Captains Endowment Association, **79 OCB 39 (BCB 2007)**
[Decision No. B-39-2007] (IP) (Docket No. BCB-2525-05).

***Summary of Decision*:** The Union alleged that the 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 that 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 NYPD's audits of compensatory time records and deductions of improperly accrued compensatory time. The Board defers the contract based improper practice claims to the parties' contractual grievance process and retains jurisdiction until the resolution of the contractual grievance process. **(*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.

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 ("City") and the New York City Police Department ("Department" or "NYPD"). The Union claims that the NYPD violated Section 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 Union members, deducting previously approved compensatory time in contravention of a recent Board decision, and failing to provide the time and leave records of members requested by the Union. The Union contends that the NYPD undertook these actions as retaliation for the Union's success in *Captains Endowment Association*, Decision No. B-16-2005 ("*Captains Endowment Ass'n*"), in which this Board held that changes to the accrual of compensatory time and to compensatory time procedures impact mandatory subjects of bargaining. The City contends that the actions complained of here were within its managerial prerogative and in accordance with established written procedures. In addition, the City argues that no causal connection exists between the issuance of *Captains Endowment Ass'n* and the NYPD's audits of compensatory time records and the deductions of improperly accrued compensatory time.

On July 6, 2006, this Board issued an Interim Decision, Decision No. B-22-2006 ("Interim Decision") requiring the City to provide the time and leave records requested by the Union and holding 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.[1] On November 6, 2006, the Union informed the Board that the City had complied with the Interim Decision and requested that the petition be reinstated in its entirety. The Board dismisses the Union's retaliation claim and defers the contract based improper practice claims to the parties' contractual grievance process, as they require the interpretation of the parties' collective bargaining agreement, and retains jurisdiction until the resolution of the contractual grievance process.

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[1] As the Interim Decision is also titled *Captains Endowment Association*, to avoid confusion it will be referred to herein as the Interim Decision and *Captains Endowment Ass'n*, whenever used herein, will refer to Decision No. B-16-2005.

BACKGROUND

After a hearing, the Trial Examiner found that the totality of the record established the relevant background facts to be as follows. The NYPD compensates overtime performed by members of the uniformed service from the rank of Captain through Deputy Chief in compensatory time. The amount of compensatory time that accrues varies depending upon the circumstances in which the overtime is performed. From December 1995 to December 2001, overtime was governed by Administrative Guide Procedure 320-29: "Lost Time/Overtime Procedures for Uniformed Members of the Service – Captain to Deputy Chief (Inclusive)" ("AGP 320-29") which prescribed, in its section titled "Additional Data," when compensatory time must be taken. AGP 320-29 also imposed a cap on the accrual of compensatory time. The Additional Data section reads, in pertinent part:

> 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.

(Ans. Ex. 1.) (emphasis in original).

The Quality Assurance Division ("QAD") referred to in AGP 320-29 monitors and seeks to ensure adherence to NYPD policies and orders. The QAD includes a Special Projects Team which 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.

Despite the language in AGP 320-29 that the QAD would "periodically review the time records of all captains through deputy chiefs," the evidence reveals no such audits conducted in at least the last ten years. CEA President Captain John Driscoll and CEA First Vice President Captain John La Rose both testified that they were aware of no prior audits of Captains through Deputy Chiefs prior to the audits conducted in 2005 that gave rise to this improper practice petition. (Tr. 52, 67-68, respectively.) The City has not rebutted this testimony, nor produced any evidence of audits being conducted prior to 2005.

On December 19, 2001, the Additional Data section of AGP 320-29 was revoked in response to overtime demands created by the September 11, 2001, World Trade Center tragedy and the inability of NYPD employees to take accumulated overtime in the prescribed time period. (Tr. 45-46.) The revocation of the overtime cap in AGP 320-29 resulted in some NYPD officers accruing overtime in excess of a year. As a result, there were instances where individuals who had filed for retirement would be not be working for over a year as they exhausted their compensatory time, yet could not be replaced because they still occupied their civil service line. (Tr. 16-17.) In late 2003 and early 2004, the NYPD Executive Staff began meeting to address this issue.[2] (Tr.15-19.) Those

[2] The Executive Staff generally consists of the Police Commissioner, the Deputy Commissioners, the Bureau Chiefs, and the Chief of Staff. For the pertinent meetings, the Executive Staff consisted of the First Deputy Commissioner George Grasso, Chief of Staff Joe Wuench, Chief of Personnel Rafael Pernell, Deputy Commissioner for Labor Relations John Beirne, Deputy Commissioner for Management and Budget Edward Allocco, Deputy Commissioner for Strategic Initiatives Michael Farrell, and Deputy Chief Peter Cassidy, who is the Commander of the QAD. (Tr. 28-31.)

meetings resulted in Interim Order #25, which, when implemented in April 2004, would reinstate AGP 320-29.[3]

Also in late 2003 and early 2004, the NYPD Executive Staff planned for the QAD to conduct audits. (Tr. 19.) It was decided that the audits would not begin until a year after the reinstatement of AGP 320-29 to allow enough time to gauge the impact of Interim Order #25. The first audit would begin on April 1, 2005, and the second audit would begin on July 1, 2005.

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[3] Interim Order #25 states, in pertinent part:

> 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.
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> 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.
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> 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.

(Ans. Ex. 5.)

Prior to its issuing Interim Order #25, the NYPD informed CEA President John Driscoll of its intentions to do so and showed him of draft of Interim Order #25. (Tr. 32-34, 51-52.) Driscoll responded that the cap on overtime would violate the parties' collective bargaining agreement and that the Union would file an improper practice petition should the order be issued. *Id.* The proposed audits were not discussed, although the text of the draft of Interim Order #25 showed Driscoll referenced AGP 320-29, which includes language that the QAD would "periodically review the time records of all captains through deputy chiefs." On April 26, 2004, the NYPD issued Interim Order #25 and, on April 30, 2004, the Union filed a verified improper practice petition, docketed BCB-2399-04, which alleged that the NYPD violated the NYCCBL when it reinstated AGP 320-29 and thereby unilaterally instituted a cap on the accrual of compensatory time for employees in the titles Captain through Deputy Chief.

On May 10, 2005, this Board issued *Captains Endowment Ass'n* holding that the imposition of limits on, or changes to, the accrual of compensatory time and compensatory time procedures constitute mandatory subjects of bargaining. This Board ordered that the NYPD 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 (*i.e.*, as it existed prior to the issuance of Interim Order #25 and the reinstatement of the Additional Data section of AGP 320-29); and bargain over any imposition of or changes to the limitation on the accrual and use of compensatory time and related procedures.

On July 13, 2005, the NYPD issued Interim Order #27 which explicitly suspends AGP 320-29, revokes Interim Order #25, and does not contain any of the language regarding the cap on the

accrual of compensatory time that was at issue in *Captains Endowment Ass'n*.[4] The provisions that the QAD would "periodically review the time records of all captains through deputy chiefs" remained unchanged.

Also on July 13, 2005, the QAD submitted the first audit report, entitled Q.A.D. #1064, s.05, which examined the overtime accrued by a sample of 45 Captains through Deputy Chiefs for the period April 1, 2004, through March 31, 2005. Q.A.D. #1064, s.05, found 102 incidents of improper

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[4] Interim Order #27 reads, in pertinent part:

> 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:
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> **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):
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> **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.
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> * * *
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> ***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.*
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> * * *
>
> 2. Interim Order 25, series 2004 is hereby **REVOKED.**
>
> 3. Any provisions of the Department Manual or other Department directives in conflict with the contents of this order are suspended.

(Ans. Ex. 3.) (emphasis in original).

accrual of compensatory time.[5] On August 3, 2005, in response to Q.A.D. #1064, s.05, George A. Grasso, the First Deputy Commissioner of the NYPD, directed the Deputy Commissioners of Operations and Administration and the Chiefs of Housing and Internal Affairs to "reevaluate each incident that resulted in overtime, conduct appropriate follow up regarding those submissions that are not in compliance with Department policy and adjust time records accordingly." (Ans. Ex. 7.)

On September 30, 2005, the second audit was completed and the audit report, entitled Q.A.D. #1612, s.05, was submitted on November 18, 2005. Like Q.A.D. #1604, s.05, Q.A.D. #1612, s.05, reviewed overtime accrued by Captains through Deputy Chiefs but for the period July 1, 2004, through June 30, 2005, and found 86 incidents of improper accrual of compensatory time.[6]

After the audits, the NYPD deducted accrued compensatory time from those who had improperly accrued such time for administrative and other routine duties that are specifically excluded under the NYPD guidelines. (Ans. ¶ 64.)[7] The record, however, is devoid as to the

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[5] A review of 40 of the 45 selected at random found that 102 of the 1039 overtime incidents (9.8%) resulted in an improper accrual of compensatory time; 100 of the 102 incidents were attributed to two Captains. Q.A.D. #1064, s.05, also analyzed the top five 1st Quarter 2005 (January 1, 2005, through March 31, 2005) Overtime Earners, and found that 55 of the 223 overtime incidents (25%) resulted in an improper accrual of compensatory time; 50 of the 55 incidents were attributed to two Captains.

[6] For Q.A.D. #1612, s.05, the QAD Special Projects Team reviewed the overtime accrued by 55 Captains through Deputy Chiefs, including the top 15 overtime earners for the 2nd Quarter of 2005 (April 1, 2005, through June 30, 2005). A review of 40 of the 55 selected at random found that 86 of the 1725 overtime incidents (5%) resulted in an improper accrual of compensatory time. The 86 discrepancies were attributable to 16 members of the service; one Captain accounted for 30 of the 86 incidents. Q.A.D. #1612, s.05, also analyzed 15 of the top 50 2nd Quarter 2005 Overtime Earners and found that 43 of the 372 overtime incidents (11.5%) resulted in an improper accrual of compensatory time; the 43 incidents were attributed to six members of the service.

[7] The City has stipulated with regard to the first audit "that deductions took place after the Board issued its decision on May 16, 2005." (Tr. 36.) The City refused to so stipulate regarding the second audit. (Tr. 38.)

specifics of any such adjustments, and the Union has not identified any individual whose has had compensatory time deducted as a result of the audits.

The Union claims that the procedures for the approval of compensatory time were well established. The Union provides a letter from Police Commissioner Raymond W. Kelly to CEA President Captain John Driscoll, dated March 14, 2002 ("Kelly letter"), which it contends constitutes "a side bar letter to the contract." (Tr. 51, 56.) The letter reads, in pertinent part:

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

The Union has not identified any member who has had compensatory time deducted as a results of the audits complained of herein that was arguably approved in accordance with the above side bar letter to the contract.

On December 1, 2005, the Union's counsel requested that the NYPD provide copies of the time and leave records for all CEA members in order to identify which CEA members had compensatory time taken away. On December 13, 2005, the Union filed the instant improper practice petition, requesting 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 Union members; restore any benefits that may have been lost by Union members; and post a notice of the Board's decision in all NYPD facilities. On July 6, 2006, this Board issued the Interim Decision requiring 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, and holding in abeyance the Union's other claims in the instant petition pending the Union's submission of a letter

requesting their reinstatement. On November 9, 2006, the Union submitting a letter stating that the City was in compliance with the Interim Decision and requesting the reinstatement of the instant petition.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the facts they have alleged establish that the City violated NYCCBL § 12-306 (a)(1), (2), (3), (4) and (5).[8] First, the Union argues that deducting previously approved

[8] The Union has not identified which alleged acts correspond with which section. NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> (2) to dominate or interfere with the formation or administration of any public employee organization;
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> (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;
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> (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;
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> (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

compensatory time from Union members constitutes a unilateral change in the use of compensatory time and compensatory time procedures in violation of *Captains Endowment Ass'n*, which held such to be mandatory subjects of bargaining. The deduction of the aforementioned compensatory time without any compensation and without any negotiations is a violation of the NYCCBL.

Second, the audits described above were undertaken within months of the Board issuing its decision in *Captains Endowment Ass'n*. The Union describes the audits as pretextual; the City decided to reduce previously approved and credited compensatory time through the use of these pretextual audits in violation of *Captains Endowment Ass'n*. The deductions of compensatory time also did not occur until after the Union's victory in *Captains Endowment Ass'n*.

The Union does not claim that the audits, in and of themselves, violated the NYCCBL but rather that the timing of the audits and deductions form the basis of the Union's retaliation claim. According to the Union, both audits were ordered after the filing of the 2004 improper practice petition. Prior to these audits, no audit of compensatory time for Captains through Deputy Chiefs had been conducted in the past ten years.

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

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> 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 NYPD, unchanged for the past ten years, and expressly and/or implicitly approved by the highest levels of the NYPD. Thus, the NYPD'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.

City's Position

The City denies that deducting previously approved compensatory time from Union members constitutes a unilateral change in the use of compensatory time and compensatory time procedures in violation of *Captains Endowment Ass'n* or the NYCCBL.

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). CEA members were not engaged in protected Union activity when they improperly accrued compensatory time and, absent evidence of protected activity, there can be no claim of unlawful motivation under the NYCCBL.

Also, mere affiliation with Union activity does not make personal activity protected Union activity under the NYCCBL. The filing of an earlier improper practice petition regarding compensatory time does not allow Union members to disregard the NYPD 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 Union members' accruing compensatory time for routine administrative duties, which are specifically excluded under the NYPD guidelines. The NYPD appropriately deducted compensatory time in those instances.

The City contends that even if Union activity is presumed, the Union fails to establish the required casual connection between the alleged improper practice and the Union activity. The

NYPD 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 NYPD followed written procedures that have been in place for at least ten years to determine whether the Union members who made overtime submissions were eligible for the compensatory time requested and approved. The decision to conduct the audits was made prior to the filing of the improper practice petition that resulted in *Captains Endowment Ass'n* and the first audit began prior to the Board issuing that decision. Even if Petitioners could establish a *prima facia* case, the City had legitimate business reasons for auditing compensatory time requests and conducting such audits is within its management rights under NYCCBL § 12-307(b).[9] The complained of acts – the audits and resulting deductions – would have occurred in absence of any protected conduct.

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 NYPD has not made any unilateral change to a mandatory subject of bargaining by auditing

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[9] 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; . . . 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.

compensatory time requests and making appropriate deductions. The procedures outlined in Interim Order #27 mirror the 1995 and 2005 version of AGP 320-29. The only change is the absence of language regarding the cap on the accrual of compensatory time which the NYPD removed to comply with the *Captains Endowment Ass'n* decision. 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.

The City argues that the Union has not established a violation of NYCCBL § 12-306(a)(5) because the NYPD 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.

Finally, in their post hearing brief, the City argued that any issue of compensatory time deductions should be deferred to arbitration.[10]

DISCUSSION

Although arguing that the City's conduct violates all sub-sections of NYCCBL § 12-306, the facts alleged by the Union relate only to claims of retaliation and unilateral change. As the Union has failed to plead facts establishing any violation of NYCCBL § 12-306(a)(2), that claim is dismissed.

The Union contends that the City engaged in the alleged improper practices described herein in retaliation for its success in a prior improper practice petition resulting in the decision in *Captains*

[10] On September 12, 2007, by letter, the City confirmed that it "is willing to waive timeliness objections if the Union files a request for arbitration on the contractual issues pertaining to compensatory time deductions that were raised in the [improper practice petition]."

Endowment Ass'n. The alleged activity is alleged to violate NYCCBL § 12-306(a)(1) and (3).

The test to establish retaliation is well settled; a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and

2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, Decision No. B-51-87 at 18-19 (*adopting City of Salamanca*, 18 PERB ¶ 3012 (1985)); s*ee also Howe*, Decision B-19-2007 at 11. The above formulation is commonly referred to as the "*Salamanca* test."

In the instant case, the Union has failed to satisfy the first prong of the *Salamanca* test. The Union activity at issue is the filing of the improper practice petition which resulted in the decision in *Captains Endowment Ass'n*. It is undisputed that the CEA put the NYPD on notice of its intention to file that improper practice petition in April 2004, prior to the audits actually being conducted. (Tr. 32-34, 51-52.) However, it is also undisputed that the decision to conduct the audits was made at the same time as the decision to re-institute AGP 320-29 in late 2003 and early 2004. (Tr. 19.) That is, the decision to conduct the audits was made prior to the NYPD having notice of the Union's intention to file an improper practice petition and more than 12 months prior to the issuance of the Board's decision in May 2005. Therefore, the Union has failed to establish that the NYPD had the requisite knowledge of the Union activity to satisfy the first prong of the *Salamanca* test. *Byrne*, Decision No. B-40-2000 at 10 (although notified of a demotion after making a speech, a protected activity, the petitioner failed to satisfy the *Salamanca* test as the decision to demote her was made prior to the protected activity); *Doctors Council*, Decision No. B-12-97 at 10-11 (petitioner was terminated after filing a grievance by mail but prior to the City receiving the grievance; the union

failed to satisfy the *Salamanca* test as it had not demonstrated that the City had knowledge of the protected union activity prior to the termination of the employee). On this basis the Board dismisses the Union's retaliation claim.

The Union's remaining claim is that the deduction of previously approved compensatory time from Union members constitutes a unilateral change in the use of compensatory time and compensatory time procedures which this Board found to be mandatory subjects of bargaining in *Captains Endowment Ass'n*. The alleged activity, therefore, is alleged to violate NYCCBL § 12-306(a)(4) and (5). To the extent that the Union argues that the deductions themselves, absent the motivation thereof, constitute improper practices, the allegations sound in contract, not the NYCCBL. That is, the Union does not dispute that the NYPD has the right to conduct audits. Rather, the Union argues that the Kelly letter constitutes part of the collective bargaining agreement between the City and the Union and that, therefore, the City cannot deduct any compensatory time from members that the NYPD did not formally deny within 90 days of the member submitting the request for compensatory time. Whether the Union's contract interpretation is correct is a question for an arbitrator, not the Board. Section 205.5(d) of the Taylor Law, provides that:

> the board shall not have authority to enforce an agreement between a public employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

When the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement, this Board's jurisdiction may not be invoked. *District Council 37, Local 1508*, Decision No. B-11-2007 at 9 ("Alleged violations of an agreement between the employer and an employee organization that do not otherwise constitute improper practices are expressly beyond

the jurisdiction of this Board."); *County of Nassau*, 25 PERB ¶ 3071 (1992) (PERB interpreting § 205.5 as depriving it of jurisdiction over improper practice charges when the underlying disputes are essentially contractual); *Patrolmen's Benevolent Ass'n*, Decision No. B-24-87 at 7, *aff'd sub. nom., Caruso v. Anderson*, 138 Misc.2d 719 (N.Y. Co. 1987), *aff'd*, 145 A.D.2d 1004 (1st Dept. 1988), *lv. denied*, 73 N.Y.2d 709 (1989).

The instant case does not present the situation where the facts alleged to constitute a unilateral change claim are inextricably related to a statutory claim such that the claim cannot be deferred to be resolved separately in arbitration. *See Sergeants Benevolent Ass'n*, Decision No. B-32-2005 (unilateral change in leave request policy found to be inherently destructive to the union and therefore properly before the Board). Therefore, the Union should raise its contract claim in the context of the grievance procedure and not in an improper practice proceeding. *District Council 37, Local 1508*, Decision No. B-11-2007 at 10; *Local 237, Int'l Bhd. of Teamsters*, Decision No. B-31-1998 at 7; *Local 1182, Communications Workers of America,* Decision No. B-8-96 at 11. Accordingly, we find that the contractual matters "should be determined in the arbitral forum, while retaining jurisdiction in the event that the arbitration decision does not conform with the NYCCBL." *District Council 37*, Decision No. B-21-2007 at 21; *United Probation Officers Ass'n*, Decision No. B-38-91 at 15. That is,

> in the event that either the issue raised in the improper practice petition is not resolved in the arbitral forum, or the arbitration produces a result that is alleged to be inconsistent with policies and purposes underlying the NYCCBL, we shall, upon demand, reassert jurisdiction in this matter to hear and determine the allegations of improper practice.

District Council 37, Decision No. B-27-2001 at 8; *District Council 37*, Decision No. B-31-85 at 20.

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 claims sounding in retaliation are dismissed and that the contract based claims in the improper practice petition filed by the Captains Endowment Association, docketed as BCB-2525-05, and the same hereby are, deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL.

Dated: December 4, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER