UFT, 7 OCB2d 12 (BCB 2014)

(IP) (Docket No. BCB-2878-10)

Summary of Decision: The Union alleged that the City violated NYCCBL § 12-306(a)(1), (4), and (5) by imposing restrictions on the weekly and monthly working hours of Hearing Officers (Per Session) employed by OATH, which administers the tribunals of ECB, DOHMH and TLC. The City asserted that its weekly limit on hours was longstanding, motivated by a desire to control benefit eligibility; that a letter it sent to bargaining unit members clarified existing policy; and that the application of the weekly limit constitutes a non-discriminatory exercise of its managerial right to schedule Hearing Officers pursuant to NYCCBL § 12-307(b). Additionally, the City contended that the Union failed to meet its burden of proof with regard to its allegation that the City implemented a monthly limit on hours. The Board found that the City violated NYCCBL § 12-306(a)(1), (4), and (5), by making a unilateral change in the hours worked per week by these Hearing Officers. The Board did not find a unilateral change in the hours worked per month. Accordingly, the petition was 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-

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

On July 27, 2010, the United Federation of Teachers, Local 2, AFT, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") on behalf of its members in the title Hearing Officer (Per Session) ("Hearing Officers"), employed by the City

Office of Administrative Trials and Hearings ("OATH"), which administers the tribunals of the Environmental Control Board ("ECB"), the Taxi & Limousine Commission ("TLC"), and the Department of Health and Mental Hygiene ("DOHMH").[1] The Union claims that the City, beginning on or about March 26, 2010, unilaterally restricted the number of hours Hearing Officers could work on both a weekly and monthly basis, in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a), (1), (4), and (5).[2] The City asserts that the weekly limit on hours was longstanding, motivated by a desire to control benefit eligibility; that a March 26, 2010 letter it sent to bargaining unit members clarified an existing policy; and that the application of the weekly limit constitutes a non-discriminatory exercise of its managerial right to schedule Hearing Officers pursuant to NYCCBL § 12-307(b). Additionally, the City contends that the Union failed to meet its burden of proof with regard to its allegation that the City implemented a monthly limit on hours. The Board finds that the City violated NYCCBL § 12-306(a)(1), (4), and (5), by making a unilateral change in the hours worked per week by these Hearing Officers. The Board did not find a unilateral change in the hours worked per month. Accordingly, the Board grants the petition in part and denies it in part.

BACKGROUND

The Trial Examiner held six days of hearings and found that the totality of the record established the following relevant facts.

The Union is the certified representative of Hearing Officers employed by the City at

[1] Petitioner subsequently filed an amended petition on August 3, 2011.

[2] Petitioner also alleged a violation of NYCCBL § 12-306(a)(3). This allegation was withdrawn on November 26, 2013. (November 26, 2013 Union Affirmation)

various agencies including ECB, TLC, and DOHMH.[3] *See UFT*, 80 OCB 14 (BOC 2007); *CSBA*, 64 OCB 10 (BOC 1999). Hearing Officers adjudicate violations of rules and laws within these agencies' jurisdictions, conduct hearings, and render determinations. Hearing Officers are not full-time salaried employees, but are paid on an hourly basis.

The job specification for Hearing Officers issued by the New York City Department of Citywide Administrative Services ("DCAS") on December 9, 1998, contains a "Note," which states: "No incumbent shall work more than 17 hours per week in any two consecutive weeks, or more than 1,000 hours per year." (Union Ex. 9) This same "Note" was included in several job postings throughout the agencies, ranging from 2006 to 2012. (Union Exs. 10, 11, 20(a), 20(b), 20(c), 30) Many of the job postings also include an "Hours/Shift" section. For example, the "Hours/Shift" section of the July 3, 2006 job posting states "N/A." (Union Ex. 10) As set forth in greater detail below, the evidence shows that despite the "Note" in the job specification, prior to March 2010, the Hearing Officers were not limited to 17 hours per week in any two consecutive weeks.[4]

On March 26, 2010, ECB, DOHMH, and TLC issued letters to the Hearing Officers ("March 26, 2010 Letter") informing them of a limit on the number of hours they could work. The letter stated in pertinent part:

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[3] In August 2008, pursuant to Local Law No. 35 of 2008, ECB was functionally transferred from the New York City Department of Environmental Protection to OATH. On or about June 2011, pursuant to Executive Order No. 148 of 2011, TLC and DOHMH were transferred to OATH. Therefore, the Hearing Officers in issue here are now all employed by OATH. During the majority of the time relevant here, they continued to hear cases from their respective agencies: DOHMH, ECB, or TLC. As the underlying record refers to the Hearing Officers as employees of ECB, DOHMH, and TLC, we will refer to them as such in this decision.

[4] The "Hours/Shift" sections of job postings issued in March 2010 and after differ. The "Hours/Shift" section of the March 26, 2010 posting states "Day," and the April 20, 2010 posting states "Part-Time." (Union Exs. 20(a), 20(b)) For the first time in December 2011, and again in June 2012, the postings state "Day shift – 17 hrs/week." (Union Exs. 11, 30)

> Under the [DCAS] job specification for the position "hearing officer (per session)", your employment as a judge/hearing officer at [DOHMH], [ECB], and/or [TLC] may not exceed 17 hours per week in any two consecutive weeks nor be for more than 1,000 hours per year. Those limits apply to the total number of hours you work as a judge/hearing officer at [DOHMH], ECB and/or TLC, whether you work at one or more of those agencies. The 1,000-hour limit applies to the calendar year (2010).
>
> Unless you worked at least 50 hours for each of two tribunals during the past 12 months, your employment as a judge/hearing officer at [DOHMH], ECB or TLC for the remainder of 2010 will be limited to the tribunal at which you were solely employed or primarily employed during the past year. Your employment as a judge/hearing officer at [DOHMH], ECB or TLC will be limited to 1,000 hours for the entire calendar year of 2010, including hours already worked this year…

(Union Exs. 1(a), 1(b), 1(c)) This letter was also the subject of *UFT*, 4 OCB2d 4 (BCB 2011) ("*UFT 1,000 Hour Annual Cap*").[5] Here, at issue is the statement that a Hearing Officer may not exceed 17 hours per week in any two consecutive weeks ("Weekly Cap"). On or about December 6, 2010, ECB, DOHMH, and TLC issued letters to the Hearing Officers including the same first paragraph as the March 26, 2010 Letter above, except referencing the calendar year 2011.

On January 14, 2011, the Director of Adjudications at DOHMH, Miguel Gonzalez ("Director Gonzalez"), sent a memo to "All Hearing Examiners" at DOHMH ("January 14, 2011 Memo"), which stated in pertinent part: "[p]lease bear in mind that you are still limited to 35 hours per week in any week and no more than 17 hours in any week following a week in which you have worked more than 17 hours." (Union Ex. 6) Despite Director Gonzalez's use of terms different from those in the March 26, 2010 Letter regarding limits on weekly hours, it is undisputed that in April 2010 he told Hearing Officer Keefe that she "could work two days per week and then [she]

[5] It is undisputed that over a long period of time, Hearing Officers that work at only one agency have been limited to working 1,000 hours per year.

could work three days a week next but [she] could never work more than 17 hours in any two consecutive weeks."[6] (Tr. 38)

On or about April 13, 2011, ECB, DOHMH, and TLC issued correspondence to the Hearing Officers ("April 13, 2011 Correspondence"), which stated in pertinent part:

> Please be advised that the letters sent on March 26, 2010 and December 6, 2010 regarding the 1,000 hour cap for ALJs/hearing officers are hereby rescinded.
>
> Unless you work at multiple agencies, under the [DCAS] job specification for the position hearing officer (per session), your employment as a judge/hearing officer at [DOHMH], [ECB] or [TLC] may not exceed 17 hours per week in any two consecutive weeks nor be for more than 1,000 hours per year.
>
> If you worked as a Hearing Officer (Per Session) for multiple agencies in 2010, you may continue to work at multiple agencies during 2011, consistent with the pre-March 2010 practice of those agencies.

(Union Exs. 12, 13)

Seven Hearing Officers testified concerning hours they worked: Jean Keefe, Marilyn Piken, Arthur Scott Kegelman, Laura Fieber, Adele Cohen, Rachel Potasznik, and Andrea Pfeiffer. All of the Hearing Officers have served in this title for at least eight years, except Hearing Officer Cohen, whose employment began in 2008. The majority of them work at a single agency.[7] As specified below, many of them testified that, prior to March 2010, they often had the flexibility to work extra hours, and they frequently worked in excess of 17 hours per week in any

[6] The Mayor's Administrative Justice Coordinator, David Goldin ("AJC Goldin"), also testified that Hearing Officers could work two days a week and then three days a week. When asked, "isn't it true, in fact, that an individual can work 17 hours one week and under this particular rule work 35 hours in the next week," AJC Goldin testified that that was not his understanding. (Tr. 355-56)

[7] Hearing Officers Kegelman and Fieber work at both ECB and TLC. The record is not clear about whether Hearing Officer Pfeiffer works at both ECB and DOHMH, or only ECB.

two consecutive weeks and/or 80 hours per month ("Monthly Cap"). None of the Hearing Officers testified that they had ever been subjected to the Weekly Cap or the Monthly Cap on hours prior to 2010. Additionally, all of the Hearing Officers testified, as summarized below, regarding the imposition of new limitations on working hours at their respective agencies beginning at various times after March 2010 and before July 2011.

ECB

All of the ECB Hearing Officers testified that prior to the issuance of the March 26, 2010 Letter, a weekly cap had never been enforced at ECB. For example, Hearing Officer Kegelman, who has worked as a Hearing Officer since 1977 and served as ECB's Deputy Legal Director/Chief ALJ from approximately 1980 to 1982 and again from 1989 to 1991, testified that between 1977 and March 26, 2010, a Weekly Cap was never enforced.[8] In fact, prior to May 2011, he testified that he consistently worked 21 hours per week at ECB and was not limited to 17 hours per week in any two consecutive weeks. Additionally, Hearing Officer Kegelman testified that although he had been part of the hiring process in the past, he had never seen a job posting with a note about the Weekly Cap in the "Hours/Shift" section until 2011.

[8] Hearing Officer Kegelman was questioned about a Memorandum that he purportedly wrote to all ALJs dated July 5, 1990. The Memorandum states in pertinent part:

> Pursuant to Department of Personnel's new regulations, effective August, 1990 no per diem judge will be permitted to work unlimited days on a weekly basis. The following is the formula that we must follow until further notice…. First Week: ALJ can work from 2 ½ to 5 days. Second Successive Week: If you worked 2 ½ days or more the prior calendar week you can only work 2 days the second week.

(City Ex. 1) (emphasis removed). Hearing Officer Kegelman testified that he did not remember writing this letter, but since his name is on it he must have been involved with it. He does not know if it was ever distributed to staff, but to the best of his recollection it was never put into effect and he did not enforce it.

Similarly, prior to 2011, Hearing Officer Piken, and Hearing Officer Potasznik were not limited to working 17 hours per week in any two consecutive weeks. Hearing Officer Piken testified that from 2002 to June 2011, she worked three or four days a week in successive weeks.[9] Hearing Officer Potasznik testified that from 1987 until 2011, she worked three days a week, more than 17 hours each week, and she was never refused hours on non-scheduled days.[10] Finally, Hearing Officer Fieber testified that, prior to 2010, she worked a core schedule of three days a week at ECB and had the flexibility to work on non-scheduled days as well. Hearing Officer Fieber did not specify how many hours per day or per week she worked and pay stubs were not provided.[11]

All of the ECB Hearing Officers testified that some cap on hours was implemented at the tribunal in 2011. Hearing Officer Kegelman testified that he learned of the Weekly Cap around May 2011 when he was told that he was not scheduled to work a day that he had requested.[12] He testified that he spoke to the Managing Administrative Law Judge in the Manhattan ECB office, Vivian Lazerson ("Managing ALJ Lazerson"), and she told him that "they're monitoring

[9] Hearing Officer Piken's pay stubs from January 2011 to June 2011 illustrate that she worked more than 17 hours per week in any two consecutive weeks, except for a three week period in April 2011.

[10] Hearing Officer Potasznik's pay stubs for 2010 corroborate that she consistently worked more than 17 hours in any two consecutive weeks. Out of 49 weeks of work in 2010, she worked more than 17 hours in any two consecutive weeks on all but six occasions.

[11] Hearing Officer Pfeiffer also testified that neither a weekly cap nor a monthly cap were ever implemented before March 26, 2010. She stated that the Weekly Cap was enforced first at DOHMH. Additionally, sometime after the April 13, 2011 Correspondence she heard from an ECB supervisor that they were going to start limiting Hearing Officers in the mail unit to working 80 hours or less per month. Based on the record, we are unable to determine how many hours she worked before or after the implementation of the alleged cap(s).

[12] Hearing Officer Kegelman testified that his hours were only capped in May and June 2011, during which time he was scheduled for all but two of the work days that he requested.

everybody's hours now and you can't work more than 80 hours in a month." (Tr. 101) Although Managing ALJ Lazerson speculated that it may have something to do with the Weekly Cap, she told Hearing Officer Kegelman that she did not know why the policy was being implemented.[13]

Similarly, sometime in June of 2011, Managing ALJ Lazerson told Hearing Officer Piken that she could no longer work three days a week, two weeks in a row. From July 2011 through November 2011, Hearing Officer Piken was limited to a maximum of three days one week followed by two days the next week, with the exception of one occasion. Her payroll records for this time show that her hours were reduced to 17 hours per week in any two consecutive weeks, with the exception of five occasions. Hearing Officer Potasznik testified that after receiving the April 13, 2011 Correspondence, she was told that she could no longer come in on non-scheduled days or make up hours that were missed, and she couldn't work more than three days a week.[14] While Hearing Officer Fieber's testimony was equivocal at times, it indicates that in 2011 she was no longer able to work her three day per week schedule. Accordingly, the Union presented evidence that the Weekly Cap was enforced on some Hearing Officers at ECB in 2011.

DOHMH

From January 2009 until April 2010, Hearing Officer Keefe consistently worked between 21 and 23 hours per week for DOHMH, and more than 17 hours per week in any two

[13] It appears there may not have been uniformity at ECB regarding the implementation of the alleged cap. For example, the only supervisors that allegedly made statements about a Monthly Cap work at ECB. Additionally, Hearing Officer Piken testified that Managing ALJ Lazerson told her that she could not schedule her for three days a week, two weeks in a row. Hearing Officer Kegelman testified that in June 2011 he also became aware of a three day maximum work week for Hearing Officers. Then, in March 2012, he asked ECB Managing ALJ Lazerson about the "three-day-a-week limitation," and she told him that it was still in effect.

[14] Hearing Officer Potasznik's pay stubs for 2011 corroborate that after April 2011 she never worked more than three days in a single week. However, we note that she continued to work more than 17 hours a week in any two consecutive weeks after April 2011.

consecutive weeks. Hearing Officer Keefe testified that the Weekly Cap was implemented at DOHMH around April 2010, and as a result her hours were reduced to no more than 17 hours per week in any two consecutive weeks.[15] Based on the March 26, 2010 Letter, the January 14, 2011 Memo, the April 13, 2011 Correspondence, and the testimony, we find that the Union presented evidence that the Weekly Cap was enforced on at least Hearing Officer Keefe at DOHMH in 2010.

TLC

Three TLC Hearing Officers testified; however, Hearing Officer Cohen is the only witness who focused solely on her experiences at TLC.[16] From the beginning of her employment with TLC in 2008 until February 2012, Cohen rarely worked more than 17 hours per week in any two consecutive weeks. Hearing Officer Cohen testified that TLC implemented the Weekly Cap towards the summer of 2010, and indeed the hours she worked in 2010 were significantly less than her hours worked in 2009.[17] She testified that although she continued to request many hours, in some months between the summer of 2010 and July 2011 she was assigned very few hours. For example, she worked 28 hours in October 2010, 31.5 hours in November 2010, and no hours in December 2010. As a result, the record is not clear that Hearing Officer Cohen's reduction in hours from June 2010 to July 2011 was entirely due to the Weekly Cap.

[15] Hearing Officer Keefe's pay stubs from 2009 to 2011 corroborate her testimony about the reduction in her hours worked. Prior to April 2010 she consistently worked 21 to 23 hours per week. After April 2010, she testified that she continued to request the same schedule, but was only scheduled for alternating weeks of two days (approximately 14 hours) and three days (approximately 21 hours).

[16] Hearing Officers Kegelman and Fieber also work at TLC, but their relevant testimony focused on their work at ECB and their knowledge of the work rules in general.

[17] Hearing Officer Cohen worked 794.30 hours in 2009 and 559.45 hours in 2010.

Monthly Cap

Separate and apart from the Weekly Cap, the Union alleges there was a Monthly Cap imposed on ECB Hearing Officers. With regard to the Monthly Cap, Hearing Officers Kegelman, Pfeiffer, Piken, and Potasznik all testified that they had never heard of any type of Monthly Cap on hours for Hearing Officers before 2010. Hearing Officer Pfeiffer testified that, sometime after the April 13, 2011 Correspondence, she was informed by her supervisor Bradley Lamel that the ECB Mail Unit was going to start limiting Hearing Officers to 80 hours per month. Hearing Officer Kegelman testified that around May 2011, Managing ALJ Lazerson told him that "you can't work more than 80 hours in a month," which she speculated may have to do with the "17-hour rule but that she [ ] really didn't know." (Tr. 101) Then, in March 2012, Managing ALJ Lazerson told Hearing Officer Kegelman that she was not enforcing the Monthly Cap. Hearing Officer Kegelman alleges that his hours were only capped in May and June 2011. His pay stubs reflect that he worked 79.75 hours in May 2011 and 80.5 hours in June 2011. Hearing Officer Piken testified that, in June 2011, she was told that she could no longer work more than 80 hours per month. From 2002 until June 2011, Hearing Officer Piken regularly worked more than 80 hours a month; however, from July 2011 to November 2011, she did not exceed 65.75 hours in any month.[18] Hearing Officer Potasznik, who worked solely for ECB, often exceeded 80 hours per month, even after the alleged implementation of the alleged Monthly Cap at ECB.[19]

[18] The Union introduced into evidence a May 2011 email chain about June scheduling from Managing ALJ Lazerson and Bradley Lamel. The Union alleges that this email chain corroborates the Monthly Cap; however, the email does not refer to a Monthly Cap or even to 80 hours. Further, Hearing Officer Piken's pay stubs for June 2011 show that she worked 99.25 hours.

[19] Hearing Officer Potasznik's pay stubs show that she worked more than 80 hours per month in August 2011, September 2011, October 2011, and January 2012.

Mayor's Administrative Justice Coordinator

AJC Goldin testified in support of the City's position that there has been no change in Hearing Officers' weekly hours.[20] He testified that since his appointment in 2006, he has had ongoing discussions with administrators of the tribunals. With respect to the Weekly Cap set forth in the job specification, AJC Goldin stated that it "has been enforced, that the administrators at the tribunals are aware of it, that they have consistently sought to abide by it, although, again, as with the thousand-hour cap, [he] can't say that that adherence has been meticulous." (Tr. 331) Additionally, he asserted that he has seen enough assignment calendars to know that Hearing Officers at a particular tribunal typically have a maximum workload of "three days one week and two days the next, with that as a recurring pattern, which would be consistent with the 17-hour-per-week pattern." (Tr. 332) Further, he testified that the 1,000 hour annual cap and the Weekly Cap are "both part of the same job specification and [he] think[s] they're clearly intended to work in tandem. [He] think[s] that the idea behind both of them is that this is supposed to be a part-time position in which somebody is not going to serve more than half time, 17 hours…" (Tr. 328-29) He also acknowledged that there was some flexibility with respect to scheduling Hearing Officers. He testified that:

> …there's some variation across the tribunals and there's been some variation over the years, but essentially there is a calendar which is created in light of the anticipated volume of cases ... [a]nd then in consultation with the Hearing Officers who are on the roster, there is a schedule that is worked out to have them come in to cover the cases, typically identifying particular days during the course of the upcoming weeks, over the next foreseeable period of time, whether it's broken down in terms of a particular month or sequence of months.

[20] The Mayor's Administrative Justice Coordinator testified that since 2006 his office has worked on the development of multiple initiatives for increased efficiency, fairness, and transparency among the City's administrative tribunals, including the consolidation of the administrative tribunals.

(Tr. 321)

The Union requests that the Board order the City to cease and desist from unilaterally changing the number of hours Hearing Officers work per day, week, and/or month; remove the unilaterally imposed Weekly and Monthly Caps on hours; restore the *status quo* regarding hours of work; and bargain over any imposition and impact of changes in hours of unit members. Additionally, the Union seeks payment to Hearing Officers who have incurred any additional expense or lost revenue as a result of the unilateral change. The Union further requests that the City post a notice, by both bulletin board and electronic mail, concerning its violations.

POSITIONS OF THE PARTIES

Union's Position

The Union denies the City's claim that its amended petition filed on August 3, 2011, is untimely. It is undisputed that the original petition filed on July 27, 2010, was timely. Thereafter, the imposition of the caps continued and additional facts arose, particularly in January and April of 2011. Thus, the Union's reply filed on February 2, 2011, and its amended petition filed on August 3, 2011, included the additional facts that arose after the original petition was filed. Additionally, all of the facts related back to the same claims asserted in the original petition, namely a unilateral reduction of the number of hours a Hearing Officer may work.

The Union asserts that the City violated NYCCBL § 12-306(a)(1), (4), and (5).[21] Specifically, the Union contends that the City violated § 12-306(a)(1) and (4) by failing to bargain

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

> It shall be an improper practice for a public employer or its agents:
> (1) to interfere with, restrain or coerce public employees in the

with the UFT over Hearing Officers' hours of work. Pursuant to the NYCCBL, the City has a duty to bargain over mandatory subjects, including hours. Here, the Union maintains that the City's imposition of caps on working hours directly impacts the number of hours worked per week, appearances/days worked per week, and/or the overall hours worked per year, and thereby has impermissibly imposed a unilateral change in hours worked by unit members. The Union cites the Board's reasoning in the *UFT 1,000 Hour Annual Cap* case in which the Board was not persuaded by the argument that the flexible nature of the Hearing Officers position exempts them from collectively bargaining a limitation on hours.

Additionally, the Union asserts that the City violated NYCCBL § 12-306(a)(1) and (5) by changing the longstanding *status quo* under which a Weekly or Monthly Cap was never applied. The Union contends that it has shown a departure from a practice of not capping weekly or monthly hours that existed for such a period of time that Hearing Officers could reasonably expect the practice to not change. Before March 2010, the consistent and credible testimony of the Union's witnesses and the documentary evidence overwhelmingly demonstrates that the Weekly and Monthly caps were not enforced at DOHMH, ECB, or TLC, despite the Weekly Cap's inclusion in the title specification. The Union contends that Hearing Officers frequently exceeded 17 hours per week or 80 hours a month and these were not isolated instances of variation

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> 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;
>
> (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.

as the City asserts. Further, the Union asserts that the Weekly Cap does not work in tandem with the 1,000 hour cap; Hearing Officers limited to 17 hours a week are not able to reach 1,000 hours per year. Finally, the Union argues that any reliance by the City on the job specification is misplaced because the Monthly Cap is not mentioned in the job specification, and there was a longstanding and unequivocal practice of not capping weekly hours despite the reference to a Weekly Cap in the job specification. Thus, the Union argues that by unilaterally imposing the Weekly and Monthly Caps, and thereby altering the *status quo* in which Hearing Officers were not limited to any Weekly or Monthly Caps, the City violated NYCCBL § 12-306(a)(1) and (5).

City's Position

The City asserts that the Union's amended petition is untimely with respect to claims against the former DOHMH tribunal. The Union's amended petition, filed on August 3, 2011, introduces claims that pertain to acts which occurred more than four months before the filing of the petition. Specifically, the Union had notice of the implementation of the Weekly Cap at DOHMH at least as early as January 14, 2011, as evidenced by Director Gonzalez's memo.[22] Therefore, the Union's Amended Petition filed on August 3, 2011, was filed over four months after the Union had knowledge of the alleged change at DOHMH.

The City argues that it has not violated the NYCCBL because it did not implement any changes to a mandatory subject of bargaining. It contends that any evidence of an alleged unilateral implementation of a Weekly Cap is "plainly insufficient, with witnesses relying on hearsay and surmise to attempt to establish a cause-and-effect connection with the availability of hours." (City Brief 23) Hearing Officers are scheduled according to the individual needs of the

[22] The City also objected to the filing of the Union's reply, which allegedly introduced claims not in the petition. We have reviewed all of the pleadings and although the reply includes more detailed facts than the petition, we find that it does not allege a new cause of action.

agency, subject to the limits outlined in the job specification. Since at least 1998, the job specification has limited the working hours of Hearing Officers to no more than 17 hours in any two consecutive weeks, nor more than 1,000 hours per year. The Weekly Cap merely ensures that agencies can conform to the 1,000 hour annual cap, which preserves the part-time status of the position and limits the Hearing Officers eligibility for benefits, while maintaining a sufficient number of Hearing Officers for the agencies to meet their needs throughout the year. Therefore, the Weekly Cap is "inseparable" from the 1,000 hour annual cap and the two caps work "in tandem." (City Brief 21) The City distinguishes the instant matter from the factual circumstances in both *UFT*, 3 OCB2d 44 (BCB 2010) ("*UFT Minimum Five Hour Day*") and *UFT*, 4 OCB2d 54 (BCB 2011) ("*UFT Fixed Seven Hour Day*") because those cases involved "previously non-existent policies," whereas here, the Weekly Cap has been in existence since at least 1998. (City Brief 18)

Further, the City asserts that the scheduling of Hearing Officers, in consideration of working hour caps and agency needs, are management rights set forth in NYCCBL § 12-307(b).[23]

[23] NYCCBL § 12-307(b) provides:

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

It acknowledges that changing the total number of hours worked per week by employees with fixed schedules may be a mandatory subject of bargaining for employees with regular work schedules. However, the City asserts that Hearing Officers are part-time employees who can change their availability without repercussion. Since Hearing Officers do not have a regular, fixed schedule of work, they can expect that their hours will change. Further, the City asserts that "the [Weekly Cap] affects only the allocation of the total number of hours available to a [Hearing Officer] to work, not the total number of hours that they may work." (City Brief 22) Thus, because the City has the right to schedule employees as needed, and because Hearing Officers do not have a fixed schedule or guaranteed hours, the City argues that it has the right to enforce the Weekly Cap.

With regard to the Monthly Cap, the claim that an agency policy had been created based only on hearsay evidence attributed to two supervisors is wholly insufficient to establish the implementation of a Monthly Cap. Thus, the alleged Monthly Cap claim must be dismissed. In sum, the City asserts that the Union has failed to establish that the City's conduct was inherently destructive of employee rights, or that there has been a violation of the duty to bargain in good faith under NYCCBL § 12-306(a)(1), (4), or (5).[24]

The City further argues that Petitioner's request for a monetary remedy is speculative. The inherent variability in Hearing Officers' schedules makes it nearly impossible to ascertain the number of hours Hearing Officers would have worked. Additionally, the record in the instant

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> conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

[24] The City also asserts that it did not commit an independent violation of NYCCBL § 12-306(a)(1). However, since the Union did not allege an independent violation we need not address the issue.

matter demonstrates that the Weekly Cap did not have an effect, independent of the 1,000 hour cap, on the Hearing Officers' total hours. Thus, the record fails to provide a basis upon which to calculate a monetary award.

DISCUSSION

Here, the substantive issues before the Board are: 1) whether the City's enforcement of the Weekly Cap and/or Monthly Cap concern a mandatory subject of bargaining and if so, 2) whether the City made a unilateral change in its enforcement of the Weekly Cap in violation of the NYCCBL, and 3) whether the City unilaterally implemented a Monthly Cap.[25]

Pursuant to NYCCBL § 12-306(a)(4), it is an improper practice for an 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." The Board has long held that "an employer commits an improper practice when it makes a unilateral change in a mandatory subject of bargaining [and] … a new work rule that involves a mandatory subject of bargaining may constitute such [a] unilateral change." *DC 37*, 6 OCB 2d 14, at 16 (BCB 2013). As a general

[25] Although the City initially raised a timeliness defense with respect to the claims against DOHMH, neither party raised the issue in their closing briefs. Therefore, we address it only briefly. We find that the petition as originally filed encompassed the allegation that the unilateral implementation of a Weekly Cap at DOHMH violated the NYCCBL and therefore, the claim is timely. *See*, *e.g.*, *Local 333*, 6 OCB2d 25, at 13 (BCB 2013); *DEA*, 4 OCB2d 8, at 8 (BCB 2011); *NYSNA*, 51 OCB 37, at 6 (BCB 1993) (holding that pleadings are to be liberally construed.) The claims concerning implementation of the cap at DOHMH that the City asserts are untimely are all factual allegations of additional actions taken by the City "arising out of the cause of action set forth in the original pleadings." *McAllan*, 31 OCB 2, at 16 (BCB 1983). We further note that DOHMH's January 14, 2011 Memo was issued over five months after the initial petition was filed. The Board has no procedural rule that requires facts occurring after the filing of an original improper practice to be pleaded in an amended petition, instead of a reply. Moreover, the Union's Reply and Amended Petition clearly put the City on notice. Finally, the City was not prejudiced because it was afforded a full opportunity to respond to any newly alleged facts in its Answer to the Amended Petition and at the hearing.

matter, hours are considered a mandatory subject of bargaining, while staffing levels and certain aspects of scheduling are matters of managerial prerogative and are not subject to mandatory bargaining. *See UFT*, 3 OCB2d 44, at 8 (citing *DC 37, L.*1457, 1 OCB2d 32, at 26 (BCB 2008)); *LEEBA*, 3 OCB2d 29, at 31-32 (BCB 2010). Specifically, the Board has consistently held that the City "must bargain over the total number of hours employees work per day or per week." *UFT*, 4 OCB2d 54, at 12 (quoting *UFOA*, 1 OCB2d 17, at 10 (BCB 2008)); *see also Local 237, IBT*, 57 OCB 13, at 7 (BCB 1996); *PBA*, 15 OCB 24, at 16-17, 19 (BCB 1975), *affd.*, *Matter of Patrolmen's Benevolent Assn.. v. Bd. of Collective Bargaining*, N.Y.L.J., Jan. 2, 1976, at 6 (Sup. Ct. N.Y. Co.); *PBA*, 15 OCB 5, at 17 (BCB 1975).

The basis for the current claim, changes to the weekly/monthly work hours of Hearing Officers, is similar to the basis of the allegations in three previous cases involving the UFT. All of the claims in these earlier cases concern unilateral changes to the total hours or number of days worked by Hearing Officers. In all of these cases, we have consistently found that prior to 2010, and in some instances 2008, Hearing Officers had flexibility in scheduling their hours and that their hours and days were not limited by a minimum or maximum per day. In the *UFT Minimum Five Hour Day* case, this Board held that the implementation of a requirement that Hearing Officers in the ECB Appeals Unit work a minimum of five hours per day, at least twice per week in any week worked, was a unilateral change during a period of negotiations, in violation of NYCCBL § 12-306(a)(1), (4), and (5). *UFT*, 3 OCB2d 44. The Board denied the petition as to the requirement that Hearing Officers work be performed during certain hours of the day because that requirement is a matter of scheduling, which is not subject to mandatory collective bargaining. *Id*. at 9. In the *UFT Fixed Seven Hour Day* case, the implementation of a requirement that Hearing Officers in the TLC Appeals Unit work in fixed blocks of seven hours a day was a change

to a mandatory subject of bargaining during a period of negotiations. *UFT*, 4 OCB2d 54. In addition, in the *UFT 1,000 Hour Annual Cap* case, the implementation of a 1,000 hour annual cap on hours worked by Hearing Officers employed by more than one tribunal during negotiations for a first collective bargaining agreement was a unilateral change in violation of NYCCBL § 12-306(a)(1), (4), and (5). *UFT*, 4 OCB2d 4. Moreover, this Board has consistently rejected the City's position that *per diem* employees are not entitled to bargain over subjects that would be mandatory subjects for full-time employees, because it is contrary to the NYCCBL, Board decisions, and the New York State Public Employment Relations Board precedents. *Id.*, at 19 (citing *Matter of Doctors Council v. NYCERS*, 127 A.D.2d 380, 382 (1st Dept. 1987), *affd. in part, revd. on other grounds in part* 71 N.Y.2d 669 (1988); *Town of Fishkill*, 39 PERB ¶ 4607 (ALJ 2006)).[26]

Turning to the present case, we find that the City made a unilateral change in hours in violation of NYCCBL § 12-306(a)(4) and (5) when it issued memos commencing on March 26, 2010 noting that, "your employment as a judge/hearing officer at [DOHMH], [ECB] or [TLC] may not exceed 17 hours per week in any two consecutive weeks . . . ." (Amended Pet. Ex. A; Union Exs. 1(a), 1(b), 1(c), 12, 13) It is undisputed that over a long period of time, Hearing Officers at a single agency have been limited to working 1,000 hours a year. Nonetheless, the evidence presented shows that for many years before 2010, the Weekly Cap had not been enforced on Hearing Officers. In fact, six of the seven Hearing Officers testified that the Weekly Cap had

[26] In *Matter of Doctors Council*, the Appellate Division held that both part-time per annum and sessional employees enjoy full collective bargaining rights. 127 A.D.2d at 382. We note that, although the Court of Appeals did not address the Appellate Division's statements regarding bargaining rights, as those statements, like the Court of Appeals' analysis of the right to be included in NYCERS, turn on the fact that such rights are defined inclusively of all "employees" and do not specifically except part-time employees, the Court of Appeals' decision is consistent with our conclusion. 71 N.Y.2d at 674-77.

never been enforced before March 26, 2010. The seventh Hearing Officer was not specifically asked if the Weekly Cap was ever enforced before March 26, 2010. Additionally, at least four Hearing Officers testified and presented pay stubs demonstrating that before the implementation of the Weekly Cap they exceeded 17 hours a week in any two consecutive weeks. The record also supports the finding that at varying times between March 2010 and June 2011 the Weekly Cap was enforced. Testimony and pay stubs show that at least two Hearing Officers, Keefe and Piken, no longer consistently worked more than 17 hours per week in any two consecutive weeks.[27]

Accordingly, we find that the March 26, 2010 letter represented a change to hours, a mandatory subject of bargaining, and violated NYCCBL § 12-306(a)(4). Further, we find that the Weekly Cap changed the *status quo* during a period of contract negotiations in violation of NYCCBL § 12-306(a)(5). *See UFT*, 4 OCB2d 4, at 21; *see also UFT*, 3 OCB2d 44, at 9-10. Thus, this Board holds that the City violated NYCCBL § 12-306(a)(1), (4), and (5), when it failed to bargain before implementing the Weekly Cap.[28]

The City contends that the Weekly Cap was not a change because it has been in the job specification since at least as early as December 9, 1998, and it has always been enforced to some degree. Thus, the City asserts that the Hearing Officers had notice of the Weekly Cap and could not reasonably expect to exceed 17 hours per week in any two consecutive weeks. We are not persuaded by this argument. Although some Hearing Officers may have had knowledge of the language in the job specification and a few administrators may have inconsistently tried to enforce

[27] A third Hearing Officer experienced a reduction in her total annual hours from 2010 to 2011; however, she still often exceeded 17 hours per week in any two consecutive weeks after the implementation of the cap in 2011. A fourth hearing officer only experienced a reduction in his hours during two months in 2011.

[28] It is not clear from the record how consistently and/or continuously the Weekly Cap was enforced. Any remedy the Board orders will fully address the extent to which Hearing Officers suffered a reduction in hours.

restrictions on hours prior to March 26, 2010, no evidence of any efforts to enforce the Weekly Cap was presented.[29] To the contrary, the record demonstrates that at least some Hearing Officers consistently worked more than 17 hours per week in any two consecutive weeks before March 2010. Indeed, the Mayor's Administrative Justice Coordinator testified that although administrators have consistently sought to abide by the Weekly Cap, "[he] can't say that adherence has been meticulous." (Tr. 331-32)

We do not find, however, that the evidence is sufficient to establish that the City unilaterally established or implemented a Monthly Cap, separate and distinct from the Weekly Cap, at all of the agencies. First, the written policies promulgated at all of the agencies, including job specifications, job postings, and memos to Hearing Officers, all specifically note the Weekly Cap and the 1,000 hour annual cap, but make no mention of a Monthly Cap on all Hearing Officers. Second, there is no evidence that a Monthly Cap was either established or implemented at TLC or DOHMH. As for ECB, we find that the statements attributed to two supervisors are insufficient to demonstrate that a Monthly Cap was either established or implemented throughout ECB.[30] The evidence establishes only that statements articulating a Monthly Cap were made to the following three Hearing Officers. With respect to Hearing Officer Pfeiffer, there is no evidence that the alleged Monthly Cap was implemented. With respect to Hearing Officer Piken, the evidence shows that her hours were not restricted in June 2011. Then, from July 2011 through November 2011, her hours per month did not exceed 65.75, akin to the Weekly Cap. With respect

[29] The Board of Certification noted in a 1999 case, *L. 237, IBT*, that, "[p]er session attorneys are limited to 17.5 hours of work each week, or about 1,000 hours each year, at all of the agencies in question here." 64 OCB 1, at 3 (BOC 1999). Nevertheless, the record evidence here demonstrates that the Weekly Cap was not enforced for at least nine years immediately preceding the March 26, 2010 letter.

[30] Neither of the two supervisors testified at the hearing.

to Hearing Officer Kegelman, his hours were only restricted by one day in May 2011 and one day in June 2011, albeit for a total of approximately 80 hours in each of those two months. Moreover, the record shows that at least one ECB Hearing Officer significantly exceeded the alleged Monthly Cap. Accordingly, we find that the record evidence is insufficient to establish the implementation of a separate and distinct Monthly Cap and we dismiss this claim.[31]

Finally, we consider the Union's request for remedial relief. With regard to the Union's request that the affected unit members who have incurred any additional expense or loss of revenue as a result of the unilateral change be made whole, we are not satisfied that the record, as it now stands, is sufficient to fashion a remedy for all affected Hearing Officers. Additionally, we note that there are other cases pending before this Board that may impact the fashioning of a remedy here. In the *UFT 1,000 Hour Annual Cap* case, the *UFT Minimum Five Hour Day* case, and the *UFT Fixed Seven Hour Day* case, a remedy may have been ordered or may be ordered in the future for some Hearing Officers who were also affected by the implementation of the Weekly Cap that would make them fully whole for any reduction in hours.[32]

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[31] In reaching this, we note that the Weekly Cap could limit the Hearing Officers hours worked per month. Nevertheless, the Union's claim regarding a Monthly Cap that is separate and distinct from the Weekly Cap was not established.

[32] Further, there are other factors that may affect whether a remedy is due to individuals affected by the Weekly Cap. For example, annual hours of Hearing Officers working at only one agency would not have exceeded 1,000 hours per year, regardless of the implementation of the Weekly Cap. Additionally, it was not clear from the limited number of payroll records in evidence, whether the Weekly Cap was consistently and continuously implemented after March 2010. As noted earlier, the extent to which Hearing Officers experienced a reduction in hours as a result of the Weekly cap will be fully considered and addressed in considering what remedy, if any, is necessary.

Therefore, we direct the City to rescind its memos restricting the weekly hours worked by Hearing Officers, to bargain in good faith over any change in hours and to post the attached Notice to Employees. The Board retains jurisdiction to determine what remedy, if any, is appropriate to order.

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 United Federation of Teachers, Local 2, docketed as BCB-2878-10, be, and the same hereby is granted as to the unilateral change to weekly hours in violation of NYCCBL § 12-306(a)(1), (4), and (5); and denied as to the unilateral change to monthly hours in violation of NYCCBL § 12-306(a)(1), (4), and (5); and it is further

ORDERED, that the City of New York rescind its memoranda restricting the weekly hours worked by Hearing Officers and bargain with the Union over any changes to the weekly hours worked by Hearing Officers; and it is further

ORDERED, that the parties provide, at the Board's direction, information regarding damages as the Board will retain jurisdiction to determine any remedy at a later date; and it is further

ORDERED, that the City of New York post appropriate notices, including electronically, detailing the above-stated violations of the New York City Collective Bargaining Law for no less than thirty (30) days at all locations the City of New York uses for written communications with Hearing Officers represented by the United Federation of Teachers, Local 2, AFT, AFL-CIO.

Dated: April 3, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GWYNNE A. WILCOX
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 7 OCB2d 12 (BCB 2014), determining an improper practice petition between the United Federation of Teachers, Local 2, AFT, AFL-CIO, and the City of New York.

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, Docket No. BCB-2878-10 be, and the same hereby is granted as to the unilateral change to weekly hours in violation of NYCCBL § 12-306(a)(1), (4), and (5); and denied as to the unilateral change to monthly hours in violation of NYCCBL § 12-306(a)(1), (4), and (5); and it is further

ORDERED, that the City of New York rescind its memoranda restricting the weekly hours worked by Hearing Officers and bargain with the Union over any changes to the weekly hours worked by Hearing Officers; and it is further

ORDERED, that the parties provide, at the Board's direction, information regarding potential remedies, if any; and it is further

ORDERED that the City of New York post appropriate notices, including electronically, detailing the above-stated violations of the New York City Collective Bargaining Law for no less than thirty (30) days at all locations the City of New York uses for written communications with Hearing Officers represented by the United Federation of Teachers, Local 2, AFT, AFL-CIO.

The City of New York
(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.