relates to a mandatory subject of bargaining." *SSEU, L. 371*, 1 OCB2d 20, at 9-10 (BCB 2008). The "petitioner must then demonstrate the existence of a change from the existing policy or practice." *DC 37, L. 3631*, 4 OCB2d 34, at 11 (citations omitted). Matters within the scope of collective bargaining "generally include wages, hours, working conditions, and any subject with a significant or material relationship to a condition of employment." *Id.*

Regarding performance evaluations, "[s]ubstantive changes, such as changes in criteria and standards, are not subject to bargaining." *DC 37, L. 1508*, 79 OCB 21, at 22 (BCB 2007) (citations omitted). We note that the City has not claimed, nor has the Union alleged, that IO 41 altered the criteria or standards for performance evaluations. Thus, the City's reliance on *PBA*, 63 OCB 2, is misplaced. *PBA* concerned the NYPD's unilateral implementation of performance banding to its evaluations where by officers were compared to their peers and designated to be in the top 25 percent, middle 50 percent, or lower 25 percent band. We found such non-bargainable because performance banding is "not a procedure" but a change to the performance evaluation standards. In contrast, we find that the appeal deadline in the instant case is a procedure as it

concerns the appeal process itself and not the standards or criteria applied. *See PBA*, 73 OCB 12, at 15 (BCB 2004), *affd., Matter of Patrolmen's Benevolent Assn. v. N.Y.C. Bd. of Collective Bargaining*, Index No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd.*, 38 A.D.3d 482 (1st Dept. 2007), *lv. den.*, 9 N.Y.3d 807 (2007) (citing *County of Nassau (PBA)*, 35 PERB ¶ 4566, at 4721-4722 (2002)) (other citations omitted).

Regarding performance evaluation procedures, "we have consistently held that the procedures for implementing performance evaluations are mandatory subjects of bargaining." *DC 37, L. 3631*, 4 OCB2d 34, at 12 (citing *DC 37*, 75 OCB 13, at 11 (BCB 2005); *DC 37, L. 1508*, 79 OCB 21, at 22-23; *PBA*, 63 OCB 2, at 11).[7] Thus, "when procedural revisions, such as timing issues, are made to performance evaluations, they are mandatorily negotiable unless they pertain only to supervisory functions." *PBA*, 73 OCB 12, at 15. *See also DC 37, L. 3631*, 4 OCB2d 34, at 12-13 (conducting an employee review on a more frequent basis was a procedural change altering employee participation and, thus, a mandatory subject of bargaining) (citing *DC 37, L. 1508*, 79 OCB 21, at 23; *Matter of Patrolmen's Benevolent Assn. of the City of N.Y.*, No. 112687/04, slip op at 6; *Suffolk County Board of Cooperative Educational Services*, 17 PERB ¶ 3043 (1984)). The parties disagree as to whether, prior to IO 41, there was a deadline for officers to file appeals. It is, however, undisputed that, prior to IO 41, there was not a uniform 30-day deadline. Thus, IO 41's new appeal deadline is not a clarification of a pre-existing policy. *See DC 37*, 4 OCB2d 19, at 23 (BCB 2011) (revision to a written policy which eliminated supervisor's discretion cannot be considered a clarification); *cf. COBA*, 69 OCB 26, at 19 (BCB 2002) (revision in directive clarifying the meaning of the written term "timely appeal" not mandatorily bargainable).

[7] As we find that setting the deadline at issue was not a managerial prerogative, we do not reach the Union's doctrine of estoppel against inconsistent positions argument.

We find that this procedural change does not "pertain only to supervisory functions." *PBA*, 73 OCB 12, at 15. The City acknowledges that IO 41 requires officers to "inform supervisors of their intent to appeal *sooner*." (Ans. ¶ 73) (emphasis added) That is, IO 41 shortens the time frame officers have to prepare and submit their appeal report to 30 days. This alteration to the procedures to be followed by employees is "a qualitative change in employees' participation in the process." *DC 37*, 75 OCB 14, at 15 (BCB 2005). Thus, the institution of the 30-day deadline is a procedural, not substantive, change and mandatorily bargainable. *See City of Albany*, 41 PERB ¶ 3019 (Albany's implementation of the 30-day restriction on when requests to use leave may be submitted found to "impose[] a new procedural restriction" and mandatorily bargainable).

We find unpersuasive the City's argument that that the change occasioned by IO 41 is *de minimis*. A change is considered *de minimis* where it "is, a change in form only, which does not require increased participation on the part of the employee, or alter the substance of the benefit to the employee." *DC 37*, 4 OCB2d 43, at 8-9 (BCB 2011) (citing *CEU, L. 237*, 2 OCB2d 37, at 12-13 (BCB 2009); *UFA*, 4 OCB2d 3, at 7 (BCB 2011)). By reducing the time officers have to prepare their appeal, IO 41 alters employee participation and alters the substance of the benefit (the right to appeal) to employees. That police officers still possess the right to appeal their performance evaluations, albeit subject to a deadline, does not render the change *de minimis*.[8]

[8] We disagree with the City's assertion that "the Board has repeatedly held" that a change is *de minimis* "where an employer's actions do not materially, substantially, or significantly change a term or condition of employment." (Ans. ¶ 76) To the contrary, the Board has explicitly rejected this position. *See DC 37*, 4 OCB2d 43, at 9, n. 5 (rejecting City's argument that a change must be "material, substantial and significant" in order not to be found *de minimis* and holding that "under the Taylor Law, 'the value of the benefit at issue is not judged by the Board; the only issue is whether it affects terms and conditions of employment.'") (quoting *Board of Education*, 42 PERB ¶ 4568, at 4760 (ALJ 2009), *affd.*, 44 PERB ¶ 3003 (2011)) (other citations omitted).

See DC 37, 4 OCB2d 43, at 11 (availability of other free parking spaces nearby work location does not make reduction of City-provided free parking spaces adjacent to the work location *de minimis*).

We find that the provision of IO 41 regarding the 30-day deadline to submit the report appealing the unsatisfactorily resolution of a performance evaluation at the rater/reviewer level to be violative of NYCCBL § 12-306(a)(1) and (4). We order that Respondents rescind that provision and cease and desist from implementing that provision until such time as Respondents bargain over these issues. *See DC 37*, 77 OCB 34, at 8 (BCB 2006). We further order Respondents: to restore the *status quo ante* with respect to the deadline to file appeals of performance evaluations; to make whole any member aggrieved by the 30-day appeal deadline provision of IO 41, including, but not limited to, accepting and processing performance evaluation appeal reports that have been or may be submitted by Union members beyond the IO 41's 30-day deadline; and to post appropriate notices.

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 the Patrolmen's Benevolent Association of the City of New York against the City of New York and the New York City Police Department, docketed as BCB-3061-12, be, and the same hereby is, granted to the extent that it involves claims that Respondents violated NYCCBL § 12 306(a)(4) and derivatively violated NYCCBL § 12 306(a)(1) by failing to bargain in good faith over setting a 30-day deadline to file an appeal of an unsatisfactory performance evaluation by the issuance of Interim Order 41; and it is further

ORDERED, that the New York City Police Department rescind the provision of Interim Order 41 setting a 30-day deadline for the appeal of a performance evaluation; cease and desist from implementing that provision until such time as it bargains over such provision in accordance with its obligations under the New York City Collective Bargaining Law; restore the *status quo ante* Interim Order 41 with respect to the deadline to file appeals of performance evaluations; and make whole any officer aggrieved by the 30-day appeal deadline provision of Interim Order 41, including, but not limited to, accepting and processing performance evaluation appeal reports that have been or may be submitted beyond Interim Order 41's 30-day deadline; and it is further

ORDERED, that the City of New York and the New York City Police Department post appropriate notices 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 Interim Order 41.

Dated: New York, New York
December 19, 2013

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

Concurring in judgment;
dissenting in part in separate opinion

CHARLES G. MOERDLER
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 33 (BCB 2013), determining an improper practice petition between the Patrolmen's Benevolent Association of the City of New York and the City of New York and the New York City Police Department.

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 Patrolmen's Benevolent Association of the City of New York against the City of New York and the New York City Police Department, docketed as BCB-3061-12, be, and the same hereby is, granted to the extent that it involves claims that Respondents violated NYCCBL § 12 306(a)(4) and derivatively violated NYCCBL § 12 306(a)(1) by failing to bargain in good faith over setting a 30-day deadline to file an appeal of an unsatisfactory performance evaluation by the issuance of Interim Order 41; and it is further

ORDERED, that the New York City Police Department rescind the provision of Interim Order 41 setting a 30-day deadline for the appeal of a performance evaluation; cease and desist from implementing that provision until such time as it bargains over such provision in accordance with its obligations under the New York City Collective Bargaining Law; restore the *status quo ante* Interim Order 41 with respect to the deadline to file appeals of performance evaluations; and make whole any officer aggrieved by the 30-day appeal deadline provision of Interim Order 41, including, but not limited to, accepting and processing performance evaluation appeal reports that have been or may be submitted beyond Interim Order 41's 30-day deadline; and it is further

ORDERED, that the City of New York and the New York City Police Department post appropriate notices 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 Interim Order 41.

The New York City Police Department
(Department)

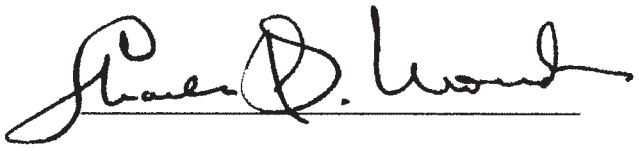
Dated: _____ **(Posted By)**
(Title)

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 Charles G. Moerdler

I dissent from so much of the majority opinion as asserts the existence of a management preogative pursuant NYCCBL Section 12-307(b). None exists and the cited ordinance is without juridical foundation and meaningless for the reasons set forth in the dissenting opinion in *Matter of the Improper Practice Proceeding between Uniformed Firefighter Association, Petitioner, and The City of New York, et ano* (BCB 2648-07) and its progeny (Copy Attached). Except as thus noted, I concur in the Order proposed by the Majority.

December 19, 2013



Charles G. Moerdler

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

- between -

UNIFORMED FIREFIGHTERS ASSOCIATION, BCB – 2648 – 07

Petitioner,

- and –

THE CITY OF NEW YORK and THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

----------X

DISSENTING OPINION OF CHARLES G. MOERDLER

I dissent because in material respects the majority opinion is fundamentally flawed and cannot stand as a matter of law. Indeed, cases that the Majority itself cites squarely negate its holding.

(A)

The majority errs in holding that NYCCBL § 12-307b validly creates or warrants some sort of enforceable "managerial prerogative" or "management right." Bluntly put, the cited section is, to the extent thus construed, in conflict with governing State law, provides no validity at all for the cited position, and this Board decisions predicated thereon are without authority in law. The rationale for that position –one repeatedly articulated over the years --is explicated at length in the Dissent in Uniform Firefighters Association, Decision No. B-39-206, (IP) Docket No. BCB 2531-06 (Dissenting Opinion). See also Dissenting Opinion in Uniform Firefighters Association, Decision No. B-2-2004, Docket No. BCB-2314-02 and Concurring Opinion in

Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO, Decision No. B-6-2003, Docket No. BCB-2218-01.

As more fully detailed in the Dissent in Uniformed Firefighters Association, Decision No. B-39-2006, the so-called "management rights" or "management prerogatives" proviso of NYCCBL § 12-307b must, in order to have any validity or force as a statutory enactment, "be substantially equivalent to the governing state law [the Taylor Law, N.Y. Civ. Serv. Law § 212(1)] as it relates to matters within the scope of mandatory negotiations," else it is invalid (at least as a creature of statutory enactment).[1] That occurs because the Taylor Law mandates that mini-PERB provisos and procedures (such as the New York City Charter provisions here at issue) shall be "substantially equivalent" to those specified under paramount State law. N.Y. Civ. Serv. Law § 212(1). Dispositively, there is no provision of law, in the Taylor Law or elsewhere in applicable State law, that provides a substantial equivalent to NYCCBL § 12-307b. Without more, that ends the inquiry as a matter of law.[2] For, to repeat, that omission to provide a

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[1] The phrase "substantially equivalent" has been defined by PERB as "that which is equal in essential and material parts" to some state law counterpart. See, Lefkowitz, Public Sector Labor and Employment Law 487 (2 ed. 1998) ("Lefkowitz"). Mini-PERB provisos or procedures that fall short of that standard are subject to challenge. See Lefkowitz, supra at 798; cf., Shanker v. Helsby, 515 F. Supp. 871, 877 (SDNY 1981). Manifestly, this Board should decline to follow or apply provisos or procedures that are invalid.

[2] The majority plucks, apart from context, isolated fragments from several PERB opinions to suggest that, notwithstanding the noted statutory void, some relevant management prerogative has been conjured up that can be invoked here. . (See Majority Opinion,pp. 8-9). When read in context, the cited fragments do not aid the majority's underlying thesis. See esp. Discussion *infra*, point (B). The Majority's reference to County of Nassau, 18 PERB ¶ 4557, aff'd 18 PERB ¶3076 at 3164 (1985),aptly illustrates my point. There, Nassau County filed an Improper Practice charge against the Adjunct Faculty Association for the latter's failure to concede at fact finding that certain provisions of its expired bargaining agreement were non-mandatory subjects of bargaining. The Administrative Law Judge in reviewing what were and were not mandatory subjects of bargaining, stated the following, only the first portion (the non-italicized portion) of which the majority quotes, while ignoring the italicized materials:

> *In general,* the right to assign, closely related to other areas of management prerogative –the determination of employee qualifications, promotional and evaluation criteria, the right to transfer, belongs to the employer. *Seniority is one of the few long recognized inroads into this area;, however, the use of seniority is limited by the employer's right to determine qualifications for employment. [A]s in White Plains, I read into the instant seniority demand an understanding that the employer's right to determine qualifications for appointment is unrestricted.*

The Administrative Law Judge then went on to hold that stated sections of the demand therefore "*are mandatory subjects of negotiation .They relate to seniority and the manner in which it can be accumulated." County of Nassau,*

"substantial equivalent in State law render this proviso of validity under the Taylor Lasw. Add to that the further observation that State law mandates that "... it is the public policy of the state and the purpose of this act [the Taylor Law] to promote harmonious and cooperative relationships between government and its employees ...." and the conclusion becomes obvious: there is simply no authority under State law for the sweeping, one-sided provisions of NYCCBL § 12-307b. Harmonious and cooperative relationships between government and its employees cannot subsist where one side is afforded the unfettered right to act as it pleases simply by invoking the mantra "managerial prerogotive.". [3]

NYCCBL § 12-307b may not properly be asserted as the predicate for a management right warranting the majority determination. (See Majority Op., p. 8). [4] Reversal of the majority's determination is warranted and I strongly urge that judicial proceedings be instituted to obtain review on the several grounds herein tendered and, in that process, to finally resolve this important and recurring issue.

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supra, at 4623 (Emphasis added; footnote references omitted). Similarly, *Town of Easthampton* 42 PERB PAR.4534 AT 4628 (ALJ 2009) does not on this record aid the majority's thesis (" Seniority as a factor in making assignments is mandatory, unless, as here, seniority is the sole criterion.") In the case before this Board seniority was not previously nor is it proposed to be the "the sole criterion." See, Point (B), *infra. and Majority Opinion pp. 3-4.*.

[3] Thus, the majority aptly summarizes the City's position as being that, under NYCCBL § 12-307(b) ,"...the employer has a right to unilaterally determine and assign job duties of employees." That sweeping claim to unfettered unilateral prerogative effectively undermines collective bargaining and its attendant precepts.

Parenthetically, it is not inconceivable that management (like labor) may under limited circumstances have certain inherent rights, responsibilities and fundamental prerogatives and duties. However, they must be clearly discernible based on some ascertainable and cognizable predicate, applicable on a case-by-case basis and under a more circumscribed, accepted and balanced standard than the sweeping language of NYCCBL § 12-307b, much less the overbroad manner in which it is here applied by the majority. The asserted management prerogative exception to mandatory collective bargaining is not, as the Board urges, justifiable simply by reference to NYCCBL § 12-307b.

[4] Importantly, no appellate judicial tribunal has to date expressly sustained the provision against a challenge such as here is stated. It merits note that the argument has been advanced that, because NYCCBBL §12-307b has been cited and relied upon over many years, it somehow has effectively become "the law" by some form of estoppel. Respectfully, that view lacks merit, the law is clear, it mandates substantial equivalency to paramount state law. N.Y. Civ. Serv. Law § 212(1). Erroneous construction, though adhered to for decades and compounded by further error (conscious or otherwise) does not create an enforceable precept by estoppel or otherwise.

(B)

The crux of this dispute, as stated by the majority, is that where a change in the *status quo* is found to have occurred –*and that precise finding was here made in the majority opinion* (Majority Opinion p.7)—an improper practice can be found to have occurred, but only where "... that change can be shown to have been a mandatory subjective of collective bargaining." (*id* at 7-8). Cases that the majority itself cites specifically hold that such a change is, on this record, a mandatory subject of bargaining.

The starting points for discussion are the "All Unit Circulars"("AUC"), pertinent portions of which are quoted in the majority opinion at pp. 3-4. Under the prior or 1992 AUC, three qualifications for a position as a regular unit chauffeur were stated:that the candidate (1) "have passed Chauffer Training School", (2) that the selection "shall be by seniority" and (3) that the candidate not "have received less than satisfactory annual evaluations in any area that reflects on the duties and responsibilities of a chauffeur." Manifestly, seniority was not the sole basis for determination. In the 2009 AUC, three further qualifications were added :"aptitude, demeanor, judgment" (in addition to "seniority"). *Id* at 4. *Id.*. Again seniority was not the *sole* criterion, a conclusion the majority also reaches.(See Majority Opinion at p. 7). Nonetheless, the majority concludes that an improper practice was not stated for reasons noted in Section (A) above and the notion that a mandatory subject of collective bargaining was not stated. (*Id.* at 7-9). Therein lies the second ground of reversible error. Thus, posited we turn to the cases the majority cites.

As previously noted (see, fn.2, *supra),* cases that the majority itself cites at pp.8-9 of its Majority Opinion squarely hold that it is only where seniority is the *sole* criterion for the determination. See discussion at fn.2 *supra.* Thus, the most recent PERB opinion relied upon by the majority states:

> The demand is also nonmandatory because it requires tour assignments to be made solely based upon seniority, which, as argued by the Town, does not allow assignments based on other factors, such as special training or expertise. *Seniority as a factor in making assignments is mandatory*, unless, as [t]here, seniority is the *sole* criterion."

Town of Easthampton, supra, at 4628. (Emphasis added). Similarly, in *Schenectady Patrolmen's Benev Assn.*, 20 NYPER (LRP) 4636, *aff'd*, 21 PERB 3022 (1988), which the majority also relies upon, it was noted:

> Seniority as a factor in making assignments is mandatorily negotiable provided, as here, it is not the sole criterion. ... While general demands for the establishment of unit-wide training programs are nonmandatory because they relate to the level of service provided by the employer and concern qualifications for employment... the training herein is limited to promotional opportunities and it reserves to the City the determination of qualifications. Accordingly, the demand is mandatorily negotiable.

Id., at p.16 (Footnote citations omitted). See also, *County of Nassau, supra,* 18 PERB ¶ 4628.

(C)

While there is some tension between an employer's ability to set qualifications and a union's right to bargain for seniority-based assignments, the Board improperly invokes it here. First, neither the original policy nor the new policy provided for seniority to be the "sole" criteria for assignment, making the Board's reliance on cases such as UPOA. 35 OCB 23 (BCB 1985) cases misplaced. See Majority Opinion pp. 8-9. Both iterations of the policy here at issue required something more than mere seniority, viz., that the employee have successfully completed the training requirement and not received less than satisfactory evaluations in any area that reflects on the duties and responsibilities of a chauffeur. Second, the new policy does not purport to change these qualifications and thus does not implicate management's rights to so do. Rather, under the revised policy, once the same qualifications are met, the employer is now permitted to make its selection by entirely subjective means through consideration of "aptitude, demeanor and judgment." These amorphous added considerations are simply a means of

undoing objective, seniority-based assignment of otherwise qualified personnel. As such, mandatory bargaining rights are implicated.

CONCLUSION

For each or any of the above-noted reasons, the improper practice should have been sustained and the majority's contrary determination should be reversed.

Dated: New York, New York
December 1, 2010

CHARLES G. MOERDLER
Member