L. 2507 & L. 3621, DC 37 v. City & FDNY, 71 OCB 12 (BCB 2003) [Decision No. B-12-2003 (IP)]

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

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and its affiliates LOCAL 2507 and LOCAL 3621,

Petitioners,

Decision No. B-12-2003
Docket No. BCB-2251-01

-and-

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

Respondents.
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DECISION AND ORDER

On November 15, 2001, District Council 37, AFSCME, on behalf of Locals 2507 and 3621 ("Union"), filed a verified improper practice petition against the City of New York and the Fire Department of New York ("City"or "FDNY"). The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), the City refused to bargain over the issue of free parking for Battalion 8 employees at Bellevue Hospital ("Bellevue"). The Union also alleges that the City failed to provide the Union with copies of plans for the new parking area. The City argues that it had no duty to bargain over the issue of free parking because the parking was provided by Bellevue Hospital, which is owned and controlled by Health and Hospitals Corporation ("HHC"), an independent public benefit corporation, and the City has no control over the management and

operation of HHC's property. In addition, the City asserts that Section 3 of the parties' Memorandum of Economic Agreement ("MEA") precludes mid-term bargaining on economic subjects.

Because the parties'collective bargaining agreement contains a waiver of additional economic demands during the term of the agreement, this Board does not find a violation of NYCCBL § 12-306(a)(4) for the City's failure to bargain over free parking. Furthermore, because it was HHC, a separate and distinct entity from the City, which rescinded the free parking, the City did not violate NYCCBL § 12-306(a)(4) or (5). However, we do find that the City's failure to provide the Union with copies of construction plans for the parking area of the new facility to be a violation of NYCCBL § 12-306(c)(4), and we grant that portion of the Union's petition.

BACKGROUND

On March 17, 1996, the City's Emergency Medical Service ("EMS") was functionally transferred from HHC to FDNY. EMS employees are assigned to work at various Battalions; those employees assigned to Battalion 8 report to work at Bellevue. Before the transfer in 1996, HHC, which owns a parking garage located on Bellevue's campus, set aside approximately 20 parking spaces for EMS employees to park their personal vehicles. After the transfer, HHC continued to make those parking spaces available to EMS employees.

In conjunction with other public authorities and agencies, HHC planned the construction of a DNA lab for the Office of the Chief Medical Examiner, to be built by the New York State Dormitory Authority. On March 18, 2001, FDNY officials informed EMS employees that the

plan required that the on-site parking garage at Bellevue be demolished at the end of September 2001. Construction of the new lab began shortly thereafter and currently continues. During the construction, Battalion 8 EMS employees are reporting to temporary modular units located on Bellevue's campus.

At a Labor-Management meeting held on August 17, 2001, FDNY advised the Union that HHC would not make parking available during the construction phase of the new DNA lab. Furthermore, FDNY stated that it did not know whether HHC would provide parking for employee vehicles once the new lab was built. At the meeting, the Union requested that FDNY provide it with HHC's preliminary plans for the parking area of the new lab. On August 20, 2001, the Union sent a letter to FDNY's Director of Labor Relations stating that the Union "believes that the Fire Department has a contractual obligation to continue the free parking." The letter suggested that FDNY negotiate with either the Bellevue Hospital representatives or neighborhood parking lot vendors to secure approximately 20 parking spaces, provide shuttle service for employees, or reimburse employees for parking costs. The Union again requested copies of plans for the parking area of the new facility. The Union did not receive the information requested.

On November 15, 2001, the Union filed the instant petition. Thereafter, the parties attempted to settle the matter but were unsuccessful. On February 12, 2002, HHC and the NYS Dormitory Authority informed FDNY employees that they would not provide parking at the new DNA lab. The Union filed its reply on April 25, 2002.

The Union requests that FDNY: (1) bargain over the issue of free parking for Battalion 8 employees; (2) provide the Union with copies of construction plans for the new parking area; (3)

reimburse Battalion 8 employees for out-of-pocket parking and transportation expenses incurred since the elimination of free parking at Bellevue; and (4) post a notice at Bellevue that it will not unlawfully refuse to bargain with the Union over free parking for EMS employees at Battalion 8 working at Bellevue.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that EMS employees working at Bellevue enjoyed free parking as a term and condition of their employment for many years both before and after the functional transfer of EMS to FDNY. The City's refusal to bargain over free parking or possible alternatives (i.e., a shuttle bus, reimbursement for private parking, authorization for on-street parking, or utilizing another parking lot vendor) constitutes a violation of NYCCBL § 12-306(a)(1) and (4). Furthermore, by unilaterally changing a mandatory subject of bargaining or a term or condition of employment during a period of contract negotiations, the City violated NYCCBL § 12-306(a)(1) and (5).[1]

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[1] NYCCBL § 12-306(a) provides:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(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.
* * *
§ 12-305 provides in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations

The Union also asserts that in response to its requests on August 17 and 20, 2001, the City failed to provide copies of construction plans for the new parking area in violation of NYCCBL § 12-306(c)(4).[2] These requests for information show that it did not waive the right to obtain information or bargain over the subject. Moreover, the City never raised the issue of confidentiality as a basis for withholding the plans, and, even if the City had, the Union merely wanted information concerning the construction of the parking area for the new facility.

Finally, the Union claims that the elimination of free parking at Bellevue has had an adverse impact on employee safety because they are forced to travel to and from their cars parked off Bellevue's campus during odd hours, "increasing the likelihood of being victimized by random criminal acts or accidents."

City's Position

The City argues that it has no duty to bargain over the loss of free parking provided by an independent third party. The City asserts that Section 3 of the MEA precludes mid-term bargaining on economic subjects. Since free parking is an economic subject, the City is not obligated to bargain mid-term and has not committed an improper practice in violation of NYCCBL § 12-306(a)(4). Moreover, by failing to raise the issue during the current round of

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of their own choosing and shall have the right to refrain from any or all of such activities. . . .

[2] NYCCBL § 12-306(c) provides:
The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

* * *

(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining. . . .

bargaining, the Union waived its right to bargain over the subject.

The City also contends that Bellevue Hospital is owned and controlled by HHC, an independent public benefit corporation, and the City has no control over the management and operation of HHC's property. Since it was HHC, and not the City, which decided to eliminate free parking, the Union has also failed to prove a violation of NYCCBL § 12-306(a)(5).

According to the City, free parking is a mandatory subject only when the nature of the employees' work necessitates the use of an automobile. Here, the EMS workers at Bellevue drive City ambulances, rather than their own personal vehicle, to perform their assigned duties.

The City acknowledges that the Union has the right to request information "reasonably available and necessary for a full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." Without elaboration, the City claims that it is concerned about divulging confidential information.

Finally, the Union's allegation of safety impact must be dismissed because the Union improperly filed an improper practice petition rather than a scope of bargaining petition and failed to provide any factual support to prove this claim.

DISCUSSION

This case presents four issues: first, whether on-site free parking is a mandatory subject of bargaining, and, if so, whether the City made a unilateral change in that subject in violation of § 12-306(a)(4) and (5); second, if free parking is a mandatory subject of bargaining, whether by the terms of the collective bargaining agreement, the Union waived its right to bargain mid-term; third, whether the elimination of free parking at Bellevue has resulted in a safety impact; and

finally, whether the City was required to provide the Union with the requested construction plans for the proposed parking area of the new facility.

It is an improper practice under NYCCBL § 12-306(a)(4) 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." Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *Social Service Employees Union, Local 371, AFSCME*, Decision No. B-22-2002 at 7. Petitioner must show that the matter to be negotiated is a mandatory subject of bargaining. *Doctors Council*, Decision No. B-21-2001 at 7.

This Board has held, in both of our past cases, that the issue of free parking is a mandatory subject of bargaining. Those cases involved employees who needed a car to perform work. In *Social Services Employees Union*, Decision No. B-11-68, the Union requested bargaining over free parking facilities for employees whose services required the use of a car. We determined that because the Union's request was within the scope of bargaining and that the parties' contract explicitly stated that the employer would provide parking for employees, it was a mandatory subject of bargaining. In *Committee of Interns and Residents*, Decision No. B-11-92, we stated that free parking is a term and condition of employment and, as such, is a mandatory subject of bargaining. We are now presented with a situation in which the employees are not required to use their personal vehicles to assist in performing their duties. We determine that even under these circumstances, the City has a duty to bargain over free parking as a term and condition of employment.

Our cases conform with those of PERB, which has consistently held that free parking is a mandatory subject of bargaining. In *County of Nassau,* 14 PERB ¶ 3083 (1981), *aff'd*, *sub. nom*. *County of Nassau v. PERB and Civil Service Employees Ass'n*, 15 PERB ¶ 7002, (Nassau Co. S. Ct.), *aff'd,* 90 A.D.2d 693, 455 N.Y.S.2d 307 (2d Dep't), *appeal denied*, 58 N.Y.2d 603, 459 N.Y.S.2d 1026 (1982), the employer leased space in a privately owned building. The lease provided for 20 free parking spaces on premises which the employer distributed to the most senior employees. The lessor made additional free parking available to the remaining employees at a nearby garage which it owned. When the Department relocated, neither the Department nor the new lessor made arrangements for the employees in question. PERB determined that the parties were required to negotiate over free parking, a mandatory subject of bargaining, because the subject was not covered by the collective bargaining agreement and there was no explicit waiver of mid-term bargaining. *See also New York City Transit Authority*, 24 PERB § 3013 (1991) (employer required to bargain over change to free-parking permit for employees); *City of Lackawanna*, 15 PERB ¶ 4522 (1982) (employer required to negotiate availability of free parking prior to abandoning longstanding practice of providing such benefit); *State of New York*, 6 PERB ¶ 3005 (1973) (availability of free parking is a term and condition of employment which cannot be changed without bargaining).

Having found that free parking is a mandatory subject of bargaining, we now determine whether the City made a unilateral change in a mandatory subject and refused to negotiate in violation of NYCCBL § 12-306(a)(4) and (5). In PERB's *County of Nassau*, 14 PERB ¶ 3083 (1981), the Board affirmed the ALJ's finding that since it was not the Department, but a landlord that arranged for free parking for certain employees before the move, the Department could not

be found to have made a unilateral change in a mandatory subject of bargaining. Here, it is undisputed that HHC, which is a public benefit corporation, is an independent entity from the City. *See* McKinney's Unconsolidated Laws § 7384. HHC, which is no longer the employer, made the change resulting in the loss of free parking. Therefore, the City cannot be found to have unilaterally changed a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1), (4) or (5). Just as in *County of Nassau,* 14 PERB ¶ 3083 (1981), an employer cannot be held responsible when a benefit which it did not provide is changed by a third party. *See also City of New York,* 9 PERB ¶ 3076 (1976) (employer is not required to negotiate over termination of free transportation privileges provided by a separate entity).

As to the second issue, we acknowledge that ordinarily, since free parking is a mandatory subject, the loss occasioned by HHC's action might have justified a Union demand for mid-term bargaining over this subject with the City. *See* NYCCBL § 12-311(a)(3).[3] Here, we find that a contractual waiver bars such mid-term bargaining.

In *County of Nassau*, there was a similar loss of free parking provided by a third party. PERB concluded that because the subject of free parking was not covered by the collective bargaining agreement and there was no explicit waiver, the employer was required to engage in mid-term bargaining. In this case, as the City asserts in its answer, Section 3 of the Union's

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[3] NYCCBL § 12-311(a)(3) provides:
Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreements arose and (b) there shall have arisen a significant change in circumstances with respect to such matter which could not reasonably have been anticipated by both parties at the time of the execution of such agreement.

MEA, "Prohibition of Further Economic Demands" precludes mid-term bargaining on economic subjects. The contract states:

> Section 3. Prohibition of Further Economic Demands
>
> No party to this agreement shall make additional economic demands during the term of the 2000 DC 37 MEA or during the negotiations for the applicable Successor Separate Unit Agreement, except as provided in Sections 4(d) [General Wage Increases] and 6 [Additional Compensation Funds]. Any disputes hereunder shall be promptly submitted and resolved.

In *United Probation Officers Ass'n*, Decision No. B-38-89 at 26, we explained that a union waives its right to bargain when ". . . it can be said from an evaluation of the prior negotiations that the matter was fully discussed or consciously explored and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter," *citing District Council 37, AFSCME*, Decision No. B-21-75 at 21, *aff'd sub nom. City of New York v. Board of Collective Bargaining*, No. 41993 (S.Ct.N.Y.Co. Mar. 18, 1976). Here, the language of the parties' contract provision states clearly, on its face, that neither party "shall make additional economic demands" mid-term. Because explicit waiver language was incorporated into the parties' agreement, we conclude that the Union has waived its right to bargain mid-term over an additional economic demand for free parking at Bellevue.

Concerning the third issue, we dismiss the Union's claim that the elimination of free parking at Bellevue has resulted in a safety impact. The essence of the Union's claim is that walking on the street increases the likelihood of "being victimized by random criminal acts or accidents." We find this claim to be speculative and unsupported by allegations of probative fact. *Patrolman's Benevolent Ass'n*, Decision No. B-12-99, *aff'd, sub.nom. Savage v. DeCosta*,

No. 120860 (S.Ct. N.Y.Co. January 13, 1999).

Finally, we do find that the City must provide the Union with the requested construction plans for the proposed parking area of the new facility since parking is a mandatory subject of bargaining. The City's failure to do so is a violation of NYCCBL § 12-306(c)(4). *District Council 37*, Decision No. B-20-2002 at 7-8. The City has not explained how the information withheld is confidential. Nor does the City dispute that it is in possession of the information, that the Union requested this information on two separate occasions, and that the information was never produced. We find that the construction plans for the parking area of the new facility were reasonably available to the City and are necessary for the Union's negotiation on a subject within the scope of collective bargaining.

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 District Council 37, AFSME, AFL-CIO, and its affiliated Locals 2507 and 3621, be, and the same hereby is, denied as to the claimed violations of refusal to bargain and unilateral change under § 12-306(a)(1), (4), and (5); and it is further

ORDERED, that the improper practice petition filed by District Council 37, AFSME, AFL-CIO, and its affiliated Locals 2507 and 3621, be, and the same hereby is, granted as to the claimed violation of providing construction plans for the parking area of the new facility under § 12-306(c)(4); and it is further

DIRECTED, that the FDNY provide the Union with a copy of plans for the new parking

area.

Dated: February 26, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent. GABRIELLE SEMEL
MEMBER

Decision No. B-12-2003

DISSENTING OPINION

I agree in part and dissent in part. I agree that the issue of free parking is a mandatory subject of bargaining and I agree that the City must provide the Union with the construction plans for the parking area of the new facility. I disagree, however, with the majority regarding the City's obligation to bargain with the Union over the elimination of free parking. Battalion 8 employees at Bellevue Hospital have enjoyed the benefit of free parking since the middle nineties at least. When EMS was functionally transferred from HHC to FDNY, the free parking benefit continued unabated. The majority holds that the City was *not* obligated to bargain with the Union regarding the loss of free parking *because* HHC (an entity independent of the City and no longer the employer) provided the free parking benefit.

In reaching its decision, the majority relies on two cases both of which I believe are distinguishable. In *County of Nassau, 14 PERB ¶ 3083 (1981),* the employer was not obligated to bargain over the elimination of a free parking benefit because the benefit had been provided by the prior landlord and not the employer. In *City of New York,* 9 PERB ¶ 3076 (1976), the employer was not required to bargain over the termination of free transportation privileges provided by a separate entity. Significantly, and I believe critical to a determination. in this case, in both *County of Nassau* and *City of New York*, the provider of the benefit was not the former employer of the employees losing the benefit.

In the instant matter, HHC was the former employer of the Battalion 8 employees.

When those employees were functionally transferred to FDNY, the contract and other terms and conditions of employment, including free parking, went with them. Based on the papers before us, we do not know enough about the relationship between these two employers and what, if anything, had been agreed to as part of the transfer regarding the provisioning of free parking. I would send this matter back for further development of the record through either the submission of affidavits or a hearing.

Further, the majority holds that the City is not obligated to bargain with the Union mid-term regarding the elimination or free parking because the contract prohibits either party from making "additional economic demands." As not all the demands put forward by the Union regarding the loss of the free parking benefit were economic in nature, at a minimum I would require the City to bargain with the Union regarding the effects of the loss of free parking and the Union's other related non-economic demands.

GABRIELLE SEMEL
MEMBER