District Council 37, 79 OCB 25 (BCB 2007)
[Decision No B-25-2007] (IP) (Docket No. BCB-2580-06)

Summary of Decision: Union claimed that the NYPD violated its duty to bargain by revising previously issued procedures for requiring documentation of certain categories of sick leave. This Board found that the revisions did not act to cure the unilateral changes in the same procedures found to constitute an improper practice in two prior determinations of the Board requiring bargaining over the change. As those prior determinations control this case, the instant petition is granted in part and denied in part.***(Official Decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On October 13, 2006, District Council 37 ("Union") filed a verified improper practice petition on behalf of its members in the civil service titles of Police Communication Technician ("PCT") and Supervising Police Communication Technician ("SPCT") against the New York City Police Department ("NYPD" or "Department") and the City of New York ("City"). The instant petition was filed subsequent to the filing of a petition docketed as BCB-2552-06, on June 2, 2006, but prior to the issuance on December 4, 2006, of a final determination by this Board of Collective

Bargaining ("Board") in that prior proceeding ("Initial Decision"). *District Council 37,* Decision No. B-34-2006. On motion by the Union, the Board also today renders *District Council 37*, Decision No. B-24-2007 ("Supplemental Decision"), clarifying the scope of the relief afforded in the Order in *District Council 37*, Decision No. B-34-2006.

As in the Initial Decision, the Union alleges here that the NYPD violated §§ 12-306(a)(1) and (a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to bargain over unilateral changes in certain departmental procedures for documenting sick leave use under the federal Family and Medical Leave Act of 1993 (29 USCS § 2601, *et seq*.) ("FMLA"). The Union asserts that the revision of one of the two policy memos at issue in the prior improper practice proceeding constitutes a failure to bargain. The Union again complains that disciplinary procedures have been instituted against members for purportedly violating the departmental procedures at issue. The Union alleges, as before, that the NYPD improperly failed to bargain over the alleged practical impact as to the health and/or safety of employees who may be required to return to duty prematurely in order to avoid disciplinary action as a result of implementation of the procedures at issue. The City contends that the NYPD has lawfully exercised its prerogative under NYCCBL § 12-307(b) to require documentation for illness-related absences and that the Department has merely reiterated pre-existing procedures without creating any duty to bargain. This Board finds that the City's revision dated September 8, 2006, to Memo No. 1/18.3 which, *inter alia*, was at issue in the Initial Decision, *District Council 37*, Decision No. B-34-2006, does not alter the outcome in that prior case and that the City's defenses are precluded by that determination. Because the Initial Decision, together with the Supplemental Decision, afford all the relief requested by ordering bargaining over any changes in the same

procedures, reversing and expunging any and all disciplinary action taken against all unit members predicated on alleged noncompliance with the procedures, and expunging any negative performance appraisals resulting from such alleged noncompliance, no further relief in this matter is required other than declaring the revised policy to be invalid for the same reasons as the original policy, and to order that the relief previously granted extend to any unit members affected by the policy as revised.

BACKGROUND

The Prior Proceedings

In the Initial Decision, *District Council 37*, Decision No. B-34-2006, we found that the NYPD failed to bargain over the implementation of new procedures by which employees in the titles of PCT and SPCT were required to document their use of FMLA-qualifying leave time. With respect to the two named individuals in that petition, we directed that the NYPD rescind the changes implemented in the procedures memorialized in NYPD Memo No. 1/17.7 and Memo No. 1/18.3 until the parties could bargain over the changes, and to rescind the placement in the leave-monitoring Step Program of PCTs and SPCTs, which, to the extent such placement was predicated on application of the changes at issue in that case, could lead to discipline. We further directed the NYPD to restore the documentation procedures that existed prior to the issuance of the memos and to bargain in good faith with the Union before implementing any change to the documentation procedures for FMLA leave and any disciplinary procedures related to violation of those procedures. As to the two employees named in that petition, we ordered expungement of any disciplinary records pertaining to the Step Program to the extent that such records related

to the changes at issue in that case. We did not reach the claim of practical impact because the City was already directed to bargain over the changes which we found had been improperly implemented.

Although the petition in that case had timely asserted the rights of all affected members and requested relief for any and all employees thus affected, the Board's Decision did not specify that the relief ordered applied employees who were not specifically named in the petition. Thus, in the Supplemental Decision, *District Council 37*, Decision No. B-24-2007, rendered today, we have clarified the relief provided by the Initial Decision, and directed the same relief for all affected, albeit unnamed, members subject to disciplinary action for violation of the procedures at issue in the Initial Decision. Further, the Supplemental Decision clarifies the relief as extending to the expungement of negative performance evaluations to affected unit members, to the extent such evaluations were predicated on alleged noncompliance with the procedures at issue in the two memoranda.

The Instant Case

The parties and procedures at issue in the instant case are identical to those in the Initial Decision. The instant case presents two differences that distinguish the prior improper practice proceedings. First, the Union asserts that "the only additional fact that has been alleged in the instant case that was not raised by either side in th earlier proceeding, BCB-2552-06, is that a significant number of PCTs and SPCTs have lost FMLA certification for failure to comply with . . . the thirty-day recertification requirement." (Reply ¶ 35). The Union also cites a different unit member as an exemplar of those members aggrieved by the implementation of the procedures at issue, PCT Ishmael Arenas, who is a paraplegic pre-certified for intermittent leave under the FMLA. On August 17, 2006, he requested an exemption from Memo No. 1/18.3 requiring him to recertify every thirty days in order to maintain his qualification for intermittent leave under the FMLA. The request was

denied. The Union contends that the procedural changes at issue have had an impact, albeit unspecified by the Union, on Arenas' safety and health.

The second difference between the initial improper practice proceeding and the instant case is that the Department revised Memo No. 1/18.3 on September 8, 2006, adding examples of the application of the procedures at issue that were not included in the version of Memo No. 1/18.3 before us in the Initial Decision and the Supplemental Decision and thus not addressed in either of those Decisions. The original memorandum and the revision are readily compared, with added text denoted by italics:

Original Memo No. 1/18.3 reads, in pertinent part:

> All Communications Section personnel utilizing leave under the provisions of the Family and Medical Leave Act (FMLA) are advised of the following:
> * Under the Family and Medical Leave Act (FMLA), certain re-certifications of medical conditions are to be submitted to the employer every thirty (30) days.
> * Effective July 1, 2006, all Communications Section personnel utilizing leave under the provisions of the FMLA in the previous month must submit an original re-certification on the first day of the next month. For example: personnel utilizing FMLA leave in July of 2006 must submit a re-certification on August 1, 2006, etc.
> * All other FMLA and sick leave regulations remain in effect.

September 8, 2006, revision of Memo No. 1/18.3 reads, in pertinent part:

> * All Communications Section personnel utilizing leave under the provisions of the Family and Medical Leave Act (FMLA) are advised of the following:
> * Under the Family and Medical Leave Act (FMLA), certain re-certifications of medical conditions are to be submitted to the employer every thirty (30) days.
> * Effective July 1, 2006, all Communications Section personnel utilizing leave under the provisions of the FMLA in the previous month must submit an original re-certification on the first day of the next month.
> * For example:
>
> * *if you use* FMLA leave in July, *you* must *recertify* on August 1.
> * *If you lose FMLA in August, you must recertify on September 1.*
> * *If you submit an FMLA certification in July but do not use any FMLA time until September, you do not have to submit an FMLA recertification until October 1.*

* All other FMLA and sick leave regulations remain in effect

POSITIONS OF THE PARTIES

Union's Position

As in the prior proceeding, the Union argues that, without bargaining and in violation of NYCCBL §§ 12-306(a)(1) and (a)(4),[1] the NYPD promulgated Memo No. 1/17.7 and Memo No. 1/18.3, both in its original and revised forms, which changed the procedures by which employees in the titles of PCT and SPCT are required to substantiate leave requests for FMLA-qualifying conditions. Violation of the procedures can result in placement of a civilian in a Step Program designed to monitor the use of sick-leave and to impose progressive discipline for such violations.

The Union reasserts its contention, upheld by us in the Initial Decision, that the memoranda in question apply regular sick leave procedures to FMLA leave, a unilateral change to pre-existing departmental procedures. Specifically, at no time prior to the implementation of Memo No. 1/17.7 on February 3, 2006, were the NYPD's regular-sick-leave documentation procedures under Administrative Guide Procedure ("AGP") No. 319-14, concerning civilian leave requests, made

---

[1] Section 12-306(a) of the NYCCBL 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. . . .

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

applicable to leave taken under the FMLA.

Also as in the prior case, the Union complains that Memo No. 1/18.3, issued June 15, 2006, and revised September 8, 2006, requires documentation every 30 days of the need for leave time albeit taken at intermittent intervals. The Union argues that, in some circumstances, this could require more frequent recertification than that required under the FMLA with which the NYPD's Personnel Services Bulletin No. ("PSB") No. 440-8R, entitled "Guidelines on the Family Medical Leave Act," is indisputedly consistent. Under both PSB No. 440-8R and the FMLA, the employer may not request recertification in less than the minimum period of time specified in the original certification, even if that period of time is longer than, *e.g.*, 30 days. Only if no time period is specified in the original leave request may the employer request recertification every 30 days and even in that case not more frequently than 30 days.

The Union contends that, by requiring certification every 30 days regardless of medical circumstances as Memo No. 1/18.3 requires, the NYPD has changed the requirements in PSB No. 440-8R without bargaining, in violation of the NYCCBL. Moreover, the Union argues, the NYCCBL is violated also by the NYPD's failure to bargain over the additional requirement in Memo No. 1/18.3 that recertification be submitted on the first day of the month following the month in which FMLA leave is used. That requirement of a filing on the first day of the month, under certain factual circumstances, could violate the requirement that recertification be made no more frequently than every 30 days. The Union asserts that requiring an employee to submit recertification on the first day of the month in which FMLA leave is used can actually mean that an employee who does not start FMLA leave on the first or second day of the preceding month must recertify more frequently than 30 days. The Union asserts that some 50 employees in the PCT and SPCT titles who

are on intermittent leave and who were precertified under FMLA have been disenfranchised of their FMLA leave due to the 30-day rule. Without citing specifics, the Union maintains that employees who have lost FMLA leave for failing to recertify under the terms of Memo No. 1/18.3 are now subject to the Step Program and its disciplinary consequences.

In the instant proceeding, the Union again seeks rescission of the 30-day rule concerning recertification for FMLA-qualifying leave and rescission of disciplinary actions taken against PCTs and SPCTs in connection with the loss of FMLA leave due to the 30-day rule, including but not limited to docked pay for disallowed FMLA-approved sick leave. The Union also seeks a posting of the Board's Order.

City's Position

The City reasserts its argument, previously rejected by us, that the Union has failed to plead and prove the contention that Memo No. 1/17.7 and Memo No. 1/18.3, with its September 8, 2006, revision, constitute any substantial changes affecting terms and conditions of employment. The City contends that the memos simply reiterate longstanding City and departmental policy on the documentation of sick leave, whether regular sick leave or FMLA leave. According to the City, any changes that may be found are *de minimis* modifications from procedures established in AGP No. 319-14.

The City also asserts its prior unsuccessful argument that, in promulgating Memo No. 1/17.7 and Memo No. 1/18.3 and its revision, the NYPD has lawfully asserted its managerial right under NYCCBL § 12-307(b) to decide unilaterally the methods, means, and personnel by which governmental operations – in this case, the dispatching of police resources to respond to 911

emergency calls – are to be conducted.[2] The City maintains that the employees in the PCT and SPCT titles at issue in this case provide a necessary service to ensure that emergency assistance is routed to people in need.

The City insists that the NYPD must be able to document and control employees on sick leave in order to assure sufficient staffing for this purpose, and thus contends that its September 8, 2006, revision of Memo No. 1/18.3 to include specific examples, enable the City to accomplish this goal as a proper exercise of management prerogative under NYCCBL § 12-307(b), and, therefore, implicate no duty to bargain. The City contends that the memos contain *de minimus* clarification and adjustments to prior established procedures, specifically, AGP No. 319-14, long in effect, and that no duty to bargain has been created thereby.

Finally, the City argues that the Union has failed to articulate a claim of practical impact on the employees at issue. The City contends that the Union has asserted no facts as to any concrete instance of an employee who actually suffered an impact of the type triggering either an evidentiary hearing by the Board on the question of impact or any duty by the City to bargain and thus has failed to show how the alleged impact results from managerial action or inaction. The Union has failed

---

[2] Section 12-307(b) of the NYCCBL 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; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; 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, 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.

to support its unsubstantiated claims as to the existence of any practical impact on safety and any duty to bargain regarding the procedures at issue.

DISCUSSION

The rendering of the Initial Decision, as clarified in the Supplemental Decision rendered by the Board this date, has largely settled the issues raised by the parties in the instant case. The City's defenses to the instant petition are virtually identical to those rejected in the Initial Decision, and the Union's request for relief for those individuals affected by Memo No. 1/18.3 both in its original and its revised form, as well as Memo 1/7.7, likewise overlap almost entirely with the relief granted in our two prior Decisions.

As we have recently stated, this "Board has consistently applied the doctrines of claim preclusion and issue preclusion – *res judicata* and collateral estoppel – in conformity with their scope as defined by the courts of this State." *Howe*, Decision B-32-2006 at 7. We explained further that

> Under the doctrine of *res judicata*, the Court of Appeals has enunciated "as a general rule" that "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Parker* v. *Blauvelt Volunteer Fire Co.*, 93 N.Y.2d 343, 347-348 (1999), *quoting O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (19); *citing Matter of Reilly v. Reid*, 45 N.Y.2d 24, 30 (editing marks and citations omitted). Thus, a cause of action that could have been presented in a prior proceeding "against the same party, based upon the same harm and arising out of the same or related facts," is barred by *res judicata*. *Id.; see also, North American Van Lines v. American Int'l Cos.*, 11 Misc.2d 1076A, 814 N.Y.S.2d 849 (Sup. Ct. N.Y. Co. 2006).

Id. at 7-8.

In the instant case, the Union asserts that the two memoranda at issue in the Initial Decision (and thus in the Supplemental Decision) represent an unlawful unilateral change. We have already held that such is indeed the case. Likewise, the City asserts all of the grounds previously rejected by this Board in the Initial Decision, and rejected again this day in the Supplemental Decision, to defend the two memoranda and to limit the scope of relief. The Union's claim is substantially that on which it has already prevailed; the City's contrary arguments are, simply, precluded. *Howe*, Decision No. B-19-2007 at 7-8. In particular, the City reasserts here that the memoranda merely reiterate existing policy and procedure set forth in AGP No. 319-14, originally promulgated in 1985 and revised in 2005. That argument was squarely and soundly rejected by this Board in the Initial Decision, where we held:

> This provision was promulgated prior to the enactment of FMLA. The Union submits a revised text which also does not mention the FMLA (Petition Exhibit B); nor, conversely, does PSB No. 440-8R, which addresses the applicability of FMLA to City employees, mention any of the certification requirements contained in individual agency procedures, let alone a direct reference to AGP No. 319-14 (Answer Exhibit 5). Thus by its own terms, AGP No. 319-14 cannot be read to apply to FMLA leave but rather only to "sick leave." Moreover, according to the City's Answer, employees on FMLA leave did not comply with this recertification provision of AGP No. 319-14, leading to the reassertion of the requirement in the Memos at issue.
>
> Because the language of AGP No. 319-14 as originally promulgated antedates FMLA and has not been amended to address FMLA specifically, we do not read the regulation to apply to FMLA leave. Accordingly, Memo No. 1/17.7, which applies AGP No. 319-14 to FMLA leave, was a change. Therefore, by subjecting FMLA leave to the reporting requirements of AGP No. 319-14 Memo No. 1/17.7 introduces new procedures concerning the use of FMLA leave that are mandatory subjects of bargaining.

Initial Decision at 16.

We further held in the Initial Decision that, in any event, Memo No. 1/18.3 applied more stringent requirements than those applicable under any policy submitted by the City to the Board, and thus constituted a change to a mandatory subject of bargaining. *Id.* at 16-17. Thus, the Board explicitly rejected the City's contention that the NYPD had merely codified past practice in the two memoranda at issue and found that a unilateral change to a mandatory subject of bargaining had taken place in the absence of any bargaining, violating § 12-306(a)(2) of the NYCCBL. The City's claims to the contrary are precluded by that finding, as indeed are any claims that could have been made in that proceeding but were not. *Howe*, *supra*, at 7-8.

According to the Union itself, the only factual distinction between the claim resolved in the Initial Decision and that before us now is the specification that, as of the filing of the instant petition, a "significant number" of PCTs and SPCTs had been affected by the implementation of Memo No. 1/18.3. This specification, together with the incidental difference of the identity of the member exemplifying those affected employees, differ from those named in the earlier petition. However, we find these differences to establish only a "distinction without a difference," which can be afforded no legal significance. *See Livingston & Gilchrist v. Maryland Ins. Co.*, 11 U.S. 506, 537 (1813); *Rampano v. United States*, ___ U.S. ___, 126 S.Ct. 2208, 2230, 165 L.Ed.2d 159, 183 (2007). The claims arise out of the same transaction, and the legal rights asserted and remedies sought are in essence the same. *Howe*, Decision B-19-2007 at 7-8. Certainly, the granting of relief in the Supplemental Decision to all affected employees – including, by definition, the named exemplar in this case – renders immaterial the factual allegations that a significant number of employees are affected and that the named exemplar is different from those in the Initial Decision. In short, the Union seeks what it has already won in the Initial and Supplemental Decision, and no additional

relief is warranted.

We turn to the other potential distinction between the instant case and the prior improper practice proceeding, that is, the issuance subsequent to the petition underlying both of our prior Decisions of an amended Memo No. 1/18.3. **A** petitioner's assertion of a "subsequent, allegedly adverse, action" may be treated as "analytically separate from the causes of action asserted in that prior case." *Howe*, Decision B-19-2007 at 8, *citing Xiao Yang Chen v. Fischer*, 6 N.Y.3d 64, 100-101 (2005). Where a claim "arising from the same series of transactions, [ ] relies upon a separate act, with distinct proof and separate damages alleged to flow from that act.," such a claim is not precluded by *res judicata*. In this case, the amendment did not materially change the scope or meaning of Memo No. 1/18.3 but merely provided examples of its application that were implicit in the original provision. However, the issuance of this revised document may lead to the disciplining or other adverse employment action against unit members under the revised memo 18.8/3, and such action may be asserted to not fall within our prior Order. Thus, we find that this subsequent issuance renders any application of the revised Memo No. 1/18.3 to not constitute "a convenient trial unit" with the earlier claims previously decided by this Board in the Initial and Supplemental Decisions. *Howe*, Decision B-19-2007 at 8.

Because the revised Memo is substantially the same as that at issue in our previous Decisions on this subject, we find that the issues presented are the same and that the City is collaterally estopped from litigating the validity of the revised Memo No. 1/18.3. *Howe*, Decision B-19-2007 at 9-10, *citing, inter alia, Pinnacle Consultants, Ltd. v. Leucadia Nat'l Corp.*, 94 N.Y.2d 426, 432 (2000),. As we explained in that case, "collateral estoppel, also known as issue preclusion, prevents a party to two actions from re-litigating in a subsequent action or proceeding an issue clearly raised

in a prior action or proceeding and decided against that party." *Id.* (*quoting Pinnacle Consultants*, 94 N.Y.2d at 432). We find that the issues raised regarding the revised policy are exactly those "raised, necessarily decided and material in the first action," and that the City "had a full and fair opportunity to litigate the issue in the earlier action." Therefore, we find that the revised Memo No. 1/18.3 is invalid for the reasons the original Memo was, as stated in the Initial Decision, and that the City is precluded from re-litigating the validity of the memos a second time before us. *Howe*, Decision B-32-2006 at 9.

Because we find that the policies at issue here have previously been deemed to constitute improper practices and thus they have been deemed void, we need not decide the Union's practical impact claim inasmuch as our prior order directed rescission of Memo No. 1/18.3, *inter alia*, and we now direct rescission of Memo No. 1/18.3, and we find no claim of impact thus stated.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the NYCCBL, it is hereby,

ORDERED, that the improper practice petition, Docket No. B-2580-06, filed by District Council 37, on behalf of its affiliated Local 1549, against the New York Police Department and the City of New York, be, and the same hereby is, granted in part and denied in part.

Dated: June 18, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

I dissent. ERNEST F. HART
MEMBER