

DC 37, Locals 461 & 508, 8 OCB2d 11 (BCB 2015)

(IP) (Docket No. BCB-4007-13)

Summary of Decision: Petitioner alleged the City violated the duty to bargain by unilaterally eliminating Lifeguards' access to free parking at the 59th Street Pool and several Brighton Beach and Rockaway Beach locations. The City moved to dismiss the petition for failure to establish a *prima facie* case of a unilateral change and, in the alternative, argued that it did not grant a uniform or unequivocal parking benefit such that Lifeguards would reasonably expect it to continue unchanged. The Board denied the motion to dismiss. The Board found that DPR provided Lifeguards at the 59th Street Pool and Rockaway Beach locations with longstanding parking benefits and that DPR's unilateral change to these benefits violated its duty to bargain. However, the Board found no violation as to the Brighton Beach locations. Accordingly, the petition was 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 Petition

-between-

**DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
and LOCALS 461 and 508,**

Petitioners,

-and-

**NEW YORK CITY DEPARTMENT OF PARKS & RECREATION
and the NEW YORK CITY OFFICE OF LABOR RELATIONS,**

Respondents.

DECISION AND ORDER

On September 25, 2013, Locals 461 and 508 of District Council 37, AFSCME, AFL-CIO ("Union") filed a verified improper practice petition against the New York City Department of Parks and Recreation ("DPR") and the New York City Office of Labor Relations ("City"). The petition alleges that DPR modified its longstanding practices of providing Lifeguards with access

to free parking at the 59th Street Pool and several Rockaway Beach and Brighton Beach locations and failed to bargain over those changes with the Union, in violation of § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”). The City moves to dismiss the petition for failure to establish a *prima facie* case of a unilateral change and, in the alternative, argues that it had no obligation to bargain over the parking changes because the availability of free parking was not an unequivocal and uniform benefit such that Lifeguards would reasonably expect it to continue unchanged. The Board denies the motion to dismiss and finds that DPR violated NYCCBL § 12-306 (1) and (4) by modifying, without negotiation, the availability of lifeguard parking at the 59th Street Pool and at the Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach locations. The Board finds no violations as to the Brighton 2nd Street and West 15th Street Brighton Beach locations because the record did not support a finding that DPR granted Lifeguards unequivocal parking benefits. Accordingly, the petition is granted in part, and denied, in part.

BACKGROUND

A six-day hearing was held, and the Trial Examiner found that the totality of the record, including the pleadings, exhibits, and post-hearing briefs, established the following relevant facts:

The Union is the certified collective bargaining representative for DPR employees in various lifeguard titles, including Lifeguard and Chief Lifeguard (collectively “Lifeguards”). The Union and the City are parties to collective bargaining agreements (“Agreements”).

The Union alleges that DPR modified the longstanding practices of providing access to free parking on a first-come first-served basis to Lifeguards assigned to seven locations: the 59th Street Pool, Brighton Beach (Brighton 2nd Street and West 15th Street) (“Brighton Beach locations”), and Rockaway Beach (Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street) (“Rockaway Beach locations”).¹

The City maintains that it did not grant uniform or unequivocal parking to Lifeguards. Joseph Trimble, DPR’s Director of Labor Relations, testified that he was not aware of any DPR policy providing Lifeguards with parking; that free parking is not part of the Agreements; and that he has not dealt with any grievances related to Lifeguard parking.² Trimble also testified that many DPR work locations do not have Lifeguard parking. As a result, the City asserts that there was no practice of providing Lifeguards with free parking and requests that the Board dismiss the petition.

The testimony regarding Lifeguards’ access to free parking is summarized below.

59th STREET POOL PARKING LOCATION

Peter Stein, President of Local 508, testified that from the late sixties or early seventies until renovations started in 2009, DPR provided Lifeguards at the 59th Street Pool with 12 to 14

¹ The Union withdrew its allegations relating to Beach 84th Street. As a remedy, the Union seeks an order directing DPR to (1) cease and desist from unilaterally modifying Lifeguard access to free parking at the locations at issue; (2) restore Lifeguard access to free parking that DPR eliminated or otherwise modified at the locations at issue; (3) bargain with the Union over its decision to modify Lifeguard access to free parking at the locations at issue; and (4) reimburse Lifeguards for expenses incurred as a result of DPR’s modification of Lifeguard access to free parking. (*See Pet.* at 11)

² Article 23 §3 of the Agreement provides: “Where lifeguard personnel are required to walk a considerable distance to their assigned posts, individual schedules will be adjusted to cover this time differential.”

parking spots in a fenced-in and locked parking lot located next to the 59th Street Pool building. While DPR employees from nearby facilities occasionally parked in this lot, the parking lot was not open to the public. A black sign attached to the gate restricted parking to “employees only.” (Tr. 77-82) Stein also testified that all Lifeguards assigned to the 59th Street Pool received a key to the parking lot and that he knew of no Lifeguard assigned to the 59th Street Pool that was denied access to this on-site parking. During the time Stein was assigned to the 59th Street Pool, he did not recall a permit process and indicated that managers had “different iterations” of authorizing Lifeguards access to free parking at the 59th Street Pool. (Tr. 80) For example, on January 23, 2007, DPR issued a parking permit to Javier Rodriguez, the Assistant Lifeguard Coordinator, to park at West 59th Street for the 2007 calendar year, which was “revocable without notice.” *See* Union Ex. E.

Three other Lifeguards corroborated Stein’s testimony on the availability of Lifeguard parking in the designated parking lot at the 59th Street Pool prior to 2009. Richard Sher, the Citywide Lifeguard Coordinator and Treasurer of Local 508, testified that he has been parking at this designated parking lot since about 1973. When Sher was assigned to the 59th Street Pool, Paul Friesel, who was in charge of the 59th Street Pool, gave Sher a key to the parking lot and told him to park there. Similarly, Franklin Paige, a Lifeguard and President of Local 461, testified that he received a key and parking permits from management on multiple occasions to park at the 59th Street Pool parking lot. Finally, Rodriguez testified that he has parked in the 59th Street Pool parking lot since 1991 or 1992.

The 59th Street Pool was closed for renovation from sometime in 2009 through sometime in June 2013. Prior to the re-opening of the 59th Street Pool sometime after June 2013, Stein and

Sher toured the 59th Street Pool with DPR Deputy Commissioner Liam Kavanaugh. During that walk-through, there was no discussion of parking accommodations at the facility. At the time of the walk-through, Sher and Stein were unaware that employee parking would not be provided when the facility reopened.

During a late-June 2013 meeting with Kavanaugh, Stein and Evelyn Seinfeld, Director of Research and Negotiations for District Council 37 and Chief Negotiator for Locals 508 and 461, were advised that the on-site parking at the 59th Street Pool was being eliminated. However, Stein testified that Kavanaugh “alluded” to the possibility that street parking would be available for the 59th Street Pool DPR employees. (Tr. 94 & 103) Since the re-opening of the 59th Street Pool in 2013, Lifeguard access to the pre-2009 parking lot at the 59th Street Pool has been eliminated, and no alternative parking has been provided. DPR did not negotiate with the Union prior to DPR’s decision to eliminate Lifeguard access to free parking at the 59th Street Pool.

ROCKAWAY BEACH PARKING LOCATIONS

Rodriguez testified regarding the availability of Lifeguard parking at Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street. Lifeguard parking in all Rockaway Beach locations from 1991 through the 2012 beach season was by permit. Lifeguards were “sometimes” issued permits and “sometimes” not. (Tr. 164) In years parking permits were not issued, DPR management instructed Lifeguards to park by “placing a lifeguard T-shirt or some [part of] their lifeguard uniform or their lifeguard parka either on the car dashboard or steering wheel”.³ (Tr. 130; 149-50) A Lifeguard who parked without a parking permit at a Rockaway

³ There was no evidence as to the number of occasions permits were issued to Lifeguards at Beach 73rd Street, Beach 86th Street, Beach 97th Street, or Beach 106th Street prior to the 2013 beach season. The testimony is that parking permits were issued in some, but not all years.

Beach location was still subject to being ticketed even if the Lifeguard followed DPR's instruction to display a part of their uniform in the car. When a Rockaway Beach Lifeguard received a parking ticket, a DPR park manager would meet with the NYPD 100th Precinct Commander on behalf of the ticketed Lifeguard to dismiss the parking ticket. (Tr. 168)

At a mid-June 2013 meeting, Kavanaugh notified Seinfeld and Stein that parking would no longer be available to Lifeguards at the Rockaway Beach locations and "that Hurricane Sandy was a factor in this decision." (Tr. 65-66) During the 2013 beach season, John Lopez, a Lifeguard assigned to Beach 73rd Street, and Maliek Shaw, a Lifeguard assigned to Beach 86th Street, received parking tickets "as a result of not being able to park in [the Rockaway Beach locations]." ⁴ (Tr. 144) DPR wrote letters on behalf of the two ticketed Lifeguards requesting the dismissal of their parking violations. The two identical letters dated July 1, 2013, in relevant part, state:

[Lifeguard Name] is an employee of the New York City Department of Parks and Recreation, working in the title of Lifeguard at Rockaway Beach. Through a long standing agreement between [DPR] and the 100th Precinct of the NYPD, lifeguards are issued permits to park at or adjacent to lifeguard stations located at Beach 59th Street, Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street, along the Rockaway Beach Boardwalk. Unfortunately, the permits for this season are still being processed. In the meantime, we have instructed all Lifeguards to display their official, department-issued orange shirt on their dashboard. [The lifeguard at issue in the letter] had his shirt displayed properly, but still received a parking violation. On behalf of [the lifeguard], I respectfully request that this violation be dismissed. [. . .]"

See Union Exs. G & H.

⁴ There is no evidence as to where Lifeguards assigned to the Rockaway Beach locations parked during the 2013 beach season.

DPR did not negotiate with the Union prior to its decision to eliminate Lifeguard access to free parking at the Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street locations, nor did Hurricane Sandy destroy the parking areas at these locations.

Beach 73rd Street Parking

Parking for approximately 27 cars was available for Lifeguards in a lot behind the boardwalk and on a paved circle along the boardwalk.⁵ A DPR-issued permit was required to park in the lot behind the boardwalk and along the paved circle along the boardwalk. A green DPR “parking by permit” sign was located at the beginning of the paved circle. (Tr. 133; 137; Union Ex. A)

Effective the 2013 Beach season, the Lifeguard parking areas previously available at Beach 73rd Street were no longer available to Lifeguards assigned to Beach 73rd Street because the area along the boardwalk was converted to a pedestrian area and the paved circle along the boardwalk was blocked by “jersey barriers.”⁶ (See Union Ex. F; Tr. 142-43)

Beach 86th Street Parking

Parking for 18 to 21 cars was available to Lifeguards on a grass area behind the Lifeguard station and a bus cut-out area near Beach 84th Street. Effective the 2013 Beach season, Lifeguards assigned to Beach 86th Street continued parking at the bus cut-out area near Beach

⁵ The circle along the boardwalk includes a defunct bus cut-out. A bus cut-out is a curbside area designed to allow city buses to pick up passengers at the beaches without blocking traffic. Buses have not used the cut-out since prior to 1991.

⁶ A jersey barrier is a modular concrete or plastic barrier employed to separate lanes of traffic.

84th Street. However, the Lifeguard parking area previously available to Lifeguards assigned to Beach 86th Street was no longer available because it was converted into a paved parking area restricted to DPR operations and concession employees. *See* Union Ex. B₂.

Beach 97th Street Parking

A parking area, accommodating approximately 21 Lifeguard cars and up to 40 cars in total, was available to Lifeguards behind the 97th Street Lifeguard station.⁷ Effective the 2013 Beach season, the Beach 97th Street parking was no longer available to Lifeguards assigned to Beach 97th Street because it was converted into a rock garden and a pedestrian ramp. *See* Union Ex. I.

Beach 106th Street

Parking for up to 40 cars was available to Lifeguards on both sides of a median adjacent to a bus area, and parking for up to 12 cars was available to Lifeguards behind the lifeguard office at Beach 106th Street.⁸ A DPR sign required a parking permit to park on both sides of the median adjacent to the bus area at Beach 106th Street. The parking area behind the Lifeguard office at Beach 106th Street was gated and locked. Lifeguards assigned to Beach 106th Street were given keys to access the 106th Street parking area behind the Lifeguard office.

With the exception of the last day of the 2013 beach season, parking at Beach 106th Street was not available to Lifeguards during the 2013 beach season because a concrete barrier blocked

⁷ Other DPR employees parked at Beach 97th Street.

⁸ Approximately 55 Lifeguards were assigned to Beach 106th Street during the beach season.

the bus area where Lifeguards assigned to Beach 106th Street previously parked and the parking area behind the Lifeguard office was converted into a garden.⁹ *See* Union Ex. J.

BRIGHTON BEACH PARKING LOCATIONS

Sher and Arthur Miller, an Assistant Citywide Lifeguard and a member of Local 508's executive board, testified regarding the availability of Lifeguard parking at the Brighton Beach locations prior to and after the 2013 beach season.

Lifeguard parking at the Brighton Beach locations was by parking permit until 2003.¹⁰ After 2003, no parking permits were issued but Lifeguards continued to park at the Brighton Beach locations by placing a piece of their orange uniform in their windshield, "hoping that it would be respected by the [NYPD] 60th Precinct and DOT [(Department of Transportation)]." (Tr. 241) Miller's testimony was corroborated by Sher, who recollected that Lifeguards left a piece of their orange uniform in the windshield to park.

If a Lifeguard received a parking ticket at a Brighton Beach location, Miller "would get them a form which was issued by DPR and submit the ticket and the form to some designated office in the Arsenal." (Tr. 241) This process resulted in dismissing tickets for some people while other "people had problem[s]." (Tr. 245)

In a mid-June 2013 meeting, Kavanaugh notified Seinfeld and Stein that Lifeguard parking would no longer be available at the Brighton Beach locations and "that Hurricane Sandy

⁹ On the last day of the 2013 beach season, DPR restored Lifeguard access to free parking at the Beach 106th Street area where Lifeguards parked on both sides of a median adjacent to a bus area.

¹⁰ Parking permits for Brighton 2nd Street were issued from 1971 until 2003. Parking permits for West 15th Street were issued from 2000 or 2001 until 2003.

was a factor in this decision.”¹¹ (Tr. 65-66) DPR did not negotiate with the Union prior to DPR’s decision to eliminate the availability of Lifeguard parking at the Brighton Beach locations.

Brighton 2nd Street Parking

Sher and Miller testified that from the 1970 beach season through the 2012 beach season, parking for 10 to 15 cars was available for Lifeguards on a street behind the boardwalk on Brighton 2nd Street and on the sidewalk along the fence of the park on Brighton 2nd Street. *See* Union Ex. K, p. 6. Effective the 2013 beach season, the two areas previously available for parking at Brighton 2nd Street were not available to Lifeguards assigned to Brighton 2nd Street because, according to Miller, it was under “heavy construction and fenced off.” (Tr. 235; *See* Union Ex. K, p. 6)

West 15th Street Parking

Miller and Sher testified that from the 2000 or 2001 beach season through the 2012 beach season, parking for approximately 15 cars was available for Lifeguards against the boardwalk and along the sidewalk leading up to West 15th Street. Effective the 2013 beach season, the areas previously available for Lifeguard parking at West 15th Street were not available to Lifeguards assigned to West 15th Street because the “entire street was cordoned off to provide space on both sides of the street for construction trailers that were there due to [Hurricane Sandy].” (Tr. 242; *See* Exhibit K pgs. 5-6)

Sher corroborated Miller’s testimony on the availability of parking at West 15th Street prior to the 2013 beach season and the unavailability of said parking during the 2013 beach

¹¹ There is no evidence as to whether the Brighton 2nd Street parking area was destroyed by Hurricane Sandy.

season. Furthermore, Sher acknowledged that Lifeguard parking was restored at West 15th Street sometime between September 2013 and April 23, 2014.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that in June 2013, DPR violated NYCCBL § 12-306(a)(1) and (4), by unilaterally changing the availability of free parking for Lifeguards, a mandatory subject of bargaining which existed for at least 30 years. According to the Union, the record establishes that prior to 2009, DPR provided Lifeguards assigned to the 59th Street Pool with access to free parking; prior to the 2013 beach season, DPR provided Lifeguards assigned to the Brighton Beach and Rockaway Beach locations with access to free parking; effective the 2013 beach season, DPR modified Lifeguard access to free parking at these locations; and DPR did not bargain with the Union prior to modifying Lifeguard access to free parking at these locations.

The Union asserts that DPR failed to present any evidence to rebut the Union's evidence of DPR's provision of a parking benefit to Lifeguards or its unilateral modification of this benefit. Furthermore, DPR failed to present any evidence to support its assertions that Hurricane Sandy caused the damage that resulted in the closure of the parking areas at issue; that the closures were temporary; that the City intends to restore the parking at the Rockaway Beach and Brighton Beach locations; that the eliminated parking areas were under the control of the DOT; or that DOT ordered the closure of the parking areas at issue.

The Union argues that a practice need not be unit-wide and cites Board and PERB precedent that a site-specific practice can be the basis of a unilateral change. The Union further

asserts that all Lifeguards assigned to the beach and pool locations at issue had the benefit of free parking for 30 or more years prior to June 2013 and that this benefit was created by DPR, known at the highest levels of DPR, and enforced by DPR.

In response to DPR's assertion that Article 23, § 3 of the Agreement covers the subject of parking, the Union claims that the provision has nothing to do with the availability of free parking. Rather, this contract provision addresses the situation when a Lifeguard is assigned to multiple locations in the course of a day.

Finally, the Union argues that DPR should be precluded from raising the restoration of the parking areas at issue as a defense and requests that the Board draw a negative inference as a result of DPR's failure to comply with the Union's request and the Trial Examiner's order to produce documents that show the restoration of the parking areas at issue.

City's Position

At the conclusion of the Union's case, the City moved to dismiss the petition for failure to establish a *prima facie* case of a unilateral change. The City relies upon *State of NY Dept of Correctional Services*, 35 PERB ¶ 3030 (2002) ("*Groveland*") to argue that a uniform parking practice cannot exist unless the Union establishes that DPR provided Lifeguards with access to free parking at all DPR pool and beach locations. In the alternative, the City argues that the Union failed to establish a uniform and unequivocal practice, such that all Lifeguards would reasonably expect to access free parking without change. In support of its arguments, DPR asserts that the record establishes that there is no DPR policy on Lifeguard parking; Lifeguards do not have access to free parking at all DPR beach and pool locations; the parking policies are

location-specific and not uniform across all DPR beach and pool locations; and that any such parking policies attach to the individual and not the Lifeguard titles.

With regard to the 59th Street Pool location, DPR asserts that there is no uniform practice of free parking because “there was no system of issuing keys and, therefore, no way to know whether management was regulating who had keys and/or access to parking at the site” and because the parking system was subject to the whims of Parks management, who had “different iterations of their vision of what should be there ” (Tr. 80) Furthermore, DPR argues that the 59th Street Pool parking was not unequivocal because the parking permits previously issued to Lifeguards in 2007 expressly stated “this permit is revocable without notice.” (Union Ex. E) Finally, DPR asserts that it was public knowledge that the 59th Street Pool parking area was being eliminated upon the completion of the renovation.

With regard to the Brighton Beach locations, DPR argues that these locations are not parking areas. Rather, the Brighton 2nd Street area is an unmaintained street with concrete paving, and the West 15th Street area is a street that ends at the boardwalk. Given this, DPR argues there can be no unequivocal expectation of free parking at Brighton 2nd Street and West 15th Street because it is unreasonable for Lifeguards to “presume that parking all over sidewalks near a playground and two or three abreast in a street blocking in each other [sic] [was] an unequivocal offer of parking.” (City Br. at 23)

DPR also argues that Lifeguards assigned to the Brighton and Rockaway Beaches locations were on notice that their access to free parking was subject to being moved or eliminated at any time. DPR cites the relocation of the Stillwell Avenue Lifeguard shack to West 15th Street sometime in 2000 or 2001 and the construction at West 33rd Street sometime in

2011 or 2012, during which Lifeguards parked at West 35th Street, as evidence that the Union and Lifeguards were on notice that Lifeguard parking areas were subject to being moved or eliminated. Finally, DPR argues that Lifeguards at Brighton Beach and Rockaway could not have an unequivocal expectation to park in areas where parking tickets were issued by the NYPD. Rather, the issuance of parking tickets in the areas Lifeguards parked suggests that Lifeguards were parking in areas not under DPR's control or parking illegally in "No Parking" zones. (City Br. at 26)

DISCUSSION

NYCCBL § 12-306(a)(4) makes it an improper practice to fail to bargain in good faith "on matters within the scope of collective bargaining, which generally consist of certain aspects of wages, hours and working conditions."¹² *Local 621, SEIU*, 2 OCB2d 27, at 10 (BCB 2009). We have long held that a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith. *See DC 37*, 79 OCB 20, at 9 (BCB 2007); *ADW/DWA*, 7 OCB2d 26, at 13 (BCB 2014).

¹² NYCCBL § 12-306 states, 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....

The party asserting a unilateral change to a mandatory subject of bargaining carries the burden of demonstrating that (i) “the matter sought to be negotiated is a mandatory subject and [(ii)] the existence of a change from existing policy.” *ADW/DWA*, 7 OCB2d 26 (quoting *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011)) (internal quotation marks omitted).

It is well established and uncontested by the parties that the availability of free parking is a mandatory subject of bargaining “because it is an economic benefit to employees.” *See DC 37, 4 OCB2d 43*, at 9 (BCB 2011) (citing *County of Nassau*, 14 PERB ¶ 3083, *aff’d sub nom. County of Nassau v. PERB and Civil Serv. Employees Ass’n*, 15 PERB ¶ 7002 (Sup. Ct. Nassau Co.), *aff’d A.D.2nd 693* (2d Dept. 1982); *DC 37, 71 OCB 12* (BCB 2003). This Board has held that there need not be a guarantee of a parking spot for parking to constitute a mandatory subject of bargaining. Rather, the mere opportunity to obtain a parking space is a benefit of employment and, therefore, a mandatory subject of bargaining. *DC 37, 4 OCB2d 43* (BCB 2011). Therefore, an employer cannot discontinue or alter the availability of free parking previously available to employees without first bargaining with the employees’ certified or designated representative. However, an employer is not required to bargain over the cessation of free parking where a third party is responsible for the change. *Local 2507 & Local 3621, 71 OCB 12*, at 9 (BCB 2003).

In determining whether the employer has made a unilateral change to a mandatory subject of bargaining, we look at whether the “practice was unequivocal and existed for such a period of time such that unit employees could reasonably expect the practice to continue unchanged.” *Local 621, SEIU, 2 OCB2d 27*, at 12 (quoting *County of Nassau*, 38 PERB ¶ 3005 (2005)).

As a preliminary matter, we address the City's motion to dismiss. The City made its' motion to dismiss at the conclusion of the Union's case-in-chief and presented no evidence to rebut the Union's witnesses testimony. Under such circumstances, there is no meaningful distinction between ruling on the merits of the case or on the City's motion to dismiss.¹³

The City's motion to dismiss is based on a legal claim that a parking practice here can exist only if Lifeguards at all DPR beaches and pools had access to free parking at their assigned work location. We do not agree. This Board has found a violation of a duty to bargain resulting from the withdrawal of a parking benefit provided to two titles in a bargaining unit. *DC 37*, 4 OCB2d 43 (BCB 2011) Similarly, PERB has affirmed that a parking practice can exist in one employer location. See *New York City Transit Authority*, 24 PERB ¶ 3013 (1991) (elimination of parking for a portion of an employee population in one location constituted a practice). Further, in *County of Nassau*, 35 PERB ¶ 3036, at 3104 (2002), PERB held that "where a practice is title-specific, it need not affect the unit as a whole for it to be enforceable" and acknowledged that "there are practices which affect all employees in a bargaining unit and there are practices that are limited to certain titles or circumstances." The circumstances here are such that only Lifeguards who are assigned to locations with access to free parking parked there. We find that the parking benefit at issue is title-specific to Lifeguards and are satisfied that the Union

¹³ A motion to dismiss is granted only "when the evidence produced by the charging party, is plainly insufficient" to establish a *prima facie* case. *State of New York Department of Correctional Services*, 35 PERB ¶ 3030 (citing *State of New York* , 33 PERB 3024, at 3065 (2000)). "[W]hen making a motion to dismiss an improper practice petition, the moving party concedes the truth of the facts alleged by the Petitioner. Moreover, the petition is entitled to every favorable inference, and it will be deemed to allege whatever may be implied from its statements by reasonable and fair intendment." *New York State Nurses Ass'n*, 43 OCB 34, at 8 (BCB 1989)

presented sufficient material facts for us to make this determination. Therefore, we deny the City's motion to dismiss.

We now turn to whether DPR provided Lifeguards with unequivocal access to free parking at the locations at issue and, if so, whether DPR modified this parking benefit without negotiation.

59th Street Pool Location

The unrebutted testimony of Stein, Sher, Paige, and Rodriguez establishes a parking benefit for Lifeguards assigned to the 59th Street Pool that existed for more than 40 years prior to June 2013. The evidence establishes that DPR authorized Lifeguards assigned to the 59th Street Pool to park in a fenced-in and gated parking lot and that Lifeguards parked in this parking lot since the late 1960s. DPR management authorized Lifeguards to park in the parking lot by instructing them to do so and by providing them with a key to access the parking lot. DPR also posted a black "Employee Parking" sign on the gate, indicating that DPR authorized Lifeguards to park in the 59th Street Pool parking lot. As such, we find that Lifeguards assigned to the 59th Street Pool could reasonably expect that access to free parking provided by DPR would continue unchanged.¹⁴

We are not persuaded by the City's defenses as to the 59th Street Pool location. The lack of a uniform or formalized system of authorizing Lifeguard parking at the 59th Street Pool, whether via the distribution of keys, a permit, or other iteration does not negate the practice here. It is undisputed that DPR authorized and provided Lifeguards assigned to 59th Street with access

¹⁴ Nor does the lack of access to free parking during the 59th Street Pool renovation, when the pool was closed and no Lifeguards were assigned to the 59th Street Pool, negate the Lifeguards' reasonable expectation they would be provided with access to free parking upon completion of the renovation and pool reopening.

to free parking for more than 40 years. Moreover, the fact that a January 23, 2007 Lifeguard parking permit for 59th Street indicates that it was “revocable without notice” does not rebut the evidence that Lifeguards consistently parked at the 59th Street Pool location without a permit and with DPR’s authorization. Finally, the record does not support a finding that Lifeguards or the Union were aware in 2009 that the 59th Street Pool parking lot was being eliminated at the completion of the renovation. Rather, the unrebutted testimony shows that the Union was not advised that DPR eliminated the 59th Street Pool parking lot until late June 2013.

We find the facts here analogous to those in *DC 37*, 4 OCB2d 43 (BCB 2011), in which the Board found that the NYPD violated the NYCCBL by unilaterally changing the availability of free parking. In that case, the NYPD altered its policy such that a parking area it previously made available to employees in two titles was restricted to employees in one title. By eliminating the parking benefit for a subsection of the employees previously afforded the opportunity to park there, the NYPD unilaterally changed a term and condition of their employment. Similarly, in this case, DPR altered its policies in 2013 such that Lifeguards at 59th Street were denied access to free parking that it previously provided. It is undisputed that DPR eliminated parking at the 59th Street Pool in June 2013 without negotiation with the Union. We therefore conclude that DPR violated its duty to bargain over its elimination of the Lifeguard parking benefit at the 59th Street Pool location.

Rockaway Beach Locations

The uncontested testimony of Rodriguez establishes a parking benefit for Lifeguards assigned to the Rockaway Beach locations that existed for more than 20 years prior to the 2013 beach season. The evidence establishes that DPR authorized Lifeguards assigned to the

Rockaway Beach locations to park on a paved or grassy area behind a Lifeguard shack, paved area along the boardwalk, or defunct bus cut-out and adjacent medians and that a permit was required to park in these areas. In addition, on July, 1, 2013, DPR confirmed this “longstanding” parking benefit in two identical letters it wrote on behalf of two Rockaway Lifeguards. *See* Exs. G & H. Specifically, the letters acknowledge that “lifeguards are issued permits to park [at the Rockaway locations] and that in the absence of a permit, DPR has “*instructed* all lifeguards to display their official, department-issued orange shirt on their dashboard.” *Id.* (***bold and italics added***) These letters are consistent with Rodriguez’s testimony and memorialize the longstanding DPR practice of providing Lifeguards assigned to the Rockaway Beach locations with access to free parking. *See County of Nassau*, 28 PERB ¶ 3047 (1995) (right to park in an unauthorized area was rebutted by express authorization of an individual in authority). As such, we find that DPR provided Lifeguards assigned to Rockaway Beach with access to free parking that they could reasonably expect to continue unchanged.

We do not find that the City’s reliance on the relocation of the Stillwell Lifeguard shack to West 15th Street or the temporary relocation of Lifeguard parking from West 33rd Street to West 35th Street shows that Lifeguards’ access to free parking was subject to elimination at any time and, therefore, not unequivocal. In the two examples raised by the City, DPR did not eliminate Lifeguard access to free parking. Rather, in these instances, DPR provided Lifeguards with access to alternative free parking near their new work locations. Here, there is no evidence that DPR provided Lifeguards assigned to the Rockaway Beach locations with access to alternative free parking. Moreover, DPR’s ability to reassign Lifeguards to new locations does not constitute notice that their access to free parking at the Rockaway Beach locations could be

eliminated. Nor is there any evidence that the Rockaway Beach locations were closed because of Hurricane Sandy. Rather, the unrebutted testimony shows that the Rockaway Beach locations were not destroyed by Hurricane Sandy and that DPR repurposed those locations.

Moreover, the express instruction and specific parking location designations in the July 1, 2013 letters makes the Rockaway parking areas akin to the parking lot in *DC 37*. It is undisputed that DPR did not negotiate with the union after its decision to repurpose the Rockaway parking areas for construction, parking for other employees, gardens, and pedestrian ramps and walkways. We therefore conclude that DPR violated its duty to bargain over its removal of Lifeguard access to free parking at the Rockaway Beach locations.

Brighton Beach Locations

As to the Brighton Beach locations, we do not find sufficient evidence to establish that Lifeguards had unequivocal access to free parking. The evidence established that, for approximately 10 years prior to the 2013 beach season, Lifeguards parked on sidewalks and paved roads along the boardwalk. Unlike the 59th Street Pool and Rockaway Beach locations, in the Brighton Beach locations there are no “parking by permit” or “employee parking” signs or other express designation of parking areas (i.e. July 1, 2013 letters) to indicate that parking was available to Brighton Beach Lifeguards. Further, unlike the 59th Street and Rockaway Beach locations, there was no evidence that express authorization or instruction to park was provided to Brighton Beach Lifeguards by DPR personnel. *See County of Nassau*, 28 PERB ¶ 3047 (1995). The only affirmative action taken by DPR to provide Lifeguards with access to parking at the Brighton Beach locations was to assist the Lifeguards with parking tickets. In this regard, we find no change since there is no evidence that DPR’s assistance changed after DPR eliminated

the Brighton Beach parking areas. Consequently, we find that Lifeguards assigned to the Brighton Beach locations were not granted unequivocal access to park at these locations such that they could reasonably expect such benefit to continue. Therefore, DPR did not violate its duty to bargain over access to parking at the Brighton Beach locations.

Accordingly, we find that, under the circumstances here, the City breached its duty to bargain in regard to the 59th Street Pool and Rockaway Beach locations, in violation of NYCCBL § 12-306(a)(4).¹⁵ When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See Local 621, SEIU*, 2 OCB2d 27, at 14; *USCA*, 67 OCB 32, at 8 (BCB 2001).

¹⁵ To the extent access to free parking was/is restored (i.e. Beach 106th Street), bargaining is required only for the period of time it was eliminated.

ORDER

Pursuant to the powers vested in the board of Collective Bargaining by the New York City Collective Bargaining law, it is hereby

ORDERED, that the improper practice petition docketed as BCB-4007-13, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, against the New York City Department of Parks and Recreation and the New York City Office of Labor Relations be, and the same hereby is, denied as to the claimed violations of refusal to bargain and unilateral changes at the Brighton 2nd Street and West 15th Brighton Beach locations under NYCCBL § 12-306(a)(1) and (4); and it is further

ORDERED, that the improper practice petition docketed as BCB-4007-13, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, against the New York City Department of Parks and Recreation and the New York City Office of Labor Relations be, and the same hereby is, granted as to the claimed violations of refusal to bargain and unilateral changes at the 59th Street Pool and Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach locations under NYCCBL § 12-306(a)(1) and (4); and it is further

ORDERED, that New York City Department of Parks and Recreation negotiate with District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, regarding access to free parking at the 59th Street Pool, Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach; and it is further

ORDERED, that New York City Department of Parks and Recreation shall make whole all Lifeguards assigned to the 59th Street Pool, Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach locations for any documented financial losses

they incurred, from the date Lifeguard access to parking was eliminated at these locations to the date access to free parking at these locations was/is restored; and it is further

DIRECTED, that New York City Department of Parks and Recreation post the attached Notice of this Decision and Order for no less than 30 days at all locations used by the New York City Department of Parks and Recreation for written communications with employees represented by the Union.

Dated: March 26, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

**NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW**

We hereby notify:

That the Board of Collective Bargaining has issued 8 OCB2d 11 (BCB 2015), in final determination of the improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, and the New York City Department of Parks and Recreation and the New York City Office of Labor Relations.

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby:

ORDERED, that the improper practice petition docketed as BCB-4007-13, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, against the New York City Department of Parks and Recreation and the New York City Office of Labor Relations be, and the same hereby is, denied as to the claimed violations of refusal to bargain and unilateral changes at the Brighton 2nd Street and West 15th Brighton Beach locations under NYCCBL § 12-306(a)(1) and (4); and it is further

ORDERED, that the improper practice petition docketed as BCB-4007-13, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, against the New York City Department of Parks and Recreation and the New York City Office of Labor Relations be, and the same hereby is, granted as to the claimed violations of refusal to bargain and unilateral changes at the 59th Street Pool and Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach locations under NYCCBL § 12-306(a)(1) and (4); and it is further

ORDERED, that New York City Department of Parks and Recreation negotiate with District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 461 and 508, regarding access to free parking at the 59th Street Pool, Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach; and it is further

ORDERED, that New York City Department of Parks and Recreation shall make whole all Lifeguards assigned to the 59th Street Pool, Beach 73rd Street, Beach 86th Street, Beach 97th Street, and Beach 106th Street Rockaway Beach locations for any documented financial losses they incurred, from the date Lifeguard access to parking was eliminated at these locations to the date access to free parking at these locations was/is restored; and it is further

DIRECTED, that New York City Department of Parks and Recreation post the attached Notice of this Decision and Order for no less than 30 days at all locations used by the New York City Department of Parks and Recreation for written communications with employees represented by the Union.

The City of New York
(Department)

Dated: _____ (Posted
By)
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.