Captains Endowment Association, 77 OCB 22 (BCB 2006)

[Decision No. B-22-2006] (IP) (Docket No. BCB-2525-05)

***Summary of Decision*:** Union alleged that NYPD violated the NYCCBL and a Board decision by auditing the compensatory time records of Union members, deducting previously approved compensatory time, and failing to provide information the Union had requested. The City contended that it acted within its managerial prerogative and that there is no causal connection between the issuance of the Board's decision and the Department's audits of compensatory time records and deductions of improperly accrued compensatory time. This Board found that the City had a duty to provide the time and leave records requested and held the Union's other claims in abeyance pending the Union's receipt and review of the requested information, and a written submission requesting reinstatement of the petition. **(*Official decision follows.*)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CAPTAINS ENDOWMENT ASSOCIATION,

Petitioner,

-and-

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

Respondents.

INTERIM DECISION AND ORDER

On December 13, 2005, the Captains Endowment Association ("CEA" or "Union") filed a verified improper practice petition against the City of New York and the New York City Police Department ("City," "Department," or "NYPD"). The Union claims that the Department violated § 12-306(a)(1), (2), (3), (4) and (5), of the New York City Collective Bargaining Law (New York

City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by auditing the compensatory time records of CEA's members, deducting previously approved compensatory time in contravention of a recent Board decision, and failing to provide the time and leave records of CEA members requested by the Union. The City contends that it acted within its managerial prerogative and in accordance with established written procedures. In addition, the City argues that there is no causal connection between the issuance of the Board's decision and the Department's audits of compensatory time records and deductions of improperly accrued compensatory time. This Board finds that the City had a duty to provide the time and leave records requested by the Union and holds the Union's other claims in abeyance pending the Union's review of the requested information and a written submission requesting reinstatement of the petition.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

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. On April 30, 2004, the Union filed a verified improper practice petition which alleged that the Department violated the NYCCBL when it unilaterally instituted a cap on the accrual of compensatory time for employees in the titles Captain through Deputy Chief. Specifically, the basis of the Union's claim was the Department's issuance of Interim Order # 25, which reinstated a revoked provision of Administrative Guide Procedure 320-29 ("AGP 320-29"), prescribed a period in which

compensatory time must be taken, and imposed a cap on the accrual of compensatory time.[1] On May 10, 2005, this Board issued *Captains Endowment Ass'n,* Decision No. B-16-2005, holding that the imposition of or changes to the accrual of compensatory time and compensatory time procedures are

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[1] Interim Order # 25 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.

The reinstated "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 Quality Assurance Division will periodically review the time records of all captains through deputy chiefs, and submit a report to the First Deputy Commissioner.

mandatory subjects of bargaining. This Board ordered the Department to: cease and desist from unilaterally changing the limitation on the accrual and use of compensatory time and compensatory time procedures; reinstate the status quo regarding the accrual and use of compensatory time and compensatory time procedures 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 bargain over any imposition of or changes to the limitation on the accrual and use of compensatory time and related procedures.

On June 1, 2005, the Department reissued the entire Administrative Guide, including AGP 320-29, which incorporated Interim Order # 25. According to the City, the Board had not yet issued its decision when the new Administrative Guide was being prepared for publication.

On July 13, 2005, the Department issued Interim Order # 27 which states:

> 1. Effective immediately, Administrative Guide 320-29, "Lost Time/Overtime Procedures for Uniformed Members of the Service - Captain to Deputy Chief (Inclusive)," is SUSPENDED and the following procedure will be complied with:
> PURPOSE
> To process and monitor lost time/overtime requests submitted by uniformed members of the service in the ranks of captain to deputy chief (inclusive):
> DEFINITIONS
> LOST TIME - any additional time, not performed at the member's option, i.e., conferences called by higher-ranking officers or community oriented meetings when alternate ranking officers are not available or cannot be utilized for these purposes. Lost time is accrued at the straight time rate in time only. Lost time is not authorized for routine administrative duties.
> * * *
> ADDITIONAL DATA
> *The Quality Assurance Division will periodically review the time records of all captains through deputy chiefs, and submit a report to the First Deputy Commissioner.*
>
> 2. Interim Order 25, series 2004 is hereby REVOKED.
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> 3. Any provisions of the Department Manual or other Department directives in

conflict with the contents of this order are suspended.[2]

AGP 320-29, both initially and as revised, contained the same provision regarding the Quality Assurance Division ("QAD").[3] According to the City, the Department issued Interim Order # 27 and suspended AGP 320-29 in order to comply with the Board's decision in *Captains Endowment Ass'n,* Decision No. B-16-2005.

Also on July 13, 2005, the Deputy Commissioner, Strategic Initiatives, submitted a report to QAD's Commanding Officer, after conducting an audit between April 1, 2005, to June 30, 2005, of overtime accrued by Captains through Deputy Chiefs during the period April 1, 2004, through March 31, 2005. The QAD Special Projects Team examined overtime accrued by a sample of 45 Captains through Deputy Chiefs, including five top overtime earners for the first quarter of 2005. The report states that the audit was conducted to ensure that guidelines set forth in AGP 320-29 were followed. The report found:

> . . . . A review of Accrued Compensatory Time for forty (40) Captains and above for the period April 1, 2004 through March 31, 2005 revealed that 102 (9.8%) of 1039 overtime incidents resulted in the member of service improperly accruing time, (not in accordance with department guidelines set forth in Administrative Guide Procedure # 320-29). One hundred (100) of these incidents were attributed to two members of the service (Captain Baymack, Facilities Management Division, had 14

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[2] Interim Order # 27 is similar to AGP 320-29 except that it does not contain the "Additional Data" section or any language regarding the cap on the accrual of compensatory time at issue in *Captains Endowment Ass'n,* Decision No. B-16-2005. Interim Order # 27 specifically suspends AGP 320-29 and revokes Interim Order # 25.

[3] The QAD monitors and seeks to ensure adherence to Department policies and orders. It includes a Special Projects Team that performs confidential investigations on behalf of the Police Commissioner and the Deputy Commissioner for Strategic Initiatives, conducts patrol staffing audits, and makes evaluations of administrative and operational systems – for example, the payroll system and time records – for all 76 precincts and eight task forces. According to the City, a payroll audit is regularly conducted and may include a review of night shift differential, vacation leave balances or overtime on a random basis.

> incidents in which he received straight time for administrative duties and Captain Henig, Internal Affairs Bureau, had 86 incidents in which he received time and a half for administrative duties.) . . . An evaluation of the top five (5), 1st Quarter 2005 Overtime Earners for the period January 1, 2005 through March 31, 2005 revealed that 55 (25%) of the 223 overtime incidents resulted in the member of the service improperly accruing time (not in accordance with department guidelines set forth in Administrative Guide Procedure # 320-29). Fifty (50) of the incidents were attributed to two members of the service (Captain Deetremont, Deputy Commissioner Operations, had 40 incidents in which he received time and a half for administrative duties and Captain Gee, Internal Affairs Bureau had 10 incidents in which he received time and a half for administrative duties.)

The report also contains a list of administrative errors, such as granted requests lacking a signature of approval by a higher ranking member or a letterhead with endorsement.[4]

On August 3, 2005, the First Deputy Commissioner of the Department sent a memorandum to the Deputy Commissioners of Operations and Administration and the Chiefs of Housing and Internal Affairs concerning the QAD's report on compensatory time. He ordered that a re-evaluation be conducted of each incident which resulted in overtime as listed in the audit and that time records be adjusted regarding compensatory time accrued in contravention of Department guidelines.

On November 18, 2005, the Deputy Commissioner, Strategic Initiatives, submitted a report to the First Deputy Commissioner after conducting another audit between July 1, 2005, to September 30, 2005, of overtime accrued by Captains through Deputy Chiefs for the period July 1, 2004, through June 30, 2005. The QAD Special Projects Team reviewed the overtime accrued by 55 Captains through Deputy Chiefs, including the top 15 overtime earners for the second quarter of 2005. The report stated that 86 (5%) of 1725 overtime incidents reported by 16 members of the

[4] The City provided charts containing the names of Captains through Deputy Chiefs who were included in the audit and indicating their accrued time and any discrepancies with Department guidelines.

service resulted in an improper accrual of compensatory time.[5] The report also found that:

> One member of the service accounted for thirty (30) of these discrepancies. In thirty (30) incidents, Captain Deetremont currently assigned to the Deputy Commissioner Operations received time and a half for administrative duties.

According to the City, for both audits, the QAD Special Projects Team relied upon eligibility criteria set forth in Interim Order # 27 and the Chief of Department's May 24, 2004, memorandum regarding Lost Time/Overtime procedures.

The City states that after the audits, the Department deducted accrued compensatory time from Captains through Deputy Chiefs who had improperly accrued such time for administrative and other routine duties that are specifically excluded under Department guidelines. The Department did not pay members of the service for such deductions.

According to the Union, it first became aware of the audits in September 2005.[6] The record indicates that an audit of compensatory time records for Captains through Deputy Chiefs has not been performed for at least ten years prior to the audits in 2005.

On December 1, 2005, by letter, the Union requested the Department to provide copies of

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[5] The City again provided charts containing the names of Captains through Deputy Chiefs who were included in the audit and indicating their accrued time and any discrepancies with Department guidelines.

[6] The Union provided a memorandum from the Police Commissioner to CEA's President, dated March 14, 2002, to support its contention that the procedures for the approval of compensatory time were well established. The memorandum states:

> Re: CEA Agreement for the period May 1, 2001 to October 31, 2003
>
> * * *
>
> Please be advised that requests for approval for compensatory time, pursuant to Article III, Sec. 1 of the above captioned agreement, that have not received a reply from the Chief of Department within 90 days shall be deemed to have been approved after 90 days.

all CEA members' time and leave records in order to identify which CEA members had compensatory time taken away. The letter states:

> It has come to the attention of the CEA that after the Board of Collective Bargaining ("BCB") decision No. B-16-2005, dated May 10, 2005, audits of CEA members' time and leave records were performed.
>
> Upon information and belief, some CEA members had previously approved and credited compensatory time deducted from their time and leave accruals without any compensation, without any agreement to refund such time, and without negotiations. Such conduct violates the New York City Collective Bargaining Law and the BCB decision number B-16-2005.
>
> Accordingly, please consider this letter a demand to restore any and all compensatory time that has been deducted and a request for all CEA members time and leave records. This request for the time and leave records is necessary to ensure that no compensatory time has been deducted or if deducted what amounts have been deducted for each individual CEA member.

The record does not indicate that the Union received a response.

On December 13, 2005, the Union filed the instant improper practice petition. The Union requests that the Board order the City to: cease and desist from making unilateral changes to mandatory subjects of bargaining; restore any compensatory time taken from CEA members; restore any benefits that may have been lost by CEA members; and post a notice of the Board's decision in all NYPD facilities.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City violated NYCCBL § 12-306 (a)(1), (2), (3), (4) and (5).[7]

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[7] 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;

First, as to its § 12-306(a)(1) and (3) claim, the Union argues that the Department's audits and subsequent deductions of compensatory time from CEA members were retaliatory in nature because they were ordered after the Union engaged in protected union activity by filing its previous improper practice petition in 2004 which resulted in the Board's issuance of *Captains Endowment Ass'n,* Decision No. B-16-2005. Indeed, the subsequent deductions of compensatory time occurred within a few months after the Board issued its decision. In effect, the Department's actions render the Board's decision null and void.

The Union states that the manner and method of approving compensatory time for Captains

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> (2) to dominate or interfere with the formation or administration of any public employee organization;
> (3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
> (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.
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> 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. . . .

through Deputy Chiefs has been an open practice, known at all levels of the Department, and unchanged for the past ten years. Despite the City's contention that there is a longstanding practice of auditing employee records, the City cannot produce any audits of compensatory time for Captains through Deputy Chiefs for at least ten years. Thus, the Department's timing of its audits and deductions cannot be shown to have been conducted for a legitimate business purpose, and are merely a pretext to justify retaliation.

The Union also claims that the City unilaterally made changes in the use of compensatory time and compensatory time procedures, which are mandatory subjects of bargaining, by deducting previously approved and credited compensatory time from CEA members. Contrary to the Board's order in *Captains Endowment Ass'n,* Decision No. B-16-2005, there has been no bargaining.

Finally, the Union states that there has been no response to its December 1, 2005, request for information. The Union requested the time and leave records of its members to ascertain whether compensatory time had been taken away and from whom, information directly related to its assertions that such deductions are in violation of the NYCCBL and the Board's decision in *Captains Endowment Ass'n,* Decision No. B-16-2005.

City's Position

The City argues that the Union failed to allege sufficient facts to support its improper practice claim pursuant to NYCCBL § 12-306(a)(1) and (3). First, the City contends that CEA members were not engaged in protected union activity when they improperly accrued compensatory time. The fact that the Union filed an earlier improper practice petition regarding compensatory time does not allow CEA members to disregard Department guidelines regarding the accrual of compensatory time. Furthermore, the deductions of compensatory time were not in retaliation for any union activity but

in response to CEA members' accruing compensatory time for routine administrative duties which are specifically excluded under Department guidelines. The Department appropriately deducted compensatory time in those instances. Thus, there is no causal connection between the Departments's actions and the Union's allegedly protected union activity.

The City contends that it had legitimate business reasons for auditing compensatory time requests and that conducting such audits is within its management rights under § 12-307(b).[8] The Department periodically reviews payroll and time records for all members of the service to ensure the accuracy of night-shift differential, vacation balances and overtime. The Department followed written procedures that have been in place for at least ten years to determine whether CEA members who made overtime submissions were eligible for the compensatory time requested and approved.

The City claims that the Union failed to make sufficient allegations of fact to support its claim that the City dominated or interfered with the administration of the Union under NYCCBL § 12-306 (a)(2).

The City argues that it did not violate NYCCBL § 12-306(a)(4) because the Union has not shown that the City has changed any policy that affects terms and conditions of employment. The procedures outlined in Interim Order # 27 mirror the 1995 and 2005 version of AGP 320-29. The

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[8] 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.

only change is the absence of language regarding the cap on the accrual of compensatory time which the Department removed in accordance with the Board's decision in *Captains Endowment Ass'n*, Decision No. B-16-2005. Furthermore, the City contends that it had no duty to bargain with the Union because the issuance of Interim Order # 27 falls within its managerial prerogative.

Finally, the City argues that the Union has not established a violation of NYCCBL § 12-306(a)(5). The Department has not made any unilateral change to a mandatory subject of bargaining by auditing compensatory time requests and making appropriate deductions. Furthermore, 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.

DISCUSSION

This case presents three issues before the Board. The first concerns the Union's request for information. This Board finds that the City must provide time and leave records of CEA members – Captains through Deputy Chiefs – from May 10, 2005, through December 31, 2005, because these records are relevant to and reasonably necessary for purposes of collective negotiations or contract administration. As to the Union's claims that the Department's audits and deductions of compensatory time constitute a unilateral change to a mandatory subject of bargaining and were conducted in retaliation for protected union activity, we hold these issues in abeyance until the Union has had an opportunity to review the information it requested and, upon such a review, submits a letter requesting reinstatement of the instant petition.

Pursuant to NYCCBL § 12-306(c)(4), and § 12-306(a)(1) and (4), public employers and public employee organizations have a mutual obligation, as part of the duty to bargain in good faith,

to furnish necessary information in order to have "full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."[9] This duty extends to information that is relevant to and reasonably necessary for the administration of the parties' agreements, such as processing grievances, and/or for collective negotiations on mandatory subjects of bargaining. *See Correction Officers Benevolent Ass'n*, Decision No. B-9-99 at 11-12.

In *District Council 37, Local 2507 and Local 3621,* Decision No. B-7-2004, the union, as part of its petition, requested that the Board order the Fire Department of New York City ("FDNY") to provide information regarding the procedures of FDNY's reasonable accommodation policy ("RA policy") as well as other related policies which concerned modified assignments for employees with disabilities. *Id.* This Board held that the union had a right to receive information regarding the procedures for the implementation of the RA policy because such procedures are a mandatory subject of bargaining. *Id.* at 21. The Board also held that the public employer had a duty to furnish certain information regarding the other related policies because these were either grievable under the contract or the information was reasonably necessary for contract administration. *Id.* at 22.

In the instant matter, the Union requested CEA members' time and leave records in order to ascertain whether the Department made deductions from members' compensatory time in violation of the NYCCBL and this Board's decision in *Captains Endowment Ass'n*, Decision No. B-16-2005.

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[9] NYCCBL § 12-306(c) provides:

> Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
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> * * *
>
> (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 . . . .

We find that the City has a duty to provide the information requested because it is relevant to and reasonably necessary for purposes of collective negotiations or contract administration. Indeed, the requested information regarding the Department's deductions of compensatory time accrued by CEA members is pivotal to the Union's claims in the instant petition that the Department unilaterally changed a mandatory subject of bargaining and retaliated against the Union for protected activity. Accordingly, we direct the City to provide CEA members' time and leave records – Captains through Deputy Chiefs – from the date of issuance of our decision in *Captains Endowment Ass'n*, Decision No. B-16-2005, May 10, 2005, through December 31, 2005, the end of that calendar year, no later than 60 days from the date of issuance of this decision. We hold in abeyance the Union's other claims until the Union has had an opportunity to receive and review the information requested and has submitted a letter requesting reinstatement of the instant petition no later than 120 days from the date of issuance of this decision.

INTERIM 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 City provide to the Union the time and leave records of its members – Captains through Deputy Chiefs – for the period May 10, 2005, through December 31, 2005, no later than 60 days from the issuance of this decision;

ORDERED, that the Union's other claims in the instant petition are held in abeyance pending the Union's submission of a letter requesting the reinstatement of the instant petition no later than 120 days from the issuance of this decision.

Dated: July 6, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

ERNEST F. HART
MEMBER