Municipal Labor Committee, 7 OCB2d 6 (BCB 2014)

(IP) (Docket No. BCB-4020-13)

Summary of Decision*:** The MLC alleged that the City violated NYCCBL § 12-306(a)(4) and (5) by unilaterally changing its policy regarding union members' eligibility to purchase certain medical riders, including prescription drug, private duty nursing, and durable medical equipment coverage. The City argued that it has not made a unilateral change because the MLC has not demonstrated a past practice of allowing union members to purchase optional health plan riders if their respective welfare funds eliminate such coverage, nor does the Summary Program Description constitute such a past practice. Further, the City argued that the MLC has refused its requests to bargain over the mandatory subject of health benefits. The Board found that the City violated NYCCBL § 12-306(a)(4) and (5) by unilaterally precluding union members from purchasing the medical riders at issue. Accordingly, the Board grants the petition in its entirety. ***(Official decision follows)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE NEW YORK CITY MUNICIPAL LABOR COMMITTEE,
on Behalf of its Member Unions,

Petitioner,

-and-

THE CITY OF NEW YORK and
MICHAEL BLOOMBERG, as Mayor of the City of New York[1],

Respondents.

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[1] We dismiss any and all claims asserted against former Mayor Bloomberg, since individuals are not employers within the meaning of § 12-306 of the NYCCBL.

DECISION AND ORDER

On December 2, 2013, the Municipal Labor Committee ("MLC") filed a verified improper practice petition against the City of New York ("City"). The MLC claims that the City violated § 12-306(a)(4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by unilaterally changing the terms of the City's Health Benefits Program's Summary Program Description ("SPD") and refusing to permit union members to purchase certain medical riders, including prescription drug, private duty nursing, and durable medical equipment coverage. The City argues the MLC has not demonstrated the existence of a past practice of allowing union members to purchase optional health plan riders if their respective welfare funds eliminate such coverage, nor does the SPD constitute such a past practice. As such, there has been no unilateral change. Further, the City argues that the MLC has refused its requests to bargain over the mandatory subject of health benefits. This Board finds that the City violated NYCCBL § 12-306(a)(4) and (5) by unilaterally precluding union members from purchasing certain medical riders, including prescription drug, private duty nursing, and durable medical equipment coverage. Accordingly, the Board grants the petition in its entirety.

BACKGROUND

The MLC is an association of certified labor organizations representing City employees. It was established in 1966 pursuant to a memorandum between the City and municipal unions and codified at NYCCBL § 12-303(k). The City, through its Office of Labor Relations ("OLR"), administers the Health Benefits Program ("the Program"),

which provides health insurance benefits for all covered City employees, retirees, and dependents.[2] The MLC and the City have historically negotiated and reached agreements on City-administered health insurance benefits for employees represented by MLC-member unions and for retirees. Such negotiations have included topics such as the design, implementation, and administration of the Program, as well as the availability and content of various optional benefit riders. The parties' most recent agreement, the 2000-2002 Health Benefits Agreement, remains in *status quo* pursuant to NYCCBL § 12-311(d). In addition to the benefits provided by the health plans available under the Program, certain MLC-member unions have established union welfare funds that provide members with a variety of benefits. The City and these individual unions are parties to Supplemental Agreements, which provide for contributions that the City makes to the union welfare funds. The MLC does not negotiate individual supplemental agreements nor does it determine the benefits that are offered by any particular fund.[3]

Health plans under the Program offer supplemental benefits that members can purchase through optional riders, including riders for prescription drugs, private duty nursing, and/or durable medical equipment coverage. If an employee elects to enroll in an optional rider, the employee pays the entire cost of the rider through payroll deductions. In some cases, the benefits provided by union welfare funds overlap with those available through these optional riders. Prior to 1983, union members could purchase any optional riders that were offered by their health plan, regardless of whether

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[2] The City states that various non-City employers, cultural institutions, and charter schools that are City-related also provide health benefits through the Program.

[3] The City avers that in the past the City and MLC have negotiated over the City's contributions to union welfare funds.

the benefits were also provided by their welfare funds. In 1983, the health plans for GHI-CBP/Empire BlueCross BlueShield ("GHI") and HIP Prime HMO ("HIP") were revised and MLC representatives met with the City and agreed to certain changes to the optional rider benefits for these plans. These changes were memorialized in a side letter dated March 3, 1983 ("1983 Agreement"). (*See* Ans., Ex. H) In particular, the parties agreed that optional rider benefits would be unavailable for an employee if that particular benefit was already provided by the employee's union welfare fund. However, the employee could still purchase those optional riders offered by GHI and HIP that did not overlap with benefits the employee already received from their union's welfare fund (hereinafter referred to as a "carve out option").

In 1986, the Program added new health plans in addition to GHI and HIP. These plans all included an optional rider for prescription drugs at an extra cost, however, the MLC and the City did not negotiate for a similar carve out option with regard to these plans.[4] Consequently, employees enrolled in one of these plans are not prevented from purchasing the optional prescription drug rider even if it overlaps with benefits offered by their union's welfare fund. However, according to the City, "OLR nonetheless advised employees who enrolled in one of these new health plans that they should not elect to purchase the optional rider if their union welfare fund already provided prescription drug benefits." (Ans. ¶ 69)

The SPD is promulgated by the City and is given to new employees. It is also available on the City's website. The City describes the SPD as "an explicatory document that describes health plans and the rules, policies, and procedures related to enrollment in

[4] None of these plans offer optional riders for private duty nursing and/or durable medical equipment coverage. GHI and HIP are the only health plans that offer those riders.

and use of health benefits." (Ans. ¶ 77) Further, the City states that it is "predicated upon existing, longstanding agreements," but that it is not a contract itself. (*Id.*) The availability of optional riders, and the procedure by which deductions for these riders are made is set forth in the SPD. This language states, in Section Two, "Enrollment," Subsection G, "Optional Riders":

> All health plans, except DC 37 Med-Team have an Optional Rider consisting of benefits that are not part of the basic plan. You may elect Optional Rider coverage when you enroll and pay for it through payroll or pension deductions. Each rider is a package and you may not select individual benefits from the rider.
>
> Many employees and retirees get additional health benefits through their welfare funds. *If your welfare fund is providing benefits similar to some (or all) of the benefits in your plan's Optional Rider, those specific benefits will be provided only by your welfare fund and will not be available through your health plan rider.* Pension and payroll deductions will be adjusted accordingly.

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(Pet., Ex. 1, p. 7) (emphasis in original). The City avers that the language in the second paragraph above is based on the 1983 Agreement.

A section of the SPD is titled "Changes in Enrollment Status." This section incudes procedures that employees must follow to make changes to their health plans, including the optional riders. It also describes qualifying events and instances when employees may make such changes outside of the annual transfer period. Subsection B of this section is entitled "Change in Plan," and it states:

> Health Benefits Transfer Periods are usually scheduled once each year. During these periods, all employees may transfer from their current health plan to any other plan for which they are eligible, or they may add or drop Optional Rider coverage to their present plan. Retirees may only

> participate in Transfer Periods that occur in even-numbered years.
>
> If you do not apply for an Optional Rider when you first enroll, you may add these additional benefits only during a Transfer Period, upon retirement, *or if there is a change in your union or welfare fund coverage*.

(*Id.*) (emphasis added) Subsection G of this section, entitled "Change of Union or Welfare Fund Membership," provides:

> Title changes that result in a change of union or welfare fund membership may require a change in payroll deductions for any Optional Rider coverage. You must contact your agency benefits representative within 31 days if you have changed union or welfare fund.

(*Id.* at p. 9)

An example of a situation in which employees were able to enroll in optional riders outside of the transfer period occurred in 2009, when a group of active members and retirees from the Marine Engineers' Beneficial Association ("MEBA") were transferred into the Organization of Staff Analysts' ("OSA") Welfare Fund. OSA's Welfare Fund does not cover prescription drug benefits. As such, MEBA members were able to purchase an optional rider for prescription drugs outside of the annual transfer period.[5]

The Patient Protection and Affordable Care Act ("PPACA") was passed on March 23, 2010. Interim regulations gradually raised the annual limits that health plans could impose on the dollar value of its covered health benefits, including prescription drugs. As of January 1, 2014, the PPACA provides that health plans can no longer place any

[5] The Union asserts, and the City denies, that this was done without negotiation. The City asserts that OLR played an active role in searching for a welfare fund for MEBA members to transfer into after District Council 37 notified it that it would no longer accept MEBA members into its welfare fund.

annual limit on these benefits. The MLC asserts that, in light of this upcoming change in the law, each union welfare fund evaluated its ability to continue to provide certain benefits in their current form. Consequently, the boards of trustees for a number of these funds concluded that they could no longer afford to provide prescription coverage or other medical benefits, such as private duty nursing and durable medical equipment coverage. Therefore, some employees were notified that, effective January 1, 2014, they will no longer have these types of coverage through their welfare fund.

At an April 18, 2013 Labor Management Technical Subcommittee on Health meeting between the MLC and OLR, the MLC indicated that some welfare funds might be eliminating prescription drug benefits and it began inquiring about the timing and procedures to be followed for any members who desired coverage under one of the City's optional riders. According to the City, Dorothy Wolfe, Director of the Employee Benefits Program, advised the MLC at this meeting that the technical aspects of changing the enrollment procedures for optional riders were complex and could take up to six months. The MLC reiterated its inquiries during subsequent meetings on May 16 and September 19, and through emails to Wolfe dated April 30, August 1, and August 7, 2013. The MLC claims, and the City denies, that each time the City's response was that it would have to get back to the MLC or that it had no answer.

On October 10, 2013, Harry Nespoli, Chairperson for the MLC, wrote to OLR's then- Commissioner, James Hanley, reiterating that the MLC had been making inquiries regarding the prescription drug and other riders and had not yet received a response. The letter further stated:

> As you know, in the past, upon notice from the union to opt into either of these riders the City informed the insurance

> carrier to place the union members into the rider's coverage and the appropriate payroll/pension deduction from the member was instituted. As long as the member paid, there were no other conditions to be met to place anyone in these riders.
>
> I am requesting a response by Wednesday October 16, 2013, if the City will process requests from the aforementioned unions, or other union(s), to opt into the above riders so that the coverage of the riders will be effective January 1, 2014. If no response is received, the MLC will act as if the City is refusing to comply with the past practice of placing the union members, active and/or retirees, into the aforementioned riders.

(Pet., Ex. 3)

On October 15, 2013, the OLR Commissioner responded and stated, in pertinent part:

> Please be advised that the [City] has not yet reached a determination about how, or if, and under what circumstances, a welfare fund can on a wholesale basis cease to provide such benefits.
>
> Until the disposition of this matter has been fully discussed with the [MLC], the [City] will not take any steps to inform active employees and/or retirees of any option to purchase a drug or other rider, and the affected Unions are expected to continue to provide such coverage as part of the respective welfare fund's benefits.

(Pet., Ex. 4)

The MLC Chairperson and the OLR Commissioner continued to correspond until November 1, 2013. Throughout these communications, the MLC Chairperson sought confirmation that, in accordance with the SPD, union members whose welfare funds were no longer offering prescription drug or other medical coverage could purchase one of the City's optional riders. The MLC Chairperson stated that this process "has been in place for decades." (Pet., Ex. 7) The OLR Commissioner responded that he was "prepared to

meet with the MLC on this mandatory subject of bargaining." (Pet., Ex. 6) The MLC Chairperson replied, stating that "[y]our letter misconstrues the nature of my letter and the underlying legal principles. We are not seeking to change a current practice, which could lead to an obligation to bargain, but to confirm its continuance here." (Pet., Ex. 7)

On November 1, 2013, the OLR Commissioner responded:

> We are confirming that employees who are both (1) enrolled in a health plan other than [GHI] or [HIP] and (2) their union welfare fund provides prescription drugs or private duty nursing/durable medical coverage have the ability to elect the optional rider in the plan that they are enrolled in. Any employee who chooses to transfer into a health plan other than [GHI] or [HIP] during the transfer period can also elect the prescription drug rider in the plan they select. Under no circumstances may these employees select the GHI-CBP or HIP-HMP prescription drug rider or the HIP-HMO private duty nursing/durable medical equipment rider.

(Pet., Ex. 8) Further, the letter stated that the City was prepared to bargain on an expedited basis regarding the optional riders and "what the appropriate reduction in the City's contribution should be to the union welfare funds that have decided to stop offering prescription and private duty nursing/durable medical equipment benefits." [6] (*Id.*) It is undisputed that the MLC did not thereafter bargain with the City over these issues.

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[6] Additionally, representatives from various union welfare funds wrote to the OLR Commissioner or the Director of the Employee Benefits Program informing them that the trustees of the fund had voted to eliminate prescription or private duty nursing and durable medical equipment coverage, and/or requesting that affected members be allowed to opt-in to the applicable riders. *See* Pet., Ex. 9 (I.U.O.E. Local 30 Municipal Employees Welfare Trust Fund); Pet., Ex. 13 (UFOA Family Protection Plan); Pet., Ex. 14 (Civil Service Bar Association Security Benefit Fund); Pet., Ex. 15 (CSA Welfare Fund). The City admits that it did not respond to the inquiries from the UFOA Family Protection Plan, or the Civil Service Bar Association Security Benefit Fund.

The MLC asserts that approximately 300 members and dependents of I.U.O.E. Local 30 ("Local 30"), who were to lose their prescription coverage through the welfare fund on January 1, 2014, were denied the ability to purchase optional riders during the open transfer period in Fall 2013. It submitted affidavits of four current Local 30 members who all stated that they were told they could not purchase prescription drug riders. (*See* Pet., Ex. 11) The MLC also submitted an affidavit of a retired Local 30 member who stated that OLR did not provide him with an answer regarding purchasing the rider and instead directed him to speak to Local 30. (*See id.*) In their affidavits, the Local 30 members spoke about their specific need for prescription drug coverage for themselves and their family members.[7]

The City submitted as evidence an affidavit from Lisa Polk, Director of the Health Benefits Program. In it she stated that the language in the SPD which provides that an employee may apply for an optional rider "if there is a change in your union or welfare fund coverage" refers to "changes in [union welfare fund] eligibility due to title or title level changes, e.g. promotion or appointment to a title covered by a different welfare fund; changes in representation of a given title; or a change in welfare fund

[7] Contemporaneously with the instant petition, the MLC filed a petition for injunctive relief pursuant to § 209-a(5) of the New York State Civil Service Law ("CSL"). On December 19, 2013, pursuant to CSL §209-a(5) and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Ch. 1) ("OCB Rules"), a majority of the Board authorized the MLC to file an application for injunctive relief in the Supreme Court, New York County. On December 30, 2013, the MLC filed an application for a temporary restraining order and a preliminary injunction pursuant to the Board's authorization. *Matter of Nespoli v. City of New York*, Index No. 161922/2013. On December 31, 2013, when the parties appeared for oral argument on the application, a settlement was reached and placed on the record before the Court, under which the *status quo* was effectively preserved until the Board issued a decision in the instant matter, which was agreed to be 60 days from January 2, 2014, that is, by March 3, 2014.

administration." (Ans., Ex. A ¶ 21) Polk further stated that, based on her understanding of the SPD, "this language is not intended to refer to the elimination of benefits provided by a particular [welfare fund]." (*Id.*)

POSITIONS OF THE PARTIES

MLC's Position

The MLC asserts that the City has violated NYCCBL § 12-306(a)(4) by unilaterally changing the terms of the SPD, which it argues memorializes a past practice that has existed for thirty years, without negotiating or reaching an agreement with the MLC. It contends that the City has also violated NYCCBL § 12-306(a)(5) because it unilaterally changed its policy regarding the availability of a health insurance benefit, a mandatory term and condition of employment, during a *status quo* period following the expiration of the various parties' collective bargaining agreements and supplemental agreements.

The MLC asserts that the SPD is a City-created document setting forth the policy regarding eligibility for various health benefits, including optional riders. Further, the language of the SPD is consistent with, and appears to be based upon, the 1983 Agreement. It clearly memorializes the eligibility criteria for the optional riders and states that "[o]nly '**[i]f** your welfare fund **is** providing benefits to some (or all) of the benefits'" [an employee wishes] to purchase, will an employee be limited in what optional benefits may be selected." (Rep. ¶ 68) (emphasis in Rep.) Additionally, the Union argues that although the City attempts to dismiss the SPD as non-binding, it also admits that it is predicated upon binding longstanding agreements. Therefore, the MLC

argues that it does not matter whether the SPD is an enforceable contract itself, because the terms within it remain binding.

The MLC argues that to construe the language, "*if there is a change in your union or welfare coverage*" to refer only to changes in title certification or level changes within a particular title, is contrary to the plain meaning of the SPD. The language at issue is written in the disjunctive. Nothing in this language refers to promotions, new appointments, or changes in representation. Instead, those situations would all fall into the first portion of the language referring to a change in union. Further, the "Changes in Enrollment Status" section contains Subsection G entitled "Change of Union or Welfare Fund" which specifically addresses "[t]itle changes that result in a change of union or welfare fund membership." (Rep., Ex. A1, p. 9) Subsections B and G cannot be construed to have the same meaning. Longstanding principles of contract interpretation provide that all provisions of contracts must be given full meaning. Therefore, plainly the "Change in Plan" subsection has a meaning separate from the "Change of Union or Welfare Fund" subsection.

The MLC asserts that the *status quo* was that employees and retirees could apply for optional riders if there was a change in union or welfare fund coverage. The City has made a change to this *status quo* by not permitting employees to apply for the optional riders even though their welfare funds have eliminated certain coverage. The Union contends that the City cannot change the eligibility requirements for enrollment in optional riders without bargaining with the MLC. Further, the City's argument that the MLC has an obligation to bargain over the actions of individual welfare funds is incorrect. The MLC asserts that its ability to bargain on behalf of individual member

unions is circumscribed by its members' authorization and consistent with the separate roles of the MLC and the individual fund trustees. Consequently, the fact that the City may have a right to seek to renegotiate its supplemental agreements with certain individual unions does not license it to make unilateral changes to the *status quo* in the interim.

As a remedy, the MLC asks that the Board order the City to permit union members whose union or welfare fund coverage has changed to purchase optional health plan riders through the Program; make petitioners whole for any and all damages; order that a Notice of the decision in the instant matter be signed and posted at City facilities; and order any other appropriate remedies.

City's Position

The City argues that the MLC has not alleged facts sufficient to demonstrate that the City violated NYCCBL § 12-306(a)(4) because there has been no change in past practice on the City's part. The City argues that the MLC is misinterpreting the SPD and that there has been no past practice that is "unequivocal and continued uninterrupted" of allowing employees to purchase optional health plan riders if their respective welfare funds eliminate such coverage. (Ans. ¶ 135) It asserts that the language of the SPD mirrors the 1983 Agreement, but does not mean that employees can enroll in optional riders because their respective welfare fund unilaterally eliminated some or all of the health benefits previously provided.

Rather, the City contends that the language "change in your union or welfare fund coverage" refers to changes in title certification or level changes within a particular title. Changes contemplated by the parties included promotion or appointment to a title

covered by a different welfare fund, changes in representation of a given title, or a change in welfare fund administration. The City avers that the language of Subsection G supports this argument. The City points to the situation in which MEBA members were placed into OSA's welfare fund as an example of such a change. Because OSA's welfare fund does not provide prescription drug coverage, these members were permitted to enroll in optional prescription riders. The City asserts that, in any event, the SPD is not a binding, enforceable contract, as it was not bargained over with any unions or signed by the City and the MLC. Rather, it is an informational guideline developed by the City to help employees understand their benefits.

The City further argues that it is the MLC and the welfare funds that seek to unilaterally change the *status quo* by altering the City's policies and procedures for enrollment in optional riders available to employees. While the City seeks to continue health care benefits in the same form and manner, the MLC and certain member unions have unilaterally modified health benefits by ceasing coverage for prescription drug, durable medical equipment, and private duty nursing benefits, which are not benefits that the City had provided for these employees. The City asserts that because these are mandatory subjects of bargaining, the MLC had a duty to bargain with it over these changes. Here, the unions and the MLC are clearly involved in the creation, implementation, and administration of welfare funds and health benefits. The fact that the unions' welfare funds and the MLC seek these changes because of mandates brought on by the PPACA does not obviate the need to bargain over how this change affects the availability of health benefits and optional riders. Yet, the City contends that the MLC has refused its requests to bargain.

With regard to the MLC's NYCCBL § 12-306(a)(5) claim, the City argues that there has been no change to any provisions of the Health Benefits Agreement between the parties. The City has not sought to change any terms of the SPD, and, in any event, the SPD is not a collective bargaining agreement. Further, as argued above, it is the MLC, and not the City, that seeks to unilaterally change the *status quo*.

DISCUSSION

The MLC claims that the City has made a unilateral change with regard to the availability of health benefits, a term and condition of employment, without bargaining and in violation of NYCCBL § 12-306(a)(4) and (5). NYCCBL § 12-306(a)(4) makes it 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." Thus, NYCCBL § 12-306(c) requires that public employers and employee organizations "bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009). The Board has long held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012). In order to establish that a unilateral change has occurred in violation of the NYCCBL, a union "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37,*

L. 436, 4 OCB2d 31, at 13 (BCB 2011) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)) (internal quotation marks omitted).

The parties do not dispute that the availability of optional riders involves health benefits, which are a mandatory subject of bargaining. Section 12-307(a) of the NYCCBL explicitly provides that "the duty to bargain in good faith on wages includ[es] but is not limited to… health and welfare benefits." Consistent with that provision, the Board has long recognized that health insurance benefits are an economic benefit that is a mandatory subject of bargaining. *See Local 621, SEIU*, 51 OCB 34, at 12 (BCB 1993); *LEEBA*, 3 OCB2d 29, at 41 (BCB 2010) (citing cases). Indeed, the MLC has bargained with the City, on behalf of its member unions, on the subject of health insurance for municipal employees for over three decades. *See MLC*, 4 OCB2d 51, at 2 (BCB 2011) ("The MLC has historically negotiated on behalf of municipal unions and entered into agreements with the City concerning health insurance benefits for all City employees covered by the New York City Employees Health Benefits Program."); *LEEBA*, 3 OCB2d 29, at 41; *PBA*, 79 OCB 6, at 9-10 (BCB 2007). Because this dispute undeniably involves a mandatory subject of bargaining, our inquiry focuses on whether a change has been made regarding the availability of optional riders.

The City admits that the SPD is a written document that "describes health plans and the rules, policies, and procedures related to enrollment in and use of health benefits." (Ans. ¶ 77) It provides the SPD to employees to rely upon in making decisions regarding coverage. Additionally, the City affirmatively relies upon the SPD's language to support its claim that it has not made a unilateral change to the availability of health benefits. Thus, we find that the SPD is evidence of the City's policies, practices,

and procedures regarding health benefits. *See CEU, L. 237,* 5 OCB2d 10, at 10 (BCB 2012) (quoting *New York City District Council of Carpenters, UBCJA*, 3 OCB2d 9, at 11 (BCB 2010)) (finding that an employee handbook was a written rule or policy of DOT as it was "'addressed generally to the [agency] and [ ] set forth a general policy applicable to affected employees'"); *see also Local 3, IBEW*, 45 OCB 59, at 11-12 (BCB 1990); *SSEU*, 77 OCB 5 (BCB 2006); *CEU, L. 237*, 77 OCB 27 (BCB 2006). Consequently, we examine the language of the SPD to determine whether the City has made a change to its existing policy regarding the availability of health benefits.

The City argues that the SPD does not provide that employees may purchase optional riders if their welfare fund eliminates some or all of the health benefits previously provided. On the other hand, the MLC argues that the SPD's plain language is clear and based on the 1983 Agreement. Indeed, the record reflects that the parties made an agreement in 1983 regarding the revised GHI and HIP plans which stated that "[t]he construction of the new riders provide for exclusions of specific rider benefits if similar benefits are provided through welfare funds." (Rep., Ex. H, p. 2 at (4)). Consistent with this Agreement, Subsection G of the "Enrollment" Section, titled "Optional Riders," provides that "*[i]f your welfare fund is providing benefits similar to some (or all) of the benefits in your plans' Optional Rider, those specific benefits will be provided only by your welfare fund and will not be available through your health plan rider.*" (Pet., Ex. 1, p. 7) (emphasis in original). Based on these two provisions, it follows that the converse must be true- that if an employee's union welfare fund is not providing benefits similar to those offered in the health plan's optional rider, those specific benefits will be available to the employee through the health plan's rider. In

fact, the City does not dispute that employees may purchase the optional riders in such circumstances.

Additionally, we do not find evidence that the "Optional Riders" subsection of the SPD was predicated upon any agreement or understanding that the union welfare funds could not change their coverage. There is no language in either the 1983 Agreement or elsewhere in the SPD that limits individual union welfare plans' ability to eliminate certain benefits. Rather, we find that the SPD specifically provides that employees will be able to purchase optional riders if their union welfare plan changes its coverage.

The pertinent language of the SPD which covers this situation is found in Subsection B of the "Changes in Enrollment Status" Section, and is titled "Change of Plan." (Pet., Ex. 1, p. 8) This provision explicitly provides that members may enroll in an optional rider outside of the open enrollment period, "if there is a change in your union or welfare fund coverage." (*Id.*)

For the reasons discussed below, we accord the language its plain meaning. *See Matter of Warner v. Board of Educ.*, 108 A.D.3d 835, 836-837 (3d Dept. 2013). First, we note that the pertinent language of Subsection B is written in the disjunctive. It describes two mutually exclusive actions which will both allow the employee to enroll in an optional rider: either an event occurs which causes the employee to be placed in a different union (perhaps through a change in title certification or a level change within a particular title, as argued by the City); or there is a change in the employee's welfare fund coverage. To find that the language "change in union or welfare fund coverage" does not refer to a situation in which a welfare fund changes its coverage would require us to ignore the plain language of the SPD.

Additional evidence that Subsection B refers to two separate qualifying events is demonstrated by the situation in which MEBA members transferred into OSA's welfare fund and were allowed to purchase optional riders outside of the annual transfer period. Their union membership did not change, (they remained MEBA members), and so the situation did not fall into the first category. However, the members' welfare fund changed, resulting in a change to the members' level of coverage, thus falling into the second category of qualifying events.[8]

Second, if we were to accept the City's argument that the Subsection B language "change in union or welfare fund coverage" does not refer to a situation in which a union changes its welfare fund coverage, we would be inserting words into that provision that the City did not choose to articulate itself. We have declined to do so when examining an agency's policy in the past. *See CEU, L. 237, IBT*, 77 OCB 27, at 16 (BCB 2006); *CSBA, L. 237, IBT*, 75 OCB 5, at 13 (BCB 2005). Instead, we choose to adhere to the "well-established rule of interpretation that a finder of fact and law must not 'under the guise of judicial construction, imply additional requirements to relieve a party from asserted disadvantages flowing from the terms actually used.'" *CEU, L. 237, IBT*, 77 OCB 27, at 16 (quoting *Collard v. Incorporated Village of Floral Hill*, 52 N.Y.2d 594, 604 (1981));

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[8] We are also not persuaded that Subsection G of the "Changes in Enrollment Status" section supports the City's urged interpretation of Subsection B. Subsection G, entitled "Change of Union or Welfare Fund Membership," refers only to title changes and not to other qualifying events that the City concedes are covered under the language of Subsection B. Thus, adopting the City's interpretation requires us to not only assume that the language in Subsection (B) does not bear its plain meaning, but would also "inappropriately transform the language . . . into mere surplusage[,]" as duplicative of Subsection (G). *See Matter of LaSonde v. Seabrook*, 89 A.D.3d 132, 138 (1st Dept. 2011) (citing *Duane Reade, Inc. v Cardtronics, LP*, 54 A.D.3d 137, 140, 143 (2008) ("a contract should be construed so as to give full meaning and effect to all of its provisions")).

see also Babbit v. Sweet Home Chapter, Communities for Great Ore., 515 U.S. 687, 698 (1995); *Civil Service Employees Ass'n v. Patchogue-Medford Sch. Dist.*, 2 A.D.3d 848, 849 (2d Dept. 2003).[9]

Finally, we are not persuaded by the City's defense to the MLC's petition that it is the MLC and the individual unions that have made an improper unilateral change by eliminating certain welfare fund benefits without first bargaining. It is undisputed that the MLC does not determine specific benefits that are offered by individual funds, nor does it negotiate supplemental agreements that are made between the individual unions and the City. Further, the individual unions are not parties to this proceeding. To the extent that the City claims the individual unions have failed to bargain in good faith, its recourse is to file an improper practice petition against those unions.[10] Nonetheless, the existence of any claims against those unions does not relieve the City of its duty to refrain from making unilateral changes with regard to the availability of health benefits prior to the completion of bargaining.

For the reasons set forth above, we find that the City unilaterally changed a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(4). Further,

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[9] We also find that there is no evidence of a past practice that contradicts the plain meaning of the SPD. In order to establish a past practice "it must be proven that the practice was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged." *Local 621, SEIU*, 2 OCB2d 27, at 10 (BCB 2009) (quoting *County of Nassau*, 38 PERB ¶ 3005 (2005)) (citing *County of Nassau*, 37 PERB ¶ 3014 (2004)). Here, neither party provided an example of a past situation in which a union welfare fund changed its prescription drug, private duty nursing, or durable medical equipment coverage. Thus, the language of the SPD remains applicable as evidence of the City's relevant policies, practices, and procedures.

[10] We express no opinion as to whether the individual unions made an improper unilateral change by eliminating certain welfare fund benefits without first bargaining with the City.

because this change altered the *status quo* during a period of contract negotiations, it also violated NYCCBL § 12-306(a)(5).[11]

[11] In is immaterial that the unilateral change to the employees' ability to purchase optional health benefit riders does not relate to the parties' Health Benefits Agreement. "Establishing a violation of NYCCBL § 12-306(a)(5) requires only that the change to a mandatory subject of bargaining be made during a period of negotiations." *UFT,* 3 OCB2d 44, at 10 (BCB 2010) (quoting *USCA*, 67 OCB 32, at 7 (BCB 2001)) (internal quotation marks omitted).

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 Municipal Labor Committee, docketed as BCB-4020-13, be, and the same hereby is, granted; and it is further

ORDERED, that the City of New York cease and desist from unilaterally changing its policy regarding union members' eligibility to purchase certain medical riders, including prescription drug, private duty nursing, and durable medical equipment coverage; and it is further

ORDERED, that the City of New York permit union members whose welfare fund has eliminated certain benefits to purchase the optional medical riders corresponding with those benefits; and it is further

ORDERED, that the City of New York make whole any union member adversely affected by its unilateral change for any losses or costs incurred, if any; and it is further

ORDERED, that the City of New York post notices reflecting the Board's determination in this matter in the same manner and extent normally utilized to notify employees regarding health care benefits.

Dated: February 24, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

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

We hereby notify:

That the Board of Collective Bargaining has issued 7 OCB2d 6 (BCB 2014), determining an improper practice petition between the Municipal Labor Committee 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 filed by the Municipal Labor Committee, docketed as BCB-4020-13, be, and the same hereby is, granted; and it is further

ORDERED, that the City of New York cease and desist from unilaterally changing its policy regarding union members' eligibility to purchase certain medical riders, including prescription drug, private duty nursing, and durable medical equipment coverage; and it is further

ORDERED, that the City of New York permit union members whose welfare fund has eliminated certain benefits to purchase the optional medical riders corresponding with those benefits; and it is further

ORDERED, that the City of New York make whole any union member adversely affected by its unilateral change for any losses or costs incurred, if any; and it is further

ORDERED that the City post this Notice for no less than thirty (30) days in the same manner and extent normally utilized to notify employees regarding health care benefits.

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.