CEU, L. 237, 9 OCB2d 22 (BCB 2016)

(IP) (Docket No. BCB-4160-16)

Summary of Decision: The Union alleged that NYCHA violated NYCCBL §§ 12-306(a)(4) and 12-307(a) by unilaterally discontinuing the practice of providing two hours of excused time during the holiday season. NYCHA argued that there was no practice of granting such excused time. The Board found that NYCHA did maintain such a practice and that unilaterally discontinuing it violated the NYCCBL. Therefore, the improper practice petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

CITY EMPLOYEES UNION, LOCAL 237,

Petitioner,

-and-

THE NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On March 22, 2016, City Employees Union Local 237 ("Union") filed an improper practice petition against the New York City Housing Authority ("NYCHA"). The Union alleges that NYCHA violated §§ 12-306(a)(4) and 12-307(a) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally discontinuing a practice of granting two hours of excused time to unit members in December. NYCHA argues that the grant of two hours of excused time is not a binding practice that requires bargaining. The Board finds that NYCHA unilaterally discontinued a practice of granting two

hours of excused time to full-time employees in December and therefore violated its duty to bargain in good faith. Thus, the improper practice petition is granted.

BACKGROUND

The Union is the certified collective bargaining representative for NYCHA employees in 29 titles. The Union and NYCHA are parties to a collective bargaining agreement ("Agreement") and several memoranda of understanding, which incorporate and modify the Agreement. The current memorandum of understanding covers the period of December 15, 2010 to May 29, 2018.[1]

NYCHA has granted excused time in December since at least 1985.[2] In many of the years that NYCHA has granted excused time to unit members, a high-level supervisor has distributed a memorandum to either all staff or all supervisors establishing the number of leave hours granted and specifying when such leave may be taken.[3] One representative memorandum, from 2014, reads as follows:

> In keeping with the spirit of the holiday season, and in recognition of your efforts throughout the year, please be advised that all full-time employees will be granted two hours of excused time between December 1, 2014 and December 31, 2014.
>
> These two hours may be taken on any one day or divided among multiple days from December 1 to December 31. Feel free to use the time for holiday preparations, personal matters, or just to give yourself a well-deserved break. However you choose to use this time, please obtain the necessary approvals from your supervisor to ensure proper coverage at your work location.

[1] Section 20 of the Agreement, entitled "Holidays," sets forth specific holidays when unit members may take off and establishes when unit members may take a floating holiday. This section does not address the provision of excused time in December.

[2] NYCHA's timekeeping system does not set forth a code for this use of excused time.

[3] The record contains 22 examples of these memoranda, spanning from 1985 to 2014. These have been sent either by the General Manager or the Deputy General Manager.

> Also, please be sure to use these hours between December 1 and December 31, 2014, because this excused time will not roll over to 2015.
>
> Thank you for your contributions to NYCHA, and best wishes to you and your family for a safe, healthy, and happy holiday season!

(Rep., Ex. A)

The parameters of granting excused time in December have varied slightly over the past 30 years. During several years in the late 1980s and early 1990s, unit members were also offered two hours excused time in April. Also in several of these years, NYCHA mandated precise days when and how excused time could be utilized, to allow unit members to attend holiday parties. For example, the memorandum distributed in 1987 provided that employees may hold holiday parties on Tuesday, December 15 and Wednesday, December 16 and that on the day of their party, employees may leave three hours prior to their regularly-scheduled departure time.[4]

Since 2001, NYCHA has granted two hours of excused time each December to full-time employees, which can be taken within a range of dates. In addition, in 2012, NYCHA granted a third hour of excused time. This was set forth in a memorandum from General Manager Cecil R. House to NYCHA staff providing that "NYCHA is adding an hour to the two hours of excused time customarily given each year to full-time employees." (Rep., Ex. A)

On December 11, 2015, Administrative Manager Yvonne Rosado sent an email to Property Managers and Property Maintenance Supervisors stating that "NYCHA will be **unable** to continue to extend the two hours of excused time to full time employees" (emphasis in original)

[4] The memorandum further provided that employees could not take a lunch break on days that they departed early.

("December 11 Email"). It is undisputed that prior to sending the December 11 Email, NYCHA did not bargain with the Union concerning its decision not to provide two hours of excused time.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the City has unilaterally changed a term and condition of employment, in violation of NYCCBL §§ 12-306(a)(4) and 12-307(a).[5] In particular, it contends that the provision of excused time in December is a term and condition of employment because it falls within the meaning of "hours" under the NYCCBL and is therefore mandatorily negotiable.[6] It further argues that the two hours of excused time in December has been maintained, with only minor variations, for many years. It has thus become part of "an unwritten part of the contract." (Rep., at 2)

Additionally, the Union argues that the unilateral decision not to provide excused time in December 2015 has negatively impacted unit employees by causing them to work two hours more in December without additional compensation.

The Union requests that the Board direct NYCHA to compensate unit members for the two hours of excused time that was not granted in December 2015; commence bargaining with respect

[5] NYCCBL § 12-306(a)(4) establishes that it is an improper practice "for a public employer or its agents to refuse to bargain collectively in good faith with certified or designated representatives of its public employees on matters within the scope of collective bargaining, which generally consist of certain aspects of wages, hours, and working conditions."

[6] NYCCBL § 12-307(a) provides, in relevant part, that "public employers and certified or designated employee organizations shall have the duty to bargain in good faith on . . . hours (including but not limited to overtime and time and leave benefits) . . . . "

to any proposed changes to the purported excused time policy; and grant any other such relief as the Board may deem just and proper.

NYCHA's Position

NYCHA contends that the Union has failed to establish a violation of NYCCBL §§ 12-306(a)(4) or 12-307(a). NYCHA asserts that the provision of excused time in December has varied considerably since the 1980s, when unit members were permitted to leave early on two designated days in order to attend a holiday party. During the 1980s and 1990s, employees were also permitted to take hours off for Good Friday. Therefore, it argues that the provision of excused time is not so "unequivocal or unchanged" as to qualify as a binding past practice. (Rep., ¶ 25)

Additionally, NYCHA asserts that the Union must demonstrate that NYCHA had knowledge of the past practice. Here, it contends that it does not view the provision of excused time to be a binding practice because there is no "Holiday Excusal" timekeeping code for the excused time at issue.

NYCHA further argues that, even if the Board were to find that the grant of excused time was a past practice, it has not violated its duty to bargain because it reverted to the terms of the bargaining agreement. Here, the applicable section of the Agreement, § 20, provides for specific holiday benefits, but does not include the provision of excused time in December sought by the Union. Accordingly, it contends, any evidence of past practice should be disregarded in favor of adhering to the Agreement's express terms.

Finally, NYCHA argues that, should Petitioner prevail, the Board should award two hours of excused time to be used pursuant to the approval of the employee's supervisor, within a specified one-month period. NYCHA further asserts that it has never awarded two hours of excused time without providing restrictions on when such time may be utilized.

DISCUSSION

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 ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014); *DC 37*, 79 OCB 20, at 9 (BCB 2007). A party asserting that such a unilateral change has occurred must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) there has been a change from existing policy. *See DC 37, L. 436 & 768*, 4 OCB2d 31, at 13 (BCB 2011); *see also Doctors Council, SEIU*, 67 OCB 21, at 7 (BCB 2001); *PBA*, 73 OCB 12, at 17 (BCB 2004), *affd.*, *Matter of Patrolmen's Benevolent Assn. v. NYC Bd. of Collective Bargaining*, Index No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd.*, 38 A.D.3d 482 (1st Dept. 2007), *lv. denied*, 9 N.Y.3d 807 (2007).

The NYCCBL expressly provides that "time and leave benefits" are within the scope of mandatory bargaining. *See* NYCCBL § 12-307(a). Thus, unilateral changes regarding paid leave constitute a violation of an employer's bargaining obligation. *See DC 37*, 6 OCB2d 14, at 16-17 (BCB 2013), *affd., Matter of City of New York v. Bd. of Collective Bargaining*, Index No. 451081/13, (Sup. Ct. N.Y. Co. Oct. 28, 2014) (discussing mandatory negotiability of leave time); *see also UFOA, L. 854 & UFA*, 67 OCB 17 (BCB 2001) (determining that employer's holiday leave policy was a mandatory subject of bargaining); *DC 37, L. 436 & 768*, 4 OCB2d 31, at 14 (finding mandatorily negotiable a change in policy regarding payment for days in which employees do not work because their work locations are closed due to inclement weather). The provision of excused time in December represents a grant of paid leave, and is accordingly a mandatory subject of bargaining.

At issue, therefore, is whether NYCHA made a unilateral change. When determining whether a change has occurred, we accept evidence of a past practice. *See DC 37, L. 436 & 768,*

4 OCB2d 31 at 14. In particular, we examine whether the "practice was unequivocal and existed for such a period of time such that the unit employees could reasonably expect the practice to continue unchanged." *See, e.g., DC 37, L. 436 & 768,* 4 OCB2d 31 at 14; *DC 37, Locals 461 & 508,* 8 OCB2d 11, at 14 (BCB 2015) (considering changes to parking benefits for unit members); *UFT,* 7 OCB2d 12, at 19-20 (BCB 2014) *affd., Matter of City of New York v. New York City Bd. of Collective Bargaining,* Index No. 451289/14 (Sup. Ct. N.Y. Co. July 17, 2015) (considering changes to weekly and monthly limit on hours that part-time employees are permitted to work); *Local 621, SEIU,* 2 OCB2d 27, at 13-14 (BCB 2009) (considering changes to the use of City-provided vehicles). The Public Employment Relations Board ("PERB") has similarly concluded that "the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice has existed." *See Chenango Forks Cent. Sch. Dist.*, 40 PERB ¶ 3012 (2007).

Here, we find that NYCHA maintained a practice of providing full-time employees with two hours of excused time in December. Importantly, NYCHA acknowledged in its 2012 memorandum that "two hours of excused time [is] customarily given each year to full-time employees." (Rep., Ex. A) Additionally, the record demonstrates that NYCHA consistently provided two hours or more of excused time to full-time employees each December since at least 2001. Thus, the practice was both unequivocal and lasted long enough for employees to reasonably expect that it would continue unchanged. *See DC 37, L. 436 & 768*, 4 OCB2d 31, at 16 (thirteen years sufficient to establish past practice); *Local 621, SEIU*, 2 OCB2d 27, at 13 (three years sufficient to establish past practice).

The lack of a timekeeping code is irrelevant to this analysis.[7] In years that NYCHA afforded excused time, a high-level supervisor submitted a memorandum to all staff or all supervisors setting forth the circumstances under which unit members may take holiday excused time. Since 2001, these memoranda have explicitly provided that "full-time staff will be granted two hours of excused time." (Rep., Ex. A) Moreover, in its own memoranda, NYCHA has stated that excused time is "customarily" granted each December. (Rep., Ex. A).

Additionally, we reject NYCHA's argument that the unilateral change was lawful because NYCHA purportedly reverted to the contract language. The contract reversion theory does not apply where, as here, there is no contractual language specifically addressing the term of employment at issue. *See DC 37*, 75 OCB 10, at 10 (BCB 2005) (discussing applicability of the contract reversion theory). In *County of Onondaga*, 46 PERB ¶ 4583 (2013), cited by NYCHA in this matter, the ALJ explained that "the respondent has the burden to both plead and prove such a defense through a negotiated term that is reasonably clear on the specific subject at issue." *Accord City of Albany*, 41 PERB ¶ 3019 (2008). Accordingly, NYCHA has not satisfied its burden under this standard because the Agreement contains no language specifically addressing the grant of excused time.

In sum, we find that NYCHA breached its duty to bargain in violation of NYCCBL § 12-306(a)(4). The Union's improper practice petition is hereby granted. Under these circumstances, we find it appropriate to order NYCHA to restore the practice of granting two hours of excused

[7] We note that the Board's past practice analysis in the context of a unilateral change does not require direct evidence that the employer had knowledge of the practice. *See DC 37, L. 436 & 768*, 4 OCB2d 31 at 14-15. Regardless, as more fully explained herein, the record establishes that NYCHA had knowledge of the practice.

leave to full-time employees during December. We further direct NYCHA to make whole unit members who were affected by the change by granting two hours of excused time to such unit members.[8] Additionally, we direct NYCHA to bargain either to agreement or impasse prior to making any such changes.

[8] We decline to specify how the make-whole remedy should be implemented, as NYCHA requests. The parties themselves are best situated to determine implementation via the bargaining process.

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 City Employees Union, Local 237, docketed as BCB-4160-16 against the New York City Housing Authority is hereby granted; and it is further

DETERMINED, that the New York City Housing Authority has violated NYCCBL § 12-306(a)(4) by making a unilateral change by not providing at least two hours of excused time in December to full-time employees, a mandatory subject of bargaining; and it is further

ORDERED, that the New York City Housing Authority make whole unit members who were not given two hours of excused time in December 2015 by granting two hours of excused time to affected full-time employees; and it is further

ORDERED, that the New York City Housing Authority cease and desist from implementing future changes in the provision of two hours of excused time in December to full-time employees until such time as the parties negotiate either to agreement or to impasse with respect to such changes.

Dated: October 6, 2016
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

GWYNNE A. WILCOX
MEMBER