L. 1180, CWA v. City & HRA, 69 OCB 28 (BCB 2002) [Decision No. B-28-02 (IP)]

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

-between-

LOCAL 1180, COMMUNICATION WORKERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION,

Respondent.
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Decision No. B-28-2002
Docket No. BCB-2255-01

DECISION AND ORDER

On November 29, 2001, Local 1180, Communications Workers of America, AFL-CIO, ("Local 1180") filed an improper practice charge alleging that the City of New York and the New York City Human Resources Administration ("City" or "HRA") violated § 12-306(a)(1), (3), (4) and (5) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The petition alleges that the City: (a) implemented a merit pay plan for employees in the Associate Job Opportunity Specialist ("AJOS") title without first negotiating with Local 1180, and/or without regard to the terms set forth in the parties' collective bargaining agreement; (b) changed terms and conditions of employment during the pendency of a representation petition, and encouraged Local 1180 members to abandon their support for the union; and (c) discriminated against union members by granting merit pay only to

employees in the Job Opportunity Specialist ("JOS") title series and not employees in other titles represented by Local 1180. The City denies any improper motive in its granting of merit pay and asserts that it fulfilled its obligation to bargain because it discussed merit pay with Local 1180 and because the collective bargaining agreement gives the City the unilateral right to implement merit increases. We find that the City's unilateral implementation of merit pay violated § 12-306(a)(1) of the NYCCBL because that action was a change to the status quo for AJOS employees during the pendency of a representation proceeding. We further find that the City's implementation of merit pay was a unilateral change in the terms of the existing collective bargaining agreement in violation of § 12-306(a)(1), (4) and (5) of the NYCCBL. As set forth fully below, we dismiss Local 1180's other allegations.

BACKGROUND

HRA operates offices which provide income assistance and social services to eligible City residents. In Fall of 2000, the City announced a proposal to change the name of its Income Support Offices to Job Centers and to create a new title series, including JOS and AJOS titles, to staff those centers. The intended purpose for the changes was to "consolidate many of the functions related to eligibility determination, employment identification, and social services monitoring into a single title series," and thereby provide each client with one individual to manage all aspects – financial, employment and social service – of the case. (Reply ¶ 10.)

By Spring of 2001, HRA began recruiting to fill the new titles from its current employees in the following titles: Principal Administrative Associates ("PAAs"), Eligibility Specialists ("ESs"), Supervisors ("SUPs"), and Caseworkers. All of these employees worked in the Income

Support Offices. The City filled the JOS title with ESs and Caseworkers and the AJOS title was filled with SUPs and PAAs. PAAs are represented by Local 1180; ESs are represented by Local 1549, Clerical Administrative Employees of District Council 37, AFSCME ("Local 1549"); and SUPs and Caseworkers are represented by Local 371, Social Service Employees Union of District Council 37, AFSCME ("Local 371").[1] In addition, as of November 2001, approximately 200 new employees hired to fill JOS positions do not have union representation.

PAAs are covered by the 2000 CWA Memorandum of Economic Agreement ("CWA MCMEA"), in addition to the 1995-2000 Principal Administrative Associate Contract ("PAA contract").[2] The CWA MCMEA provides:

> Section 7. Performance Compensation
>
> The Union acknowledges the Employer's right to pay additional compensation for outstanding performance.
>
> The Employer agrees to notify the Union of its intent to pay such additional compensation.

The PAA contract provides:

> Section 11. Merit Increases
>
> a. The Employer agrees to notify the Union of its intention to grant merit increases.
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> b. In circumstances where an agency chooses to grant non-managerial merit increases, it shall follow with respect to unit employees criteria set forth in Appendix B to this Agreement. However, the decision of whether or not an

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[1] Local 371, Local 1549, and Local 1180 are collectively referred to as the "Unions." An improper practice petition filed by Locals 371 and 1549, Docket No. BCB-2245-01, raised claims concerning the implementation of merit pay, similar to those alleged herein. The Board's conclusions on that petition were set forth in *District Council 37*, Decision No. B-23-2002.

[2] At the time the improper practice petition was filed, the PAA contract was in status quo pursuant to §12-306(a)(5) of the NYCCBL.

> agency will grant merit increases to non-managerial employees in an agency is solely a managerial prerogative.

Appendix B of the PAA contract entitled "Guidelines on Merit Increases for Sub-Managerial Employees" sets forth a detailed list of requirements to which agency heads "must adhere," including that merit pay may only be given once in a twelve month period, may not be a based on an increase in duties, must be limited to employees with above-average ratings, can be distributed up to a maximum of 7% of the employee's base salary, and shall be based on outstanding productivity, performance, initiative and resourcefulness.

In February and March 2001, Local 371 and Local 1180 filed certification petitions in Case Nos. RU-1239-01 and RU-1242-01, respectively, each union seeking to accrete the AJOS title to existing bargaining units. In February 2001, Local 371 and Local 1549 filed petitions in Case Nos. RU-1239-01 and RU-1240-01, respectively, each union seeking to represent the JOS title and accrete it to existing bargaining units.

Prior to implementing the JOS title series, the City held meetings with the Unions to brief them on the City's plan and to address any questions or concerns. At these meetings, the City informed the Unions that during the pendency of the certification petitions, current employees moving into the JOS title series "would continue to receive all the benefits of their respective collective bargaining agreements, *i.e.* the City would continue their salary, longevity, service increments, assignment differentials, and all other union benefits. . . ." (Reply ¶ ¶ 16, 21.) In addition, the City agreed that these employees would continue to be represented by their current bargaining representatives. The City began filling the JOS title series in May 2001.

On September 7, 2001, the City advised the Unions that it intended to implement a "Merit

Pay Plan" for the JOS title series, and three days later it announced its plan to the Job Center Staff. [3] The Merit Pay Plan provides that merit pay would be given in October and December 2001 and in June and December 2002. The Plan describes that the October 2001 awards to JOS titleholders would be based on "comparative statistical criteria for the months of August and September 2001 and supervisory criteria for the past 12 months." For the first AJOS awards issued, only supervisory criteria for the past 12 months were to be considered. The second award for AJOS in December 2001 was to be based on comparative statistical criteria from October and November 2001 and supervisory review criteria for the past 12 months. Employees could receive up to 20% of their base salary in each calendar year. The awards are pensionable, but would not be added to the base salary.

As a remedy for the alleged improper practices, Local 1180 seeks that the City: maintain the status quo with respect to wages and benefits during the pendency of the representation process; withdraw its merit pay plan, or in the alternative, offer merit pay to PAA employees in addition to AJOS employees; cease interfering with employees' protected rights; cease conferring benefits in order to discourage employees from joining or participating in union activities; post a notice to employees at its facilities; and any other relief that is just and proper.

POSITIONS OF THE PARTIES

Local 1180's Position

Local 1180 asserts that the granting of merit pay during the pendency of a representation

[3] Due to the events of September 11, 2001, implementation of the Merit Pay Plan was delayed. On October 15, 2001, the City advised the Unions that it intended to implement the Merit Pay Plan as soon as practicable.

petition was an improper attempt to convince employees that they will secure more benefits with no union than with a union and, therefore, interfered with employees' rights to free choice under § 12-306(a)(1) of the NYCCBL.[4] Local 1180 also claims that the Merit Pay Plan was a transparent attempt to convince PAAs to transfer to AJOS positions and abandon their membership in Local 1180 in violation of § 12-306(a)(1) of the NYCCBL.

In addition, Local 1180 asserts that the City breached its duty to bargain under § 12-306(a)(1) and (4) by implementing merit increases after the representation petitions were filed and before the Board of Certification determined the representation issue. Since the City reduced money available for salaries in order to fund merit pay, the City impaired the ability of the eventually certified bargaining representative to bargain over the base salary for the AJOS title. Further, the City failed to negotiate with the Unions over criteria and procedures for implementing merit pay. In the alternative, Local 1180 asserts that the PAA contract contains specific criteria for HRA to follow in awarding merit pay and that HRA was obligated to comply with those criteria.

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[4] 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;

* * *

(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

Finally, Local 1180 claims that the manner in which the merit pay has been implemented discriminates against bargaining unit members in violation of § 12-306a(1) and (3) of the NYCCBL, since the PAAs continue to work alongside AJOS employees doing the same or similar work, but the City granted merit pay only to AJOS employees and not PAAs.

City's Position

First, the City claims that Local 1180's claims are conclusory and speculative, for Local 1180 fails to describe how the City's implementation of the Merit Pay Plan coerced or restrained employees' exercising their protected rights, or discouraged employee participation in Local 1180. Second, the City asserts that it had no duty at that time to bargain with Local 1180 concerning the decision to grant merit pay, the aggregate amount of merit pay, or the criteria and procedures for implementing merit pay. While acknowledging a duty to bargain over criteria and procedures for implementing merit pay, the City states that it fulfilled that duty when it negotiated with all three unions on this subject and that the PAA contract specifically provides that the decision whether to grant merit pay is solely a managerial prerogative. (Answer ¶ 53.)

The City also contends that Local 1180 has not met its burden to show that the City unlawfully interfered with or discriminated against employees when granting merit pay. Local 1180 did not allege any union activity which would fall within the protection of the NYCCBL. Nor is there any evidence of improper motive. Rather, the City has remained neutral in the representation process, and no evidence exists that the granting of merit pay was inspired by favoritism or union animus. Even assuming Local 1180 demonstrated protected activity and improper motive, the City contends that it has a legitimate business reason to grant merit pay – to reward exceptional work.

Moreover, the City asserts that the Board lacks jurisdiction over Local 1180's claims because they implicate contractual provisions relating to merit increases in the PAA contract and, therefore, must be raised under that contract's grievance procedure.

DISCUSSION

At the outset, we find that the Board has jurisdiction over Local 1180's claims. Pursuant to § 12-309(a) of the NYCCBL, this Board has the exclusive jurisdiction to prevent and remedy violations of § 12-306. On their face, all of Local 1180's allegations – interference with employees' protected rights, discrimination, and breach of the duty to bargain in good faith – raise statutory claims over which the Board has jurisdiction.

Furthermore, the Board may exercise jurisdiction over an alleged breach of a collective bargaining agreement when the acts constituting the breach also constitute an improper practice.[5] *District Council 37*, Decision No. B-36-2001 at 5. Local 1180's allegation that the implementation of merit pay was a unilateral change in the terms of the parties' collective bargaining agreement raises statutory claims, not simply a breach of contract claim. Here, the merit pay claim encompasses a breach of the City's agreement to maintain the terms of the existing collective bargaining agreements for AJOS employees, a breach of the statutory status quo provision and interference with the representation process, a claim which is inherently destructive of employees' statutorily protected rights. Therefore, we find that the unilateral

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[5] Section 205(5)(d) of the Civil Service Law, Article 14, provides that the Board shall not have authority to "enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice."

change claim is inextricably related both to the claim of unlawful interference in the representation process and to the other statutory claims and, therefore, cannot be resolved separately. *See Connequot Central School District*, 19 PERB ¶ 3045 (1986) (jurisdiction asserted over claim that a unilateral change in a contract term was inherently destructive of employees' protected rights.) Therefore, we assert jurisdiction.

We now address Local 1180's allegation that the City violated § 12-306(a)(1) by conferring an economic benefit during the pendency of a representation petition. We recently stated in *District Council 37*, Decision No. B-23-2002 at 9, that "an employer must preserve the existing terms and conditions of employment during the representation process and granting of a benefit during that period must conform to the status quo." *See also Assistant Deputy Wardens Ass'n*, Decision No. B-19-95. We held that the City's "implementation of merit pay in the JOS title series subsequent to the filing of a representation petition is a change in the employees' existing employment conditions, and therefore violated § 12-306(a)(1) of the NYCCBL." *District Council 37*, Decision No. B-23-2002 at 12.

Our conclusion in *District Council 37*, is consistent with New York State Public Employment Relations Board's ("PERB") finding that "[c]hanges in prevailing employment conditions after a bona fide representation question has been raised violate the Act on a per se basis." *Genesee Valley BOCES School Related Personnel Ass'n*, 29 PERB ¶ 3065, at 3151 (1996), *aff'd, Genesee-Livingston-Stueben-Wyoming BOCES v. Kinsella*, 30 PERB ¶ 7009 (N.Y. Sup.Ct. Livingston Co., Sept. 8, 1997). PERB stated that "[s]uch changes in employment conditions inherently chill employees in their protected right to seek representation . . . , influence the employees' choice of bargaining agent and distort any collective negotiations

resulting from the certification of a bargaining agent." *Id.*; *see Dorr Glover*, 34 PERB ¶ 3008, at 3014 (2001); *Catskill Regional Off-Track Betting Corp*., 13 PERB ¶ 4028, at 4031(1980).[6]

The City is required under the NYCCBL to maintain employees' existing terms and conditions of employment upon the filing of a representation petition. As we stated in *District Council 37*, Decision No. B-23-2002 at 12:

> consistent with its rights, the City set the initial terms and conditions of employment for JOS and AJOS employees by deciding to maintain the terms of the existing collective bargaining agreements for all employees transferring to those titles. Once the representation petitions were filed, the City was precluded from modifying the terms of the pre-existing collective bargaining agreements for the duration of the representation process. (Footnote omitted.)

This case arises from the same facts as those in *District Council 37* – the unilateral granting of merit pay in 2001 to HRA's employees in the JOS and AJOS titles. There the terms of the existing collective bargaining agreement between the City and District Council 37, which had been extended to employees in the JOS title series, did not include a unilateral right to implement merit pay. In addition, there was no past practice of granting merit pay to either JOS, AJOS, Caseworkers or SUPs, and the decision to grant merit pay was not announced until well after the representation petitions were filed. *Id*. at 13. We find no reason to depart from the rationale discussed in that case. For the employees represented by Local 1180 who transferred to the AJOS title, the City was obligated to maintain the terms of the CWA MCMEA and the PAA

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[6] PERB also considers whether a change in benefits is consistent with past practice or was announced prior to the filing of the representation petition to rebut an allegation that a change in employees' terms and conditions of employment during the representation process was unlawful interference. *United Public Service Employees Union, Local 424*, 27 PERB ¶ 4065 (1994) (distribution of gift certificates after petition filed was consistent with past practice and not unlawful); *Fort Ann Central School District*, 17 PERB ¶ 4047 (1984) (pay increases lawful because the decision to grant increases preceded the filing of the petition).

contract until the representation issues were resolved. Therefore, if the City desired to grant merit pay, it had to do so consistent with the terms of the PAA contract and/or past practice. The City does not deny Local 1180's assertion that implementation of merit pay to employees in the AJOS title was inconsistent with the terms of the PAA agreement. Further, there is no evidence that merit pay had previously been a part of employees' regular compensation or that the decision to grant merit pay had been made or announced prior to the filing of the representation petitions. Accordingly, the City's implementation of merit pay to AJOS employees during the pendency of the representation process was a change in the employees' existing employment conditions and violated § 12-306(a)(1) of the NYCCBL. [7]

Local 1180 also claims that the City violated § 12-306(a)(1) and (4) of the NYCCBL because it failed to abide by the contractual terms regarding implementation of merit pay, or, alternatively, that the City breached its duty to bargain in good faith by refusing to discuss criteria and procedures for implementing merit pay with the Unions. This Board has held that the decision to grant merit increases and the aggregate amounts thereof are within the scope of management's rights set forth in NYCCBL §12-307(b), but the criteria and procedures for determining eligibility for merit increases are mandatory subjects of bargaining. *Patrolmen's Benevolent Ass'n*, Decision No. B-4-99; *United Probation Officers Ass'n*, Decision No. B-44-86; *Civil Service Bar Ass'n*, Decision No. B-9-69. In addition, a public employer's duty to bargain in

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[7] The City mistakenly asserts that a finding of unlawful interference requires evidence of improper motivation. The finding of such interference with the representation process does not require a showing of improper motivation or union animus. *District Council 37,* Decision No. B-23-2002 at 13; *Assistant Deputy Wardens Ass'n,* Decision No. B-19-95 at 43; *Hudson Valley Community College*, 18 PERB ¶ 3057, at 3120 (1985). Therefore, even in the absence of an improper motive, the City's implementation of merit pay during the representation process unlawfully interfered with employees' protected rights.

good faith encompasses the obligation to refrain from making unilateral changes in mandatory subjects of bargaining. *LaRiviere*, Decision No. B-57-87 at 5-6.

A similar refusal to bargain claim was raised in *District Council 37*, Decision No. B-23-2002 at 16, and we held:

> the City could not act as if the employees transferring to the JOS and AJOS titles had no union representation and could not unilaterally alter terms of its collective bargaining agreements with Petitioner. Initially, the City decided voluntarily to continue applying the terms of the existing collective bargaining agreements to employees moving into the JOS and AJOS titles and committed to continue its recognition of Petitioner as a bargaining representative of those employees. As a result, the City did not merely set the initial terms consistent with the pre-existing terms of employment, but in essence agreed to give Petitioner the right to administer and enforce its agreements.

The facts in this case are the same as those in *District Council 37,* with one exception. Here, the City and Local 1180 negotiated over criteria and procedures for implementing merit pay. Appendix B of the PAA contract sets forth the parties' agreement on the manner in which merit pay must be granted, for example: only to employees with above-average ratings, only once in a twelve month period, only up to a maximum of 7% of the employee's base salary. Therefore, unlike in *District Council 37*, in this instance the City mutually agreed upon the criteria and procedures to implement merit pay when it negotiated the PAA contract. As a result, the City did not have any additional obligation to bargain over criteria and procedures when it decided to grant merit pay to AJOS employees.

However, because the City agreed to maintain the terms of the PAA contract for PAAs who transferred to AJOS positions and continued its recognition of Local 1180 as a bargaining representative of those employees, the City could not act as if the AJOS employees had no union representation and could not unilaterally alter terms of the PAA contract. The City does not deny

Local 1180's assertion that its implementation of merit pay to AJOS employees was inconsistent with the terms of the PAA contract, and the record supports this conclusion. For example, criteria described in the PAA contract – such as merit pay will be granted only once in a twelve month period, and only comprise up to a maximum of 7% of the employee's base salary – are disregarded in the City's Merit Pay Plan, which permits granting of merit pay three times in a twelve month period, and up to a maximum of 20% of an employee's base salary. Accordingly, the City's implementation of the Merit Pay Plan for AJOS employees was a unilateral change in a mandatory subject of bargaining and a breach of its agreement to extend the terms of the PAA contract to AJOS employees and, therefore, violated § 12-306(a)(1), and (4) of the NYCCBL. *Local 858, International Brotherhood of Teamsters*, Decision No. B-38-92 (unilateral implementation of a change in lunch periods violated § 12-306(a)(4) and the status quo provisions of the NYCCBL.)

Moreover, § 12-306(a)(5) of the NYCCBL requires that the City maintain the provisions of the expired collective bargaining agreements during the period of negotiations. It is undisputed that when the City implemented merit pay, the PAA contract had expired and was, therefore, subject to the statutory status quo provisions. As a result, the City's implementation of merit pay inconsistent with the terms of the PAA contract was a change in the status quo and violated § 12-306(a)(5) of the NYCCBL. ***Id.***

However, we find no merit in Local 1180's remaining claims. We are not persuaded that the City discriminated against bargaining unit members in its granting of merit pay. To determine whether alleged discrimination or retaliation violates NYCCBL § 12-306(a)(3), we apply the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), adopted by this Board in

Bowman, Decision No. B-51-87. Petitioner must demonstrate that:

> 1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
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> 2. the employee's union activity was a motivating factor in the employer's decision.

If petitioner proves these two elements, the employer may refute petitioner's showing or demonstrate legitimate business motives that would have caused the employer to take the action complained of even in the absence of the protected activity. *Bowman*, at 19.

The employees' union activity in this instance is merely the PAAs' membership in Local 1180 which is widely known and acknowledged by the City. There is insufficient evidence to show that the City granted merit pay to AJOS employees and not PAAs because of the PAAs' union membership. In fact, PAAs who transferred to the AJOS title have continued their membership in Local 1180, and some Local 1180 members in the AJOS title have received merit pay awards. Since all the Unions have continued to represent members who have transferred to positions in the JOS title series, the vast majority of merit pay recipients are indeed union members. Further, the City has not objected to the addition of the AJOS title to either the pre-existing Local 1180 or Local 371 bargaining units, and the AJOS employees will remain union members once the representation process is completed. As a result, we do not find that merit pay was granted only to AJOS employees in order to discourage union membership.[8] Moreover,

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[8] *Assistant Deputy Wardens Ass'n*., B-19-95, does not provide support for Local 1180's claim that the City's conduct was discriminatory. In that case the Board dismissed the union's claim that a change in flex-time policy discriminated against employees who filed a representation petition because the change in flex-time policy was applied to all employees and not just those engaged in union activity. Moreover, the facts of this case are distinguishable from *Hudson Valley Community College*, 18 PERB 4566 (1985), in which the employer's withholding of salary increases only from those employees who had sought union representation was found

although Local 1180 emphasizes that the granting of merit pay only to HRA employees in the JOS title series was an inducement for employees in other titles to transfer to those positions, such a purpose or intent does not violate the NYCCBL. Accordingly, we cannot conclude that the granting of merit pay discriminated against employees based on their union membership, and we dismiss that claim.

Finally, it is unnecessary for the Board to consider Local 1180's remaining claims that the implementation of the Merit Pay Plan was a transparent attempt to convince PAAs to transfer to AJOS positions and abandon their union membership or that the City breached its duty to bargain in good faith because implementation of merit pay during the representation process impaired the ability of the eventually certified bargaining representative to bargain over base salary of the AJOS title by reducing resources available for salary. We have already found that the protested conduct – implementation of merit pay – interfered with employee protected rights and breached the City's duty to bargain in good faith.

In sum, we find that the City violated Section 12-306(a)(1) by implementing merit pay for employees in the AJOS title after representation petitions were filed and violated Section 12-306(a)(1), (4) and (5) by unilaterally changing the terms and conditions of employment for those employees represented by Local 1180 who are transferring to the AJOS title. We order that the City immediately cease and desist from implementing the Merit Pay Plan for the AJOS employees until a wage and benefit package is fixed by collective negotiations with the certified bargaining agent,[9] and we dismiss the remaining claims alleging violations of Sections 12-

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discriminatory.

[9] Local 1180 did not seek recission of merit pay awards already granted to employees.

306(a)(1), (3), and (4) of the NYCCBL.

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 HRA immediately cease any further implementation of merit pay to AJOS employees; and it is further

ORDERED, that HRA maintain the terms and conditions of employment existing prior to the commencement of the representation process (the CWA MCMEA and PAA contract) for employees represented by Local 1180 in the AJOS title and continue to maintain those terms until a wage and benefit package is fixed by collective negotiations with the certified bargaining agent; and it is further

ORDERED, that Local 1180's remaining claims alleging violations of Sections 12-306(a)(1), (3), and (4) of the NYCCBL be, and the same hereby are, dismissed.

Dated: September 23, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
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EUGENE MITTELMAN
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