CSBA, 8 OCB2d 15 (BCB 2015)

(IP) (Docket No. BCB-4076-14)

Summary of Decision: The Union alleged that the City and ACS violated NYCCBL §§ 12-306(a)(4) and 12-311(d), as well as a prior Board Order, by unilaterally imposing a requirement that newly hired attorneys commit to remain employed by ACS for a period of three years. The City argued that the balancing of interests dictates that the three-year service commitment is a managerial right and, thus, is outside the scope of bargaining. The Board found that a minimum time commitment is a mandatory subject of bargaining. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

CIVIL SERVICE BAR ASSOCIATION, affiliated with CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CITY OF NEW YORK and the NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES,

Respondents.

DECISION AND ORDER

On August 25, 2014, the Civil Service Bar Association ("CSBA" or "Union"), which is affiliated with the City Employees Union, Local 237, International Brotherhood of Teamsters, filed a verified improper practice petition against the City of New York ("City") and its Administration for Children's Services ("ACS"). The Union alleges that the City and ACS violated § 12-306(a)(4) and § 12-311(d) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally imposing a

requirement that newly hired attorneys represented by the Union commit to remain employed by ACS for a period of three years. The Union further argues that the City violated the Board Order in *CSBA*, 65 OCB 9 (BCB 2000), *affd.*, *City of New York v. DeCosta*, No. 403335/00 (Sup. Ct. N.Y. Co. June 7, 2001), directing ACS to bargain with the Union before implementing a time commitment for the employment of attorneys represented by the Union.[1] The City argues that the balancing of interests dictates that the three-year service commitment is a managerial right and, thus, is outside the scope of bargaining. The City further argues that *CSBA* is not controlling based on the particular facts and circumstances in the record in this proceeding. The Board finds that a minimum time commitment is a mandatory subject of bargaining. Accordingly, the petition is granted.

BACKGROUND

A hearing in this matter was held on January 15, 2015. The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

The Union is the bargaining representative for ACS attorneys employed in the titles Attorney and Attorney Intern ("non-managerial attorneys" or "attorneys"). The Union and the City are subject to the Citywide Agreement and are parties to a collective bargaining agreement ("Unit Agreement") covering ACS non-managerial attorneys. Neither the Unit Agreement nor

[1] In 1996, ACS adopted a policy of requiring newly hired attorneys to commit to work for ACS for a minimum period of years. The Board found that "the decision to require a commitment of a specific number of years to be a mandatory subject of bargaining" and directed that "the parties bargain about any decision of [ACS] to require a specific commitment of time for employment of employees in the [attorneys] titles." *CSBA*, 65 OCB 9, at 18-19. The Board's decision was affirmed by the New York County Supreme Court, and no appeal of that affirmance was taken.

the Citywide Agreement contain provisions setting out a minimum time commitment.[2] As of the date of the hearing in this matter, the parties were negotiating the successor to the Unit Agreement and it is undisputed that the City and the Union have not negotiated over a minimum time commitment for either current or prospective ACS attorneys.[3]

2014 Three-Year Commitment Policy

It is undisputed that, on July 28, 2014, ACS instituted a minimum three-year commitment policy ("2014 Three-Year Commitment Policy") for newly hired non-managerial attorneys represented by the Union in its Family Court Legal Services ("FCLS") division. The ACS memorandum instituting the policy states that: "FCLS expects new attorney hires to do whatever is necessary to fulfill these commitments and any failure to complete a commitment to remain with FCLS for the three years will be noted in the employee's personnel file." (Pet., Ex. D)

ACS Deputy Commissioner for FCLS Alan Sputz testified that he was responsible for implementing the 2014 Three-Year Commitment Policy.[4] (*See* Tr. 50; 84) Sputz testified that prior to implementing the 2014 Three-Year Commitment Policy, he had a conversation with

[2] Article I, § 1, of the Citywide Agreement provides that terms and conditions for all City employees must be uniform. The City did not rebut the Union's claim that no other City employees represented by a union, including other ACS employees, are required to commit to work for the City for a minimum period of time.

[3] Article XIX of the Unit Agreement provides, and has provided since at least 1996, that representatives of the City and the Union shall form a joint committee to address recruitment and retention problems "and where deemed necessary, make recommendations to the appropriate City officials." (Pet., Ex. C) This joint committee has only met once in the last 20 years and has not met since sometime before 1999. It is undisputed that no agreement or recommendation from the committee has addressed a minimum time commitment for ACS attorneys.

[4] Sputz joined ACS in January 2012 from the Family Court Division of the City's Law Department, which has a three-year minimum commitment policy but whose lawyers are not represented by a union.

ACS' General Counsel's Office regarding *CSBA* and its Order that ACS was required to bargain with the Union before implementing a minimum time commitment policy. (*See* Tr. 87-89)

The City maintains that the decision to implement the 2014 Three-Year Commitment Policy was necessary to fulfill ACS' mission. In addition, it alleges that facts and circumstances have changed since 2000 when *CSBA* was issued which make the 2014 Three-Year Commitment Policy essential to the fulfillment of the ACS' mission. The City presented two witnesses, Sputz and Ian Sangenito, a Supervising Attorney in FCLS' Brooklyn Office, who testified as follows.

FCLS Mission and Attorneys' Duties and Responsibilities

The mission of FCLS is protecting child safety, and ninety percent of FCLS' workload is prosecuting abuse and neglect cases.[5] Neglect can involve issues of mental illness, domestic violence, and other factors that can result in inadequate supervision. It also includes any circumstance where a parent's or guardian's actions or inactions harm or place a child at risk, such as physical or sexual abuse, medical or educational neglect, and neglect arising out of drug or alcohol abuse.

Training

ACS has an extensive training and supervision program. A new FCLS attorney will undergo a five-week full-time training program consisting of four days per week of classroom instruction and one day spent in the borough office of their assignment. This is followed by approximately 18 to 24 months of close supervision before the attorney can begin to function independently. New attorneys are accompanied by a supervisor at all court appearances and conferences during this time, and all draft petitions are reviewed. At the same time, supervisors carry a caseload of their own. More senior non-managerial attorneys are frequently utilized as

[5] FCLS also deals with juvenile delinquency proceedings, cases involving persons in need of supervision, and destitute children.

adjunct trainers for the new attorneys, to instruct in certain discreet subject matters like domestic violence and abusive head trauma.

Legal Actions Brought by FCLS

Cases are brought to FCLS by caseworkers in ACS' Division of Child Protection. FCLS will seek either the removal of the child from a parent, an order of protection, or some other legal intervention that will immediately safeguard the child's well-being.[6] These abuse and neglect cases involve specialized rules and strict timetables. Where removal is sought, FCLS attorneys must be prepared to appear in court within twenty-four hours. If the child is removed, there may be another hearing within three days to address a petition from the parent for the return of the child. Permanency hearings, to address the long-term plan for a child removed from their family, are held every six months.[7] After the filing of any action, preliminary and settlement conferences are held.[8] If no settlement is reached, fact-finding and dispositional hearings are held, a process which takes approximately twelve months to complete.[9] At these hearings, FCLS attorneys must present to the court an appraisal of the family's needs and make recommendations about services that may be ordered by the court such as foster care, supervision of the family, and services to address the danger to the child.

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[6] These proceedings include the civil prosecution of child neglect and abuse cases, warrants for access to premises where abuse or neglect is suspected, removal proceedings, permanency hearings, voluntary placements, and the extensions of placement.

[7] Prior to 2005, permanency hearings were held annually. It is undisputed that the other deadlines have been in effect since *CSBA* was issued.

[8] Issues addressed at preliminary and settlement conferences include the child's current placement, the implementation of social work services such as medical or educational plans, and any changes to the family's circumstances that might impact the safety of the child.

[9] As the petitioner, FCLS bears both the burden of proof and the burden of production. In cases involving physical injury to the child, the FCLS attorney will present medical documentation and expert medical witnesses.

FCLS attorneys are assigned based on the sensitivity and complexity of the issues involved. More experienced attorneys are assigned sexual abuse or domestic violence cases because of the difficulty presenting testimony. Most often, the child is the only witness to testify about what occurred, and the attorney needs to develop a relationship with the child to prepare the child to testify about intimate circumstances involving family members. Less experienced attorneys are assigned less complex matters that do not involve testimony from multiple witnesses, such as minor physical abuse or excessive corporal punishment cases.

FCLS attorneys are expected to handle each case assigned to them from intake through completion in court and are also expected to handle any new matters that arise affecting a family in cases already assigned to them. According to Sputz, FCLS attorneys are most effective in presenting an abuse and neglect case when they have started a case at intake, established a relationship with the caseworker at the investigation stage, and maintained a familiarity with the family and its dynamics throughout the life of the case.

Non-litigation Skills

Sputz testified that FCLS is "unique" in that its attorneys also "have to know social work." (Tr. 36) FCLS attorneys work with ACS caseworkers and have to coordinate their legal work with the broader service plan developed for the family by ACS' Family Services Unit. FCLS attorneys also need to have the ability to effectively communicate with foster care agencies, medical specialists, and school administrators, among others. Sputz noted that FCLS attorneys develop an intimate knowledge of the family and also develop relationships with other participants in the process, such as caseworkers, social work providers, and medical experts.

Post-2000 Changes in FCLS Practice

Changes in the Law

Since 2004, the issue of domestic violence in abuse and neglect cases has significantly increased, resulting in FCLS being subject to heightened requirements by the courts in the fact-finding phase to support its petitions.[10] (*See* Tr. 141; 151,154) In 2005, the Family Court Act was amended to require permanency hearings every six months instead of annually. Starting in 2009, in cases involving a change in supervision, Family Court began assigning non-FCLS attorneys to advocate on behalf of a child's interest. In 2012, legislation significantly increased the number of juvenile delinquency cases handled by FCLS.

Changes in the Practice: Impact of Institutional Providers of Legal Services

Starting in 2007, FCLS attorneys have been opposed by institutional providers of legal services. These specialized providers include the Legal Aid Society, Lawyers for Children, Brooklyn Defenders, and the Center for Family Representation. Prior to 2007, parents and children, if represented, were represented by individual lawyers appointed from the 18-b panel pursuant to the Family Court Act. The institutional providers are able to devote greater resources; they have dedicated staff attorneys, experienced supervisory support, and a variety of resources that includes staff social workers and investigators. The involvement of institutional providers has resulted in a dramatic increase in motion practice and contested hearings.

Attrition

Between January 2012 and October 2014, 107 non-managerial attorneys, out of a workforce of less than 220, resigned, resulting in the transfer of approximately 5,000 cases. (*See*

[10] This change was a result of *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004), in which the Court of Appeals, at the request of the Second Circuit, clarified issues regarding the treatment of children of victims of domestic abuse under the New York Family Court Act ("Family Court Act"). *See Nicholson v. Scoppetta*, 344 F.3d 154 (2d Cir. 2003).

Ans., Ex. C) It cannot, however, be determined if the attrition rate has increased as no pre-2012 attrition figures are in the record. Sputz testified that the loss of the knowledge of the departing FCLS attorneys impairs the progress of the transferred cases, especially when the departing attorney provides short notice.

Transferring a case in progress results in the duplication of legal work and frequently entails substantial hearing adjournments, causing delays of months. For example, the period for adjournment of a fact-finding hearing due to the reassignment of a case is typically six months. Sangenito testified that institutional providers have informed him of hardships suffered by parents as a consequence of adjournments necessitated by attorney attrition at FCLS.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that this case is controlled by *CSBA*, in which the Board found that a previous attempt by the City to unilaterally institute a minimum time commitment for attorneys working for ACS violated the NYCCBL. The Union argues that the City's unilateral action violates the Board's Order in *CSBA* and NYCCBL § 12-306(a)(4), as well as the *status quo* provision of NYCCBL § 12-311(d).[11]

[11] NYCCBL § 12-306(a)(4) provides in pertinent part that: "It shall be an improper practice for a public employer or its agents . . . to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees."

NYCCBL § 12-311(d) provides in pertinent part that: "During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement . . . the public employer shall refrain from unilateral changes in wages, hours, or working conditions."

The Union further argues that the 2014 Three-Year Commitment Policy is not a qualification for initial employment but a condition of employment and, thus, is a mandatory subject of bargaining. Qualifications for employment are pre-employment conditions that "define a level of achievement or a special status deemed necessary for optimum on-the-job performance" and, the Union argues, 2014 Three-Year Commitment Policy is neither. (Union Br. at 3) (quoting *CSBA*, 65 OCB 9 at 13).

The Union notes that the arguments raised by the City here were rejected by the Board in *CSBA*. The Board rejected that a minimum commitment policy was a core management decision and thus except from bargaining. The Board also rejected that public policy made the minimum commitment policy exempt from bargaining. The Union argues that the Board must again reject those arguments. The Union notes that the primary justification expressed by ACS in *CSBA* was attrition, the same justification presented in the instant matter, and that the City has not established that ACS' current attrition problem is materially different from that which existed when *CSBA* was issued.

Further, the Union argues that none of the changes alleged by the City justify departing from *CSBA*. FCLS' mission has not changed. Then, as now, its workload consists primarily of prosecuting abuse and neglect cases, which involve the same issues and parties, including counsel for the parents, caseworkers, social workers, and expert witnesses. According to the Union, the City has not established that the judicial process has materially changed, as the basic timeline that exists now is the same that existed when *CSBA* was issued and the substantive standards and the burden of proof remain the same.

City's Position

The City argues that the decision to implement the 2014 Three-Year Commitment Policy is not a mandatory subject of bargaining. It asserts that ACS utilizes the policy to assist in identifying candidates willing and able to commit to the particular practice of FCLS and, therefore, it serves as a qualification. The City argues that this policy is analogous to a licensing requirement and notes that the Board has "conceded that 'good character and fitness,' determined by some objective standard, may be an appropriate qualification for promotion or employment." (City Br. at 25) (quoting *UFOA*, 39 OCB 7 at 19 (BCB 1987), *affd. in part, modified in part, Levitt v. Bd. of Collective Bargaining*, 580 N.Y.S.2d 917 (Sup. Ct. N.Y. Co. 1988), *affd.*, 171 A.D.2d 545 (1st Dept. 1991), *affd. in part, modified in part*, 79 N.Y.2d 120 (1992)).

The City further argues that the 2014 Three-Year Commitment Policy goes directly to ACS's core mission of providing for the safety and well-being of children at risk of abuse and neglect. The Board, the City argues, regularly must "strike a balance" between the employer's ability to manage its core mission and the bargaining obligation of the NYCCBL. (City Br. at 19) (quoting *Local 854, UFOA*, 45 OCB 5 at 8-9 (BCB 1990)). The City argues that the 2014 Three-Year Commitment Policy advances a compelling public policy interest; it ensures that ACS is able to maintain an experienced and stable workforce of attorneys who can respond quickly and effectively to situations where children are in danger from abuse and neglect.

According to the City, the unique interests implicated in child abuse and neglect cases require an equally unique commitment from attorneys who are responsible for achieving outcomes that profoundly and permanently affect children's lives. The City argues that the practice of FCLS is unlike any other area of legal practice; the cases concern the safety and well-being of children and urgent situations. The legal matters are intricate, involve specialized rules,

strict timetables, and often complex family dynamics. Thus, the City argues, FCLS attorneys must be able to develop and maintain an intimate knowledge of familial history, and each family member's issues, while working with other participants such as caseworkers, social work providers, abuse and neglect specialists, medical experts, and institutional providers.

The City argues that the 2014 Three-Year Commitment Policy does not mandate a term of employment; it simply puts FCLS attorneys on notice of ACS' minimum expectation for their tenure in an important and demanding professional position. According to the City, there is no consequence to an attorney for failing to meet the three-year commitment beyond a notation in the employee's personnel file upon their departure that their tenure fell short of expectations. The City argues that the potential effect of such a document is "speculative" since there were no particular negative consequences alleged to be attributable to such a document. (City Br. at 29) Further, since the document would be created after the attorney has left employment with FCLS, the City argues, it is a "post-employment record" that is not germane to the working environment and, thus, not bargainable. (City Br. at 19) The City notes that the policy only applies directly to candidates for employment and has no effect on incumbent employees. Thus, the City argues, the balancing of interest falls in favor of ACS.

The City maintains that the Board's conclusions in *CSBA* were unsupported and cannot be applied here. It asserts that the Board failed to address or describe the unique and important aspects of ACS attorneys' duties. It also claims that the Board failed to address whether the service requirement was "at the core of entrepreneurial control." (City Br. at 2)

Further, the City argues that the record in the instant case is clearly distinguishable from *CSBA*. First, in this proceeding, the City argues, it has demonstrated that the matters handled by FCLS attorneys are in fact unusual and of a wholly different character than most matters handled

by other City attorneys. Second, the City argues that the record demonstrates that the harmful and unnecessary delays caused by attrition impact children and their families.

Third, the City argues that the 2014 Three-Year Commitment Policy is a means of assessing a candidate's commitment to the demanding and emotionally challenging practice of child abuse and neglect cases, which is analogous to good character and fitness, and an appropriate qualification for employment. According to the City, the time commitment, like a licensing requirement, relates to whether a candidate will meet the demands of the position and thus serves as a qualification. Fourth, the City argues that the practice of FCLS has changed since *CSBA*, including heightened requirements in domestic violence cases, the doubled frequency of permanency hearings, and the impact of child advocates and institutional legal providers. These changes, the City argues, have placed additional demands on FCLS attorneys.

Accordingly, the City argues, ACS did not have a duty to bargain concerning the 2014 Three-Year Commitment Policy.

DISCUSSION

We find here, as we found in *CSBA*, that requiring employees to commit to a minimum time period of employment is a mandatory subject of bargaining. Accordingly, we find that ACS' unilateral adoption and implementation of the 2014 Three-Year Commitment Policy violated NYCCBL § 12-306(a)(4) and grant the petition.

A Minimum Time Commitment is a Condition of Employment, Not a Qualification

The issue before the Board—whether a minimum time commitment is a mandatory subject of bargaining—was resolved by this Board in *CSBA*, which involved the same parties (ACS and CSBA), the same titles (new non-managerial attorneys), the same unilateral change (instituting a minimum time commitment policy), and the same negative ramifications, including

a document in the employee's personnel file if the employee fails to fulfill the commitment. The City maintains that *CSBA* is not controlling because that case lacked a "detailed factual record" and the Board had no factual support for its findings. (City Br. at 24; 27) The City challenged *CSBA* in New York State Supreme Court. The Court affirmed the Board and no appeal of that affirmance was taken. Therefore, *CSBA* is binding precedent that the Board cannot disregard. *See Matter of Charles A. Field Delivery Serv., Inc. (Roberts)*, 66 N.Y.2d 516, 516-517 (1985).[12]

In *CSBA*, we recognized that "setting qualifications for initial employment is not a mandatory subject of bargaining." *CSBA*, 65 OCB 9, at 12 (citing *CIR*, 37 OCB 38, at 12 (BCB 1986)) (other citations omitted). We relied upon the definition of qualification adopted by this Board in *CIR*, 37 OCB 38: "qualifications for employment are 'preconditions, not conditions of employment. [Qualifications] define a level of achievement or a special status deemed necessary for optimum on-the-job performance.'" *CSBA*, 65 OCB 9, at 13 (quoting *CIR*, 37 OCB 38, at 13, quoting *West Irondequoit Bd. of Education*, 4 PERB ¶ 4511, *affd.*, 4 PERB ¶ 3070 (1971)). The Board has found that licensing requirements may satisfy the definition of an employment qualification. *See CIR*, 37 OCB 38, at 12 (medical license); *DC 37*, 6 OCB2d 24, at 22 (BCB 2013) (driving license). The Board has also found that requiring specific experience or education may also constitute employment qualifications. *See PBA*, 39 OCB 24 (BCB 1987), *affd., Caruso v. Anderson*, 138 Misc.2d 719 (Sup. Ct. N.Y. Co. 1987), *affd.*, 145 A.D.2d 1004 (1st Dept. 1988), *leave denied*, 73 N.Y.2d 709 (1989) (specific experience); *UFOA*, 71 OCB 6, at

[12] Further, we do not find our holdings in *CSBA* to be factually unsupported and note that the City did not so argue before the Court. In *CSBA*, the Board expressly addressed the City's arguments concerning "the goals and mission of ACS [that] are an improved professional service in the child welfare system" and that "the Attorneys at ACS address serious issues of life and death and, because of the nature of these cases, ACS Attorneys must be intensively trained and supervised." *CSBA*, 65 OCB 9, at 9. In Court, the City challenged the weight the Board afforded ACS' positions in its balancing and the Court affirmed the Board.

7 (BCB 2003) (education). Similarly, a level of physical fitness, such as the ability to perform specific physical tasks, has been found to be a qualification for employment. *See DC 37*, 6 OCB2d 24, at 24, n.17 (ability to wear a respirator) (PERB citations omitted).

However, the Board has found that post–employment requirements, such as "requiring applicants for hire or promotion to repay debts is not a qualification for employment, but a condition of employment and is a mandatory subject of bargaining." *CSBA*, 65 OCB 9, at 13 n. 21 (citing *UFOA*, 39 OCB 7) (other citations omitted). Accordingly, we found in *CSBA* that a minimum time commitment policy was not a "qualification for employment as an Attorney at [ACS]." *Id*, at 13. Rather, we found that "fixing the minimum period of employment places a restriction on a condition of employment and, thus, is a mandatory subject of bargaining." *Id.*, at 17 (citing *City of Mount Vernon*, 17 PERB ¶ 4591 (1984), *affd.*, 18 PERB ¶ 3020 (1985)).

Here, we find *CSBA* controlling and reach the same conclusion we reached 15 years ago—that requiring a minimum time commitment is not an employment qualification; it is a mandatorily bargainable term and condition of employment. The record shows that: ACS has an attrition problem with FCLS attorneys; FCLS attorneys have a difficult and responsible job directly impacting the lives of children; aspects of FCLS attorneys' jobs may be unique; and there have been changes in FCLS' practice since *CSBA*. However, none of these factors, including the changes in FCLS' practice since *CSBA*, converts the 2014 Three-Year Commitment Policy into a qualification for employment. Unlike a license, work experience, or education, the 2014 Three-Year Commitment Policy does not define either a level of achievement or a special status, nor does it indicate any pre-existing skill or character trait. Instead, it is analogous to a requirement that newly hired employees repay a debt in that it solely

concerns obligations required to be fulfilled after employment commences. *See CSBA*, 65 OCB 9, at 16 (citing *UFOA*, 39 OCB 7, and *City of Mount Vernon*, 18 PERB ¶ 3020).[13]

Our holding today, like our conclusions in *CSBA*, is consistent with that of the Public Employment Relations Board ("PERB") regarding agreements that "fixed for a period" of time the employer-employee relationship. *City of Mount Vernon*, 17 PERB ¶ 4591, at 4685 (1984), *affd.*, 18 PERB ¶ 3020 (1985). *City of Mount Vernon* concerned a unilaterally imposed requirement that new police officers sign an agreement to reimburse the cost of their training if the officer leaves within three years ("training agreement"). The employer argued that the training agreement was a qualification for employment that would "instill dedication and commitment." *Id.* The Administrative Law Judge rejected the employer's arguments and PERB affirmed. The training agreement was held to be a mandatory subject of bargaining based upon the restrictions it placed "on the employee's freedom to change positions or careers." *Id.*

Accordingly, we find that the 2014 Three-Year Commitment Policy is not a qualification for employment, but a mandatorily bargainable condition of employment.

On Balance, the 2014 Three-Year Commitment Policy is Mandatorily Bargainable as it Has Not Been Shown to be Related to ACS' Basic Mission

Our conclusions in *CSBA* that minimum time commitment policies are mandatory subjects of bargaining was based on a balancing of the interest of the employer and the employees. *See CSBA*, 65 OCB 9, at 13-18. Here, the City seeks that the Board repeat the balancing test based upon circumstances that have changed since *CSBA* was issued. PERB has

[13] The City argues that the 2014 Three-Year Commitment Policy is a qualification of employment because it aids in identifying employees willing to commit to ACS's practice. We disagree because a minimum time commitment does not objectively demonstrate a commitment to the mission of the employer. *See UFOA*, 39 OCB 7, at 19.

held that where it has already determined the bargainability of a subject, a balancing test is not required. *See State of New York (Department of Transportation)*, 27 PERB ¶ 3056 (1994).[14]

However, if a balancing test were applied to the parties' interest again, the record here does not call for a different result. The standard for balancing the interests the City urges we apply in the instant matter is the same standard that was used by the Board in *CSBA*: "that for a policy to be a mandatory subject of bargaining, it must be plainly germane to the working environment and not a managerial decision at the core of entrepreneurial control." *CSBA*, 65 OCB 9, at 13.[15] In *CSBA*, we found that a minimum time commitment was plainly germane to the ACS's attorney's work environment but not a managerial decision at the core of entrepreneurial control and, thus, found it to be a mandatory subject of bargaining. Applying this standard to the 2014 Three-Year Commitment Policy, we reach the same conclusion.

The 2014 Three-Year Commitment Policy is germane to ACS' non-managerial attorneys work environment. The facts show that FCLS attorneys have a difficult and responsible job with high turnover that has grown more difficult as a result of legislation and other factors. However, these facts do not negate the fact that requiring new employees to commit to a minimum number

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[14] In *State of New York (Department of Transportation)*, 27 PERB ¶ 3056, PERB rejected the employer's argument that a "facts of the case" balancing of interest approach was required in every case because, under that approach, "no subject would be nonmandatory or mandatory according to its nature." *Id.* PERB reasoned that it was essential that parties "know with as much certainty as possible whether a given subject was negotiable or not, even if their particular factual circumstances differ." *Id.* Thus, PERB rejected the employer's approach, finding that it would undermine the uniformity and predictability necessary for effective and stable collective bargaining and would be inconsistent with the approach of determining negotiability according to the nature of the subject matter.

[15] The test was derived from *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1990), and *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964) (Stewart, J. concurring). The Board noted that, because of the similar language of NYCCBL § 12-306(a)(4) and National Labor Relations Act § 8(d), it had occasionally found it appropriate to use the analytical framework of National Labor Relations Board cases in duty to bargain decisions. *See Local 768, DC 37*, 45 OCB 1, at 9 (BCB 1990).

of years is directly germane to their employment. The 2014 Three-Year Commitment Policy fixed a term of employment with real, significant, and not speculative ramifications which include permanent documentation in the employee's personnel file of the employee's failure to abide by the commitment. Post-employment ramifications are germane to the working environment of employees. *See CSBA*, 65 OCB 9, at 4 (detailing post-employment impact); *see also, e.g.*, *City of Mount Vernon*, 17 PERB ¶ 4591, at 4685 (agreement to repay training expenses if an employee leaves before completion of three years mandatorily bargainable in part because it restricts employee freedom to change positions or careers). In addition, the 2014 Three-Year Commitment Policy impacts employees during their employment, as the City itself notes that the policy would serve as a "reminder of the employer's expectations." (City Br. at 20) Further, the City has not demonstrated that the 2014 Three-Year Commitment Policy is less germane to ACS' non-managerial attorneys than the minimum time commitment policy at issue in *CSBA*.

We further find that the 2014 Three-Year Commitment Policy does not lie at the core of ACS' entrepreneurial control. Fixing a period of employment is not fundamental to "the larger entrepreneurial questions" of "what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be." *Fibreboard Corp.*, 379 U.S. at 225. We acknowledge, as we did in *CSBA*, that ACS and its employees "deal with 'matters of life or death.'" *CSBA*, 65 OCB 9, at 15. However, "dealing with important legal matters" does not "constitute, in itself, a matter which is at the core of the agency's entrepreneurial control." *Id.*, at 15-16. We also recognize that attrition has serious and significant ramifications for any employer but we find, as did PERB, that "[e]fforts to retain staff, however, whether by positive inducements such as increased compensation or negative inducements such as reimbursements to

the employer, cannot be imposed unilaterally when, as here, they involve terms and conditions of employment." *City of Mount Vernon*, 18 PERB ¶ 3020, at 3042.

On the record before us, any change subsequent to the issuance of *CSBA* does not compel us to reach a different conclusion. There has not been any pertinent change in the law regarding what constitutes a term and condition of employment or when a subject is mandatorily bargainable. Rather, the City argues that changes in the practice of FCLS, including those resulting from changes in the Family Court Act, require that we now find that ACS' unilaterally imposed 2014 Three-Year Commitment Policy is non-bargainable. We disagree. None of the changes alleged regarding FCLS' practice impact either prong of the standard. ACS' basic mission has not changed; nor has the City established that a minimum time commitment is now less germane to ACS non-managerial attorneys than it was 15 years ago.

Accordingly, we find that the 2014 Three-Year Commitment Policy is a mandatorily bargainable condition of employment and grant the petition.[16]

[16] Having so found, we need not and do not to reach the question of whether, as the Union claims, the City's actions also violated NYCCBL § 12-311(d).

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 verified improper practice petition filed by the Civil Service Bar Association, affiliated with the City Employees Union, Local 237, International Brotherhood of Teamsters, against the City of New York and its Administration for Children's Services, docketed as BCB-4076-14, hereby is granted; and it is further,

DIRECTED, that the parties bargain over any decision of the New York City Administration for Children's Services to require a specific commitment of time for employment of employees in the titles Agency Attorney and Agency Attorney Intern; and it is further,

DIRECTED, that the New York City Administration for Children's Services notify its present employees in the titles Agency Attorney and Agency Attorney Intern, in writing, that there is no existing policy requiring them to work for a specific period of time in that title; and it is further,

DIRECTED, that the New York City Administration for Children's Services remove from the personnel files of any affected former employees the erroneous negative information concerning the alleged failure of the affected employee to abide by a commitment to remain at the agency for a specific period of time, and inform them in writing that it has taken that action; and it is further,

DIRECTED, that the City post the attached notice for no less than thirty days at all locations used by the New York City Administration for Children's Services for written communications with employees represented by the Civil Service Bar Association.

Dated: May 28, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
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 15 (BCB 2015), determining the improper practice petition filed by the Civil Service Bar Association, affiliated with the City Employees Union, Local 237, International Brotherhood of Teamsters, against the City of New York and its Administration for Children's Services.

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 verified improper practice petition filed by the Civil Service Bar Association, affiliated with the City Employees Union, Local 237, International Brotherhood of Teamsters, against the City of New York and its Administration for Children's Services, docketed as BCB-4076-14, hereby is granted; and it is further,

DIRECTED, that the parties bargain over any decision of the New York City Administration for Children's Services to require a specific commitment of time for employment of employees in the titles Agency Attorney and Agency Attorney Intern; and it is further,

DIRECTED, that the New York City Administration for Children's Services notify its present employees in the titles Agency Attorney and Agency Attorney Intern, in writing, that there is no existing policy requiring them to work for a specific period of time in that title; and it is further,

DIRECTED, that the New York City Administration for Children's Services remove from the personnel files of any affected former employees the erroneous negative information concerning the alleged failure of the affected employee to abide by a commitment to remain at the agency for a specific period of time, and inform them in writing that it has taken that action; and it is further,

DIRECTED, that the City post the attached notice for no less than thirty days at all locations used by the New York City Administration for Children's Services for written communications with employees represented by the Civil Service Bar Association.

The New York City Administration for Children's Services
(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.