Captains Endowment Assoc. v. City & PD, 75 OCB 16 (BCB 2005) [Decision No. B-16-2005, (IP)]

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

-between-

CAPTAINS ENDOWMENT ASSOCIATION,

Petitioner,

Decision No. B-16-2005
Docket No. BCB-2399-04

-and-

CITY OF NEW YORK and THE POLICE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.
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DECISION AND ORDER

On April 30, 2004, the Captains Endowment Association ("CEA" or "Union") filed a verified improper practice petition against the City of New York and the Police Department of the City of New York ("City," "NYPD," or "Department"). The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(4) and (5), the City unilaterally instituted a cap on the accrual of compensatory time for employees in the titles Captain through Deputy Chief without bargaining with the Union. The City contends that the Department's decision to change the administrative guide procedure falls within its management rights and, moreover, the Union has waived its right to negotiate over the subject. This Board finds that the imposition of or changes to the accrual and use of compensatory time and compensatory time procedures are mandatory subjects of bargaining. Accordingly, we grant the petition.

BACKGROUND

At the NYPD, overtime performed by members of the uniformed service from the rank of Captain to Deputy Chief is compensated in compensatory time. The amount of compensatory time that is accrued varies depending upon the circumstances in which overtime is performed. Article III, Section 1, of the parties' May 1, 2001, to October 31, 2003, collective bargaining agreement ("Agreement"), dated May 20, 2002, provides that "overtime performed by Captains shall be compensated for in compensatory time off at the rate of time and one-half when such overtime is ordered by the Police Commissioner or Chief of Department . . . ." Article III, Section 2, entitled "Quarterly Compensatory Days," states that Captains receive a maximum of one compensatory day per quarter for time worked prior to or after a regularly scheduled tour of duty if they have accrued eight hours of time during the quarter." Section 2 further states that it "does not supersede the lost time procedure in Administrative Guide Procedure 320-29 which procedure shall continue in full force and effect."

Administrative Guide Procedure 320-29 ("AGP 320-29"), entitled "Lost Time/Overtime Procedures for Uniformed Members of the Service – Captain to Deputy Chief (Inclusive)," and issued on December 1, 1995, states the rate at which overtime is accrued, imposes a limitation on the amount of compensatory time Captains to Deputy Chiefs may accumulate, and prescribes a time period in which the compensatory time must be taken. AGP 320-29 also details the manner and means whereby forms of overtime are recorded and approved by the Department and identifies members of service responsible for each step of the process.

The "Additional Data" section of AGP 320-29 provides:

> The maximum amount of compensatory time a uniformed member of the service may accumulate is five (5) days. When the member concerned accrues compensatory time in excess of five (5) days, the excess MUST be taken within thirty (30) days, needs of the service permitting. In any event, compensatory time MUST be taken within one (1) year of the date earned.
> The Inspections Division will periodically review the time records of all captains through deputy chiefs, and submit a report to the First Deputy Commissioner.

The record indicates that the "Additional Data" section first appeared in the 1992 AGP 320-29 and is identical to the same section in the 1995 AGP 320-29.[1]

In December 2001, approximately three months after the events of September 11, 2001, the First Deputy Commissioner for the Department sent two messages through the FINEST message system to all commands indicating that the limitation on the accrual of compensatory time and the time-frame in which it must be taken was revoked. On December 19, 2001, the FINEST message stated:

> Administrative Guide Procedure 320-29, RE: Lost Time/Overtime Procedures for uniformed members of the service – Captain to Deputy Chief (inclusive), is revoked.

The next day, another FINEST message was sent to all commands:

> On December 19, 2001 . . . a FINEST message was transmitted revoking Administrative Guide Procedure 320-29 . . . . The only portion of Administrative Guide 320-29 being revoked is the "Additional Data" information contained on page 3 of 3. The remainder of Administrative Guide 320-29 remains in effect.

On December 31, 2001, the parties entered into a written agreement that provided a lump sum cash payment for one-half of the total amount of all compensatory time attributable to overtime hours actually worked from September 11 to November 10, 2001. The City states that

[1] Interim Order No. 18 issued on May 9, 1978, which outlined lost time procedures for Captains through Deputy Chiefs, was replaced by the version of AGP 320-29 issued in December 1985, and again in October 1992. The 1985 AGP 320-29 did not have an "Additional Data" section which imposed a limitation on the accrual of compensatory time.

it entered into this agreement to address an extraordinary amount of overtime that the Department needed and approved immediately after September 11, 2001.

According to the Union, in April 2004 CEA was informed that the Department intended to reinstate a cap on the accrual of compensatory time for Captains through Deputy Chiefs. The City contends that it informed CEA that it intended to reinstate a modified version of the guidelines for the accrual and use of compensatory time.

On April 22, 2004, CEA's counsel sent a letter to the Commissioner of the New York City of Office of Labor Relations ("OLR") stating:

> I am sure you will agree that compensatory time and compensatory time procedures are mandatory subjects of bargaining. It is the CEA's position that a unilateral change in these mandatory subjects of bargaining violate [sic] the law. On behalf of the CEA I am requesting a meeting, prior to any change in these mandatory subjects of bargaining, to negotiate the changes in compensatory time and the changes in compensatory time procedures.
> I am further informed that the above changes will be implemented as soon as tomorrow. I am requesting that any change be held in abeyance until we can meet and have a reasonable opportunity to resolve the issues that have caused the Police Department to decide to implement any change in compensatory time and compensatory time procedures for Captains through Deputy Chiefs.

On April 26, 2004, NYPD issued Interim Order #25 which was distributed to all commands. Similar to the "Additional Data" section of AGP 320-29, Interim Order # 25 imposes a limitation on the amount of compensatory time Captains to Deputy Chiefs may accumulate, and prescribes a time period in which the compensatory time must be taken, with certain modifications. The Order states:

1. On Friday, April 23, 2004, the Department re-instituted the provisions of Administrative Guide Procedure 320-29, "Lost Time/Overtime Procedures for Uniformed Members of the Service – Captain to Deputy Chief (Inclusive)," "Additional Data," with respect to maximum accrual guidelines for compensatory time. This order further clarifies this time balance limit, and amends the

compensatory time cap as outlined below.

2. Beginning Sunday, May 16, 2004, members in the ranks of Captain through Deputy Chief will be prospectively capped at nine (9) months (1,566 hours) of compensatory time. This limit, when combined with terminal leave, annual leave and any other type of leave, allows for a cumulative time balance of one (1) year or more.
3. Captains through Deputy Chiefs who currently exceed this 1,566 hour limit will be allowed to carry their entire time balances forward. However, any additional accumulations of compensatory time by these members must be taken within thirty (30) days, needs of the service permitting. In any event, this additional compensatory time MUST be taken within one year of the date earned, or prior to retiring from the Department, whichever is earlier.
4. Those Captains through Deputy Chiefs who currently are under the 1,566 hour limit may continue to accrue compensatory time until they reach the 1,566 limit. Any accumulations of compensatory time which cause the member to exceed this limit, as defined in paragraph #2, must be used within thirty (30) days of accrual, needs of the service permitting and in any event, MUST be taken within one year of the date earned, or prior to retiring from the Department, whichever is earlier.

On May 17, 2004, the parties had a labor-management meeting regarding changes to AGP 320-29. The record does not indicate what transpired during the meeting.

The Union requests that the Board find that the City has violated NYCCBL § 12-306(a)(4) and (5) and order the City to: cease and desist from making unilateral changes to mandatory subjects of negotiation; restore and reinstate provisions of the December 19 and 20, 2001, FINEST messages; restore any benefits that may have been lost by an affected CEA member; and post a notice of the decision in the instant matter in all NYPD facilities.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City violated NYCCBL § 12-306(a)(4) and (5) by making a unilateral change to a mandatory subject of bargaining when, in April 2004, the City instituted a

new cap on compensatory time and changed the compensatory time procedures for Captains through Deputy Chiefs without first bargaining with the Union.[2] Compensatory time directly relates to employees' terms and conditions of employment and is therefore a mandatory subject of bargaining.

In response to the City's arguments, the Union asserts that it has not expressly waived its bargaining rights because neither the changes to AGP 320-29 nor the impact of such changes have been fully discussed or clearly waived. The Union asserts that it has no knowledge whether

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[2] 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;
(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.

NYCCBL § 12-305 states, 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 and shall have the right to refrain from any or all of such activities. . . .

NYCCBL § 12-311(d) states, in pertinent part:
Preservation of status quo. During the period of negotiations between the public employer and a public employee organization concerning a collective bargaining agreement . . . , the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . .

the 1985, 1992, and 1995 revisions to AGP 320-29 were by agreement or made unilaterally. They were implemented respectively 19, 12, and 9 years before the revision at issue and do not affect the current matter.

Further, according to the Union, the NYCCBL does not limit practical impact bargaining to the period of contract negotiations. Even if the subjects at issue were non-mandatory, the City has an obligation to bargain over the impact of its unilateral decisions.

Alternatively, the Union argues that the City has an obligation to bargain over changes to AGP 320-29 and the impact of those changes because the parties' Agreement specifically cites to AGP 320-29 in Article III, § 2, thereby incorporating it into the parties' Agreement. Thus, any unilateral change in the terms of AGP 320-29, similar to any other unilateral change of a mandatory subject in another aspect of the parties' contract, violates the NYCCBL and constitutes an improper practice.

City's Position

The City contends that it has not violated NYCCBL § 12-306(a)(4) because the decision to change the administrative guide procedure falls within its management rights.[3]

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[3] 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; . . . direct its employees; . . . 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 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, . . . 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.

The removal of the cap on compensatory time in December 2001 was implemented in the aftermath of September 11, 2001. According to the City, as a result of the removal of the limitation on the accrual of compensatory time, a number of employees in the rank of Captain to Deputy Chief accrued compensatory time in excess of a year. The situation has resulted in some individuals' leaving the Department, spending over a year on payroll as they exhaust their compensatory time, and continuing to hold civil service lines that cannot be filled by the Department. The situation has also reduced the number of experienced superior officers and impinges upon the Department's ability to determine its staffing and scheduling needs which is central to the meaning of management's rights. In furtherance of their operational needs, the Department must maintain its ability to place a cap on compensatory time accrual unilaterally.

The City also argues that the Union has failed to state a prima facie case of improper practice under NYCCBL § 12-306(a)(5). The parties have engaged in one negotiation session for a successor agreement to the May 1, 2001, to October 31, 2003, Agreement. The Department does not violate the NYCCBL when it makes a decision or alters a policy or procedure that is taken pursuant to its managerial prerogative during the status quo period. The City contends that the Department has not made any unilateral change to a mandatory subject of bargaining or to any term or condition of employment by revising AGP 320-29.

Finally, the City argues that the Union waived its right to bargain over this subject by failing to request bargaining over changes in the limitation on the accrual of compensatory time under AGP 320-29 for nearly 20 years. The City states that the Union has never requested bargaining over the implementation or over the impact of any changes in AGP 320-29 when it was revised and reissued in the past, nor did the Union seek to address these issues during

collective bargaining negotiations or request mid-term bargaining.

DISCUSSION

The issue in this case is whether the matter of imposing or changing a limitation on the accrual and use of compensatory time and compensatory time procedures are mandatory subjects of bargaining. This Board finds that the imposition of or changes in the limitation on the accrual and use of compensatory time and related procedures require bargaining under the NYCCBL.

Section 12-307(a) of the NYCCBL requires public employers and employee organizations to bargain in good faith on all matters concerning wages, hours, and terms and conditions of employment. 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."

The duty to bargain over wages includes the duty to bargain over employee compensation for overtime, including cash or compensatory time. In *District Council 37,* Decision No. B-3-2001, the Fire Department changed how Emergency Medical Service employees were compensated for overtime by implementing a new policy which provided that an employee may not earn cash or compensatory time once he or she has reached the 25% cap on overtime. The Board found that the only factor considered in implementing this system was an economic one – not based on managerial concerns, such as special needs or safety – and held that bargaining over a method for the distribution of overtime was mandatory. *See also Correction Officers' Benevolent Ass'n,* Decision No. B-26-99 at 9 (the duty to bargain includes overtime where the issue concerns the rate of compensation); *Uniformed Firefighters Ass'n,* Decision No. B-4-89 at

36 ("Overtime pay demands concerning compensation at the rate of time and one-half or compensatory time, is a mandatory subject of bargaining.").

Here, Captains through Deputy Chiefs are compensated for overtime only with compensatory time. Because Interim Order # 25 changes employee use of compensatory time, which is a form of wages, it is a mandatory subject of bargaining. Just as in *District Council 37,* Decision No. B-3-2001, here, the Department changed an existing term and condition of employment by imposing a limitation that precludes employees in the ranks Captain through Deputy Chief from accruing compensatory time beyond the 1,566 hour limit. Accordingly, we find that the Department must bargain with the CEA over any imposition of or changes in the limitation on the accrual and use of compensatory time and related procedures – including the prescription of the period during which an officer may use such time.

Furthermore, we find unpersuasive the City's argument that the Union has waived its right to bargain over this matter because it failed to request bargaining over changes on this subject for nearly 20 years. This Board has held that a union does not waive its right to bargain unless prior negotiations indicate that the matter was "fully discussed or consciously explored and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter." *United Probation Officers Ass'n,* Decision No. B-38-89 at 26; *see also District Council 37,* Decision No. B-21-75, *aff'd, City of New York v. Board of Collective Bargaining,* N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 15, 1976) (no waiver of the right to bargain over the impact of layoffs absent evidence that the subject had been fully discussed or consciously explored). A union does not waive its right to bargain over a mandatory subject merely because it failed to raise the subject during prior negotiations. *United Probation Officers Ass'n,* Decision

No. B-44-86 at 18-19 (when an employer takes unilateral action on a mandatory subject not raised during negotiations of an existing agreement, a union is not required to make a formal demand to bargain because the employer's action "violates the NYCCBL as much as a flat refusal to bargain"); *and see District Council 37,* Decision No. B-21-75 at 19 (union should not be barred from negotiating mid-contract subjects not previously raised in bargaining.)

In the instant case, there is no evidence that the Union waived its right to bargain over the matter of imposing or changing a limitation on the accrual and use of compensatory time and compensatory time procedures. The Union made a request to bargain over the changes to AGP 320-29 on April 22, 2004, before Interim Order # 25 was issued. Subsequently, the parties attended a labor-management meeting on May 17, 2004, to discuss changes to AGP 320-29, but the record does not indicate what occurred. Absent evidence showing that the subject here was fully discussed or consciously explored by the parties during prior bargaining, we cannot find that the Union waived its right to bargain or that the City exhausted its duty to bargain. *District Council 37,* Decision No. B-23-2002 at 14. The fact that prior to April 22, 2004, the Union had not made a request to bargain over the matter does not constitute a waiver of the Union's right to bargain. *United Probation Officers Ass'n,* Decision No. B-44-86 at 18-19; *and see District Council 37,* Decision No. B-21-75 at 19.

The City's reliance on *Correction Officer's Benevolent Ass'n,* Decision No. B-21-81, is misplaced. There, the union claimed that the City made a unilateral change in a mandatory subject by requiring correction officers to work an additional twenty minutes during the workday. The Board found no duty to bargain because the union never submitted a demand to bargain even though negotiations over the parties' successor agreement were in progress while the petition was

pending, and because the correction officers were no longer required to work the additional time and thus the matter was moot. Here, the Union made a request to bargain over changes in the accrual and use of compensatory time and related procedures before the Department reinstated the "Additional Data" section of AGP 320-29 and issued Interim Order # 25 but no bargaining took place.

The Board now holds that NYPD violated NYCCBL § 12-306(a)(1) and (4) when it failed to bargain before reinstating the "Additional Data" section of AGP 320-29 and issuing Interim Order # 25. Therefore, we direct NYPD to reinstate the status quo regarding the accrual and use of compensatory time as it existed on April 22, 2004, before the Department reinstated the "Additional Data" section of AGP 320-29 and issued Interim Order # 25, and to bargain in good faith over the imposition of or changes in the limitation on the accrual and use of compensatory time and any related procedures. To the extent the City alleges that the use of compensatory time earned for performing overtime work impinges on its staffing decisions, it may seek to address these concerns through negotiations.

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-2399-04, filed by the Captains Endowment Association, be, and the same hereby is, granted, as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over the imposition of or changes in the limitation on the accrual and use of compensatory time and related procedures; and it is further

ORDERED, that the Police Department of the City of New York cease and desist from unilaterally changing the limitation on the accrual and use of compensatory time and related procedures; and it is further

ORDERED, that the Police Department of the City of New York reinstate the status quo regarding the accrual and use of compensatory time as it existed as of April 22, 2004, before the Department reinstated the "Additional Data" section of AGP 320-29 and issued Interim Order # 25; and it is further

ORDERED, that the City bargain over any imposition of or changes in the limitation on the accrual and use of compensatory time and related procedures.

Dated: May 10, 2005
New York, New York

MARLENE A. GOLD

CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

I dissent. ERNEST F. HART
MEMBER