DC37 v. City & Finance, 75 OCB 10 (BCB 2005) [Decision No. B-10-05, (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,

Petitioner,

Decision No. B-10-2005
Docket No. BCB-2443-04

-and-

CITY OF NEW YORK AND NEW YORK CITY DEPARTMENT OF FINANCE,

Respondents.

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DECISION AND ORDER

On November 12, 2004, District Council 37, AFSCME ("Union" or "DC 37"), filed a verified improper practice petition against the City of New York and the New York City Department of Finance ("City" or "DOF") alleging that DOF violated § 12-306(a)(1) and (4), of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union argues that DOF improperly eliminated a compressed time program – which included longer work days and shorter work weeks – for approximately 300 employees without bargaining over the decision or its impact. The City argues that it has no duty to bargain because DOF was reverting to the Citywide Agreement provision concerning work hours. This Board finds that the compressed time program is a mandatory subject of bargaining and that under the facts particular to this case, the City's defense of reversion does not apply. Accordingly, we grant the petition.

BACKGROUND

In 1980, Mayor Koch issued Mayoral Directive No. 80-4, encouraging City agencies to establish alternative work schedules ("AWS"), including a compressed time schedule in which employees work fewer than five days per week but more hours per day. Mayoral Directive No. 92-2, issued in March 1992, continues to encourage participation by declaring that the policy of the City is that all agencies implement AWS, and includes compressed time as one of the forms. The anticipated benefits were greater public access to City services, increase in productivity, a larger applicant pool for City employment, increase in employee morale, reduction of absenteeism and lateness, and greater opportunity for City employees to get educational credentials. The revised directive also sets forth procedures for review of AWS. For example, an implementation plan, based on the needs of both employees and management, must be submitted to the agency's Quality of Work Life ("QWL") Committee, or, if no such committee exists, an agency must consult with all affected unions. The agency must contact the Office of Labor Relations ("OLR") to arrange the meetings and then submit any plan to the Department of Personnel, now the Department of Citywide Administrative Services.

On October 20, 1992, DOF's QWL Committee, consisting of DOF's Directors of Discipline and Employee Relations, Operations, Human Resources, and other divisions, and representatives of DC 37 and the Communications Workers of America, issued a Memorandum announcing a Compressed Time Pilot Program ("Memorandum"). The Memorandum, issued on DOF stationery, states that the program is a result of the joint efforts between the Union and

management. Employees who volunteered for the program would work for nine instead of ten days in a two week period and work 45 minutes longer than they had previously each day. Most employees could use Monday or Friday as the day off. The Memorandum states that this "5-4/9 Plan" would continue if absenteeism was reduced and productivity increased. According to the Union, the Pilot Program became permanent and, after two years, meetings about compressed time were no longer necessary. The program was implemented and continued for 12 years without interruption for the employees at issue here.

On November 16, 2001, Answorth Robinson, DOF's Director of Labor Relations, advised the Union that as of December 1, 2001, compressed time for employees in the Management Information Systems ("MIS") Division was being rescinded. The Union did not seek bargaining.

On June 30, 2004, Robinson informed the QWL Coordinator for DC 37 that DOF planned to eliminate the compressed time program for all employees. The affected unions and management held a meeting on July 15, 2004. DC 37 wrote a letter that same day reiterating its request to receive a list of members in the compressed time program and information on: absence rates for employees on compressed time compared to the absence rates in the agency, disciplinary action for time and attendance for employees on compressed schedules during the last year, and customer or user complaints related to lack of staff. On July 30, 2004, OLR, wrote to DC 37 to state that if DOF finds the compressed schedules unsatisfactory, it may "revert to the normal work week described in the Citywide Agreement after providing sufficient advance notice. . . ."

Robinson responded to the Union's request for information in a letter on August 16,

2004. As for absentee rates for employees on compressed time compared to those on non-compressed time, Robinson wrote that the appropriate data would be the absentee rates for those on compressed time compared to those rates before the employees were on compressed time, but DOF did not have those data. Concerning disciplinary action for lateness or undocumented sick leave, Robinson wrote that the same procedures are implemented for those on AWS as for those on a traditional schedule. Robinson also stated that the reasons that the compressed schedules were problematic were that employees were not always available when issues concerning daily operations occur, employees were not always supervised for the extra hour they worked, meetings were difficult to schedule, objectives of daily operation were not always met and projects were often prolonged. In October 2004 DOF discontinued the compressed time program.

As a remedy, the Union requests that this Board declare that DOF's elimination of the compressed time program is a unilateral change in the terms and conditions of employment in violation of the NYCCBL, and order that DOF cease and desist from terminating the compressed time program, reinstate the program for all employees who have been removed from it, bargain in good faith concerning the proposed elimination of the compressed time program, and place notices at the appropriate work sites.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that under NYCCBL § 12-307(a), the subject of hours is a mandatory

subject of bargaining.[1] This Board, the Union says, has held specifically in *New York State Nurses Ass'n*, Decision No. B-37-93 ("*NYSNA*"), that compressed time is a mandatory subject and that while staffing is a management right, the numbers of hours worked per day or days per week must be bargained.

The Union also contends that eliminating the compressed time program raises a practical impact that requires bargaining.[2] Two attached affidavits by members of the Union indicate that the loss of their compressed schedule would adversely impact their duties to elderly parents; the Union also notes an impact for those involved with child care.

In response to the City's answer, the Union argues that a contract reversion defense is inappropriate in this case. According to the Union, such a defense may be used by an employer when it wishes to stop a certain practice that is contrary to a provision in the parties' collective bargaining agreement. The applicable provision in this case, Article II, § 2, of the Citywide

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[1] NYCCBL § 12-307(a) provides in pertinent part:
. . . [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . , hours (including but not limited to overtime and time and leave benefits), working conditions . . . .

[2] NYCCBL § 12-307(b) provides in pertinent part:
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 . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization . . . . 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 conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

Agreement is not contrary to DOF's compressed schedules, the Union says. The provision encourages alternative work schedules, and, at least, does not bar them. That provision reads:

> Wherever practicable, the normal work week shall consist of five (5) consecutive working days separated by two (2) consecutive days off. This shall not, however, constitute a bar to the investigation and implementation by the Employer with the Union's participation and consent of flexible work weeks, flexible work days or other alternative work schedule(s).

The words, "wherever practicable," refer to the parties' understanding that when employees have a five-day work schedule, they should have two consecutive days off. The phrase does not mean that the employees' schedule should be a five-day work week whenever that is practicable.

City's Position

The City contends that it has a right to revert to Article II, § 2, of the Citywide Agreement. According to the City, under this provision, a "normal work week" is five days of work and two days off. An agency may implement AWS "wherever practicable" and may refuse initially to implement AWS. Furthermore, an employer has the right to return to a normal work week whenever the employer deems AWS impractical. Since DOF found that compressed time was not practical, gave notice, and presented reasons for the elimination of compressed time program, DOF's return to the terms of the pre-existing Citywide Agreement is not a contravention of its bargaining obligations.

The City distinguishes the *NYSNA* case, in which the Board found that compressed time is a mandatory subject of bargaining, by the fact that there the parties had an AWS Agreement. The City argues that because that agreement, unlike the Citywide Agreement, was silent as to whether the employer could require an employee to return to the standard work day, the decision

does not control.

The City also maintains that no practical impact exists in this case. The Union has not asserted unduly burdensome workload, improper manning, or safety issues; therefore, the bare allegations of practical impact do not state a sufficient claim. Finally, the Union has not shown a derivative or independent violation of NYCCBL § 12-306(a)(1).

DISCUSSION

NYCCBL § 12-307(a) provides that public employers and certified or designated employee organizations have a duty to bargain in good faith on matters within the scope of collective bargaining. These matters include wages, hours, and working conditions and are mandatory subjects of bargaining. Under NYCCBL § 12-306(a)(1) and (4), it is an improper practice for a public employer to refuse to bargain in good faith on mandatory subjects of bargaining.[3] In the *NYSNA* case, *New York State Nurses Ass'n*, Decision No. B-37-93, the New York City Health and Hospitals Corporation (HHC) unilaterally discontinued a program in which participants volunteered to work either three or four days per week from between five to thirteen

[3] 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 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. . . .

§ 12-305 provides in pertinent 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 of their own choosing . . . .

hours per day. The program had been in effect for four years. An AWS Agreement between the parties provided that an employee in the program was entitled to return to the five-day, seven and one-half-hour schedule upon four weeks' written notice; however, the agreement was silent as to whether HHC could require the employee to return to the standard schedule. *Id*. at 3. This Board found that "the number of hours worked per day and the length of the work week or number of appearances required per week are mandatory subjects of bargaining." *Id*. at 7.

> It therefore follows that an employer may not unilaterally implement an adjusted work schedule that alters the number of work hours per day or days per week that employees are required to work. Clearly, the termination of AWS, which allowed employees to work fewer than five days per week and more or less than seven and one-half hours per day, and the reinstitution of the standard five day week constituted a unilateral change in a mandatory subject of bargaining.

Id. at 8. In a supplemental decision and clarifying order, the Board reiterated that HHC was obligated to refrain from making unilateral changes to the compressed time program, a mandatory subject of bargaining, because it included hours worked per day and the length of the work week or number of appearances required per week. *New York State Nurses Ass'n*, Decision No. B-10-94.

The Board based the *NYSNA* decision on well-settled law that while a City agency may determine staffing levels and schedules, including start and finish times, the City must bargain over total numbers of hours worked per day or per week. *See Patrolmen's Benevolent Ass'n*, Decision No. B-5-75 at 17; and its companion case, *Patrolmen's Benevolent Ass'n*, Decision No. B-24-75 at 16-17, 19, *aff'd, Patrolmen's Benevolent Ass'n v. Bd. of Collective Bargaining*, N.Y.L.J., Jan. 2, 1976, at 6 (S. Ct. N.Y. Co.). In these scope of bargaining cases, the Police

Department attempted to alter the squad-scheduling system in a way that would change the number of hours that police officers worked in a day. The Board determined that the City was obligated to bargain since the subject included more than the "mere" scheduling of tours. Furthermore, the duty to bargain over hours, the Board found, includes the duty to bargain over "swing shifts," or time off between tours. *See also Fire Alarm Dispatchers Benevolent Ass'n*, Decision No. B-1-95 at 10-11 (Inj.); *Uniformed Firefighters Ass'n*, Decision No. B-4-89, *aff'd, Unif. Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (S. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dep't 1990).

We find that *NYSNA* is controlling. DOF's compressed time program, ongoing for 12 years, required that employees who chose this form of AWS remain 45 minutes longer during every work day and afforded one work day off during every two-week period. This 5-4/9 Plan, just like the plan in *NYSNA,* was not simply a scheduling tool but a means to lengthen the work day and shorten a work week and affected an employee's number of appearances. In addition, one consequence for some employees was to lengthen the "swing," the time off, to three days instead of two. Thus, the compressed time program concerns hours, which is a mandatory subject of bargaining, and the program may not be discontinued unilaterally.

We do not agree with the City's contention that the *NYSNA* case can be distinguished because HHC and NYSNA had an AWS Agreement and because that Agreement was silent as to the issue of reinstitution of the standard week. First, the Board did not base its analysis in *NYSNA* on the existence of an AWS Agreement but rather on the mandatorily bargainable subject of hours. Second, Article II, § 2, of the Citywide Agreement, like *NYSNA*'s AWS Agreement, is

silent as to reinstitution of the "normal work week." Article II, § 2, provides:

> Wherever practicable, the normal work week shall consist of five (5) consecutive working days separated by two (2) consecutive days off. This shall not, however, constitute a bar to the investigation and implementation by the Employer with the Union's participation and consent of flexible work weeks, flexible work days or other alternative work schedule(s).

The provision deals with initial choices but not future changes.

There is no dispute that the parties did not bargain over the elimination of compressed schedules. The City erroneously asserts that it can unilaterally revert to that part of the contract provision which provides for a standard work week. The defense of contract reversion is raised when an employer wishes to change a practice that is inconsistent with the collective bargaining agreement. The theory is that the employer can revert to the contractual terms concerning the particular subject of the practice. The defense has also been characterized as duty satisfaction or waiver by agreement. *See County of Nassau*, 31 PERB ¶ 3074 (1998). In *Maine-Endwell Central School District*, 14 PERB ¶ 4625 (1981), *aff'd,* 15 PERB ¶ 3025 (1982), the Public Employment Relations Board ("PERB") explained that when an employer unilaterally discontinues a noncontractual practice concerning a mandatory subject of bargaining, PERB looks to the parties' collective bargaining agreement to decide whether an employer had a duty to bargain. If the parties have fully negotiated and reached agreement on the mandatory subject at issue, the employer cannot be said to have acted unilaterally when it reverts to the terms of the agreement, notwithstanding an inconsistent practice. *See State of New York (Workers' Compensation Board)*, 32 PERB ¶ 3076 (1999); *Town of Shawangunk*, 32 PERB ¶ 3042 (1999).

The reversion theory does not apply in this case because the compressed time program is

expressly authorized by the contract. Article II, § 2, of the Citywide Agreement allows employers to choose either a five-day week for its employees or various forms of flexible work days and weeks. Once an employer chooses an AWS, the employer must investigate and implement a program with the Union's participation and consent. By issuance of the Memorandum, DOF chose to permit certain employees to work on a compressed schedule and, with the consent of the Union, implemented the 5-4/9 Plan. DOF's use of this plan for 12 years is thus not inconsistent with the contract but indeed conforms to it. Having designed and implemented the AWS program consistent with the Citywide Agreement and in partnership with the Union, DOF cannot now choose to eliminate that program unilaterally and implement a standard work week. That a contract provision permits an employer to choose certain flexibility to encourage productivity and attendance does not mean that the provision necessarily permits unilateral action on a mandatory subject once the program is in effect. *See New York State Nurses Ass'n*, Decision No. B-10-94 at 6; *County of Albany*, 33 PERB ¶ 4596 (2000).

This Board now holds that DOF violated NYCCBL § 12-306(a)(1) and (4) when it failed to bargain before implementing a change in the compressed time program, and we direct DOF to reinstate the program as it existed as of the dates it was discontinued and to bargain in good faith over any change in hours.[4] Because of our holding, this Board need not reach the question of practical impact.

[4] The 2001 elimination of the compressed time program for employees in the MIS Division is not subject to this decision.

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, BCB-2443-04, filed by District Council 37, AFSCME, be, and the same hereby is, granted, except as to the practical impact claim, which is dismissed; and it is further

ORDERED, that the Department of Finance cease and desist from unilaterally changing the compressed time program implemented by the Quality of Work Life Committee; and it is further

ORDERED, that the Department of Finance reinstate the compressed time program as it existed as of the dates it was eliminated; and it is further

ORDERED, that the City of New York bargain in good faith concerning any changes in the compressed time program.

Dated: May 10, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER