OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition	:	
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-between-	:	
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UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO, and UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK,	:	
	:	Decision No. B-17-2001
Petitioners,	:	Docket No. BCB-2102-99
	:	
-and-	:	
	:	
THE CITY OF NEW YORK,	:	
	:	
Respondents.	:	

DECISION AND ORDER

The Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO ("UFOA") and the Uniformed Firefighters Association of Greater New York ("UFA")(or collectively referred to as the "Unions") filed a Verified Improper Practice Petition alleging violations of §§ 12-306 (a)(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL").[1] The Unions allege that the City of New York ("City") through the New York City Fire Department ("FDNY") unilaterally changed

[1] Section 12-306 of the NYCCBL provides, in part:

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

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(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;

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the uniformed holiday policy applicable to members assigned "off-line" and refused to bargain in good faith with the Unions over that change. The City claims it met all of its bargaining obligations at the time a contractual provision covering holiday compensation was drafted. The petition is granted for the reasons discussed below.

BACKGROUND

At the time the dispute arose, both the UFOA's and the UFA's contracts stated that the Unions' members "shall receive eleven paid holidays annually." The Unions' members receive holiday pay for those eleven days in two separate disbursements, one in January and one in June. Uniformed personnel in the New York City Fire Department ("FDNY") generally work a schedule consisting of forty hours a week. The uniformed personnel are required to work on holidays from time to time.

Uniformed personnel are assigned to either "on-line" or "off-line" job duties. On-line job duties are those generally associated with fighting fires as part of an engine or ladder company, and uniformed personnel assigned to the numerous firehouses throughout the City are responsible for performing those duties. These locations must be open and fully staffed even on holidays. Off-line job duties are those generally performed in an administrative capacity. The locations for many off-line positions are often closed on holidays. The City claims that if the personnel working at these locations wished to take a day off on a holiday falling during their normal work week, they had to request the use of accrued leave. In the past, uniformed personnel working off-line did not submit leave requests to take time off for a holiday but nonetheless received pay for that day. The City claims that this situation resulted in the employees being paid twice for a holiday.

On November 3, 1999, William M. Feehan, First Deputy Fire Commissioner, sent a memorandum to "All Bureau Heads" with "Uniformed Holidays" listed as the subject. It stated:

> Based on questions recently asked, it appears that there is some confusion concerning holidays for members of the uniformed force working in "off line" assignments. City policy requires members of the uniformed forces who receive holiday pay, to work on those holidays, which fall during their normal workweek.
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> If, for example, a member works Monday thru Friday and one of the eleven paid holidays occurs between Monday and Friday, the member is required to work, or take vacation leave, or comp time, in order to be off on the holiday. For those members working a four day week (4 10 hr. tours) they may, if approved, use the holiday as their R.D.O. For example, a holiday falls on Tuesday and the members R.D.O. is Friday, the member may opt, with permission to take off Tuesday, and work Friday instead, or use V/L or comp time for the Tuesday holiday and take his/her R.D.O. of Friday.

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue as follows: Prior to November 3, 1999, members assigned off-line who did not work on holidays were not required to surrender vacation or compensatory time in order to be paid for such holidays; and the City has knowingly maintained that former policy.[2] The policy was in effect prior to the negotiation of the last collective bargaining agreements between the parties and before that, for a period of twenty years; the policy was maintained by and applicable to all uniformed management personnel assigned off-line; and the FDNY has advertised the existence of the policy in order to induce members to volunteer for or to accept less desirable off-line assignments. Several Department Orders state that an available off-line position has "holidays off"

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[2] The Unions submitted two affidavits supporting this conclusion -- one from Peter Gorman, President of the UFOA and another from Carlos Rivera, former Commissioner of the Fire Department. The text of the affidavits stated that in the two men's experience, the policy and procedure of the FDNY regarding uniformed holidays was to allow members assigned off-line to take holidays off without using accrued vacation.

as part of the benefits

of the position.[3]

It is not claimed that the City breached a provision of the collective bargaining agreement but, rather, that the City unilaterally changed an established and longstanding policy and practice which is not referred to in the parties' bargaining agreements. The allegations in the petition describing how the City unilaterally changed members' benefits and refused to bargain over its unilateral change are specific and completely satisfy pleading requirements.

The change in holiday policy for off-line positions constitutes a unilateral change in conditions of employment, and §12-307(a) of the NYCCBL specifically recognizes "hours (including but not limited to . . . leave benefits)" as a mandatory subject of bargaining. It is axiomatic that a unilateral change in a mandatory subject of bargaining constitutes a refusal to bargain in good faith and unlawfully interferes with the exercise of unit members' rights under § 12-305 of the NYCCBL, in violation of both §§ 12-306(a)(1) and (4).[4] As the Board has long recognized, the fact that a benefit for unit members is not included in their contracts – like the holiday time off for off-line members in this case – does not mean that the City has no duty to bargain over the modification or elimination of that benefit.[5]

The UFOA demanded bargaining with Commissioner Von Essen of the Fire Department and

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[3] Department Order No. 88, issued November 13, 1997, offers the position of Quartermaster. Part of the job description states, "A flexible work schedule, choice of vacation, weekends and holidays off are some of the benefits associated with the position."

[4] Decision No. B-25-85.

[5] Decision Nos. B-25-85; B-23-75; B-11-92.

Commissioner Hanley of the Office of Labor Relations. Both Commissioners Von Essen and Hanley rejected the UFOA's demands, denied the existence of a past practice or policy and indicated that the City would not bargain.

As a remedy, the Board should order the City to: (1) cease and desist from denial of holiday leave time and compensation to members assigned off-line; (2) restore the previous uniformed holiday policy wherein members assigned off-line were not required to utilize accrued vacation or compensatory time in order to be paid for a holiday off; and (3) grant such other and further relief as may be deemed just and proper by the Board.

City's Position

The City asserts the following contentions: When an employee does not work on a holiday and does not utilize accrued leave, the employee would be paid twice for the same holiday because the employee was already compensated in one of the biannual holiday disbursements. By clarifying how holidays are paid to uniformed personnel in off-line positions, the November 3, 1999 memorandum corrected the recently discovered overpayments that resulted from the confusion over holiday leave.

The Unions' allegations of violations of §§ 12-306(a)(1) and (4) are conclusory, speculative, and false, and, therefore, must be dismissed. In order for petitioners to establish that an employer committed an improper practice under § 12-306(a)(1), they must fulfill the requirements as set forth by the Public Employment Relations Board ("PERB") in *City of Salamanca* [6] and subsequently adopted by the Board. The Unions have not fulfilled those requirements.

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[6] 18 PERB ¶ 3012 (1985).

Additionally, the Unions have failed to allege facts sufficient to support a violation of § 12-306(a)(4) of the NYCCBL since the City has no further obligation to bargain with the Unions over compensation for holidays. Although the Unions did not state how or when they demanded bargaining on this issue, the City met all of its bargaining obligations under § 12-306(a)(4) at the time the contractual provision covering holiday compensation was drafted. Since the provision covering holiday compensation was still in effect at the time the Union apparently wanted to bargain, the City had no obligation to bargain in the middle of the contract.[7]

The petition must be dismissed because the issue centers on a contract dispute over which the Board has no jurisdiction. Since holiday compensation is covered by the parties' agreement and the City's actions deal directly with the enforcement of the contract, the Board has no jurisdiction over the claim.

DISCUSSION

Preliminarily, we reject the City's claim that the petition must be dismissed because the issue centers on a contract dispute. The Unions' claims do not revolve around a breach of a contract provision; rather, they involve allegations that the City refused to bargain over a unilateral change in the off-line vacation policy in violation of §§ 12-306(a)(1) and (4). The City's allegations that the Unions' claims are conclusory and speculative are equally unpersuasive.

Section 12-306(a)(4) states that it shall be an improper practice for a public employer or its agents to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. Section 12-307(a)

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[7] The City states that the contract expired in "May or June of 2000."

states that public employers and certified or designated employee organizations shall have the duty to bargain in good faith on, among other things, hours, including but not limited to overtime and time and leave benefits.

The evidence supports the long-standing existence of a policy under which members assigned off-line were not required to surrender vacation or compensatory time in order to be paid for holiday time off. The existence of this policy is apparent in the documentary evidence submitted by the Unions and further buttressed by the City's need to correct the overpayments. The correction made by the City, as outlined in Feehan's November 3, 1999 memorandum, directly changes the off-line leave policy that had been in existence prior to November 3, 1999. As the City has a duty to bargain about leave under § 12-307(a), and the off-line leave policy was changed, the City has violated § 12-306(a)(4). The City has not extinguished its duty to bargain over this issue.

We have held that when the City refuses to confer with the certified employee representative regarding a change affecting terms and conditions of employment, the City interferes with the effectiveness of the employee representative and, consequently, the rights of the employees, in violation of § 12-306(a)(1).[8] In this instance, the City is incorrect when it urges us to utilize *City of Salamanca* as the standard because the *Salamanca* test is applied only in cases of claimed discrimination or retaliation in violation of § 12-306(a)(3) of the NYCCBL. Therefore, we order the City to cease and desist from requiring the off-line members to utilize accrued vacation or compensatory time in order to be paid for a holiday off until the City bargains and reaches an agreement with the Union over this issue.

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[8] *Committee of Interns and Residents v. New York City Health and Hospitals Corporation*, Decision No. B-25-85 at pp. 10-11.

ORDER

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

ORDERED, that the improper practice petition docketed as BCB-2102-00 be, and the same hereby is, granted; and it is further

ORDERED, that the City of New York shall cease and desist from requiring off-line members of the FDNY to utilize accrued vacation or compensatory time in order to be paid for a holiday off until the City bargains and reaches an agreement with the Union over that issue.

Dated: April 30, 2001
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

EUGENE MITTELMAN
MEMBER