PBA, 10 OCB2d 3 (BCB 2017)

(IP) (Docket No. BCB-4159-16)

Summary of Decision: The Union alleged that the City and the NYPD violated NYCCBL § 12-306(a)(1), (4), and (5), by unilaterally changing the date upon which newly hired Police Officers receive their first paycheck from the second pay period following their date of hire to the third pay period. The City maintained that there has been no unilateral change triggering a duty to bargain because the delay occurred only once and it was *de minimis*. The Board found that the City violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally changing the date on which a class of newly hired Police Officers received their first paycheck, a mandatory subject of bargaining, during a period when the parties' collective bargaining agreement was in *status quo*. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On March 4, 2016, the Patrolmen's Benevolent Association of the City of New York, Inc. ("Union" or "PBA") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD") (collectively "Respondents"). The Union alleges that Respondents violated § 12-306(a)(1), (4), and (5) of the New York City

Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally changing the date upon which newly hired Police Officers receive their first paycheck from the second pay period following their date of hire to the third pay period. The Union contends that Respondents did not bargain in good faith over this change and instituted the unilateral change when the parties' collective bargaining agreement was in *status quo*. The City maintains that there has been no unilateral change triggering a duty to bargain because the delay occurred only once and it was *de minimis*. The Board finds that the City violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally changing the date on which a class of newly hired Police Officers received their first paycheck, a mandatory subject of bargaining, during a period when the parties' collective bargaining agreement was in *status quo*. Accordingly, the petition is granted.

BACKGROUND

The Union is the certified collective bargaining representative for NYPD employees in the rank of Police Officer. The City and the Union are parties to a collective bargaining agreement covering the period from August 1, 2010, to July 31, 2012 ("Agreement"), and are currently in negotiations for a successor agreement.[1] The Agreement remains in *status quo* pursuant to NYCCBL § 12-311(d).

Police Officers' pay period covers two weeks, and the regular pay date is the Friday following the end of the pay period. It is undisputed that newly hired Police Officers historically

[1] As of the issuance of this decision, the parties have reached a tentative agreement that is pending ratification by the Union's membership.

received their first paycheck in the second pay period following their date of hire. Indeed, a Union Delegate, Police Officer Steven Wallace, affirmed that this practice has existed uninterrupted since 1993.

On January 6, 2016, the NYPD hired a class of approximately 1,300 new Police Officers ("January 6 Class"). Friday, January 29, 2016, was the pay date in the second pay period following the January 6 Class' date of hire and the date that, had the NYPD followed its prior practice, the January 6 Class would have received their first paycheck.

On January 6 and again on January 15, the NYPD advised the January 6 Class that they would not receive their first paycheck until February 12, 2016, the regular pay date in the third pay period after their date of hire.[2] While the City asserts that it advised the Union of the anticipated delay in paychecks,[3] it does not contend that it initiated bargaining or actually bargained over the timing of the first paychecks for the January 6 Class.

The City asserts that in response to the PBA's concerns, on or about February 2 or 3, 2016, the NYPD Payroll Section requested and was granted a supplemental payroll authorization by the

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[2] Members of the January 6 Class who were City employees when they joined the NYPD received paychecks at their old rate of pay on January 15 and January 29, 2016, and, on February 12, 2016, they received paychecks that included the difference, if any, between their old rate of pay and their new rate of pay.

[3] It is undisputed that a Lieutenant from NYPD's Labor Relations Office spoke to a PBA Associate General Counsel regarding the delayed paychecks. The Union asserts, and the City does not deny, that on January 20, 2016, the PBA Associate General Counsel initiated the conversation after the Union was alerted to the delayed payment by one of its delegates to the Police Academy. The City also alleges that the NYPD Director of Payroll and Benefits explained the expected delay in paychecks to a PBA Pension Consultant.

City's Office of Payroll Administration.[4] As a result, on February 4, 2016, the NYPD issued the January 6 Class paper checks covering the two-week period from January 10 to January 23, 2016. These paper checks were distributed between February 4 and February 8, 2016. Thus, the January 6 Class received their first paychecks between six and ten calendar days after January 29, 2016.

On February 12, 2016, the next regular pay date, the NYPD issued paychecks for the January 6 Class that included payment for the period of January 6 to January 9, 2016. Thus, the January 6 Class received payment for the period of January 6 to January 9, 2016, 14 calendar days after January 29, 2016.

According to the City, the NYPD Payroll Section was unable to pay the January 6 Class on January 29, 2016, because it could not process the necessary paperwork in time. The City asserts that the NYPD Payroll Section was handling multiple payroll matters, including: issuing over 50,000 W-2s and Section 1127s for calendar year 2015; processing holiday pay for all uniformed members; disbursing retroactive uniform allowances; and paying approximately 40,000 active, retired, and promoted Police Officers retroactive wage increases. In an affidavit submitted with the City's answer, the NYPD's Director of Payroll and Benefits claimed that "[t]his delay was an isolated event. While the NYPD does not anticipate such a situation to arise again in the future, should a similar situation occur, the NYPD will ensure that newly hired Police Officers will receive their first paycheck by the second pay period after their date of hire."[5] (Ans., Ex. 1 ¶ 14)

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[4] A supplemental payroll authorization, according to the City, allows the NYPD to issue a paycheck in between pay periods, covering a period of no more than two weeks.

[5] According to the City, a class of 99 Police Officers was hired on April 6, 2016, and all but one of them, a transfer from the Department of Correction, received their first paycheck on April 22, 2016, the pay date in the second pay period after their date of hire.

The retroactive wage increases were authorized under a November 13, 2015 impasse award, which did not set a deadline for payment of the retroactive increases. According to the City, it paid all of the retroactive increases by December 31, 2015.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that Respondents violated NYCCBL § 12-306(a)(4) and (5), and derivatively § 12-306(a)(1), by unilaterally altering the practice of paying newly hired Police Officers in the second pay period after their date of hire, and by doing so when the parties' Agreement was in *status quo*.[6] According to the Union, it is well-settled that the date on which

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[6] NYCCBL § 12-306(a) provides, in pertinent part, that:

> 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 [§] 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;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of [§] 12-311 of this chapter.

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

employees receive their paychecks is a mandatory subject of bargaining. Thus, the Union argues that Respondents' failure to negotiate over the timing of the newly hired Police Officers' first paycheck is a violation of their duty to bargain in good faith.

Additionally, the Union asserts that there exists an unequivocal and long-standing practice of newly hired Police Officers receiving their first paycheck in the second pay period after their date of hire. The Union alleges that the practice continued uninterrupted for 23 years, such that there was a reasonable expectation that the practice would continue unchanged.

The Union requests that the Board find that Respondents committed an improper practice; direct them to make whole any Union member aggrieved by the unilateral change, including interest at the maximum legal rate; post a conspicuous notice of the violation throughout the NYPD; and grant such other relief the Board deems just and proper.

City's Position

The City argues that the instant petition must be dismissed as the NYPD has not violated NYCCBL § 12-306(a)(1), (4), or (5). It alleges that it has not made a change triggering a duty to bargain under NYCCBL § 12-306(a)(4) and (5). The City "does not dispute that the timing of paychecks is a mandatory subject of bargaining or that there was a past practice of paying [newly hired] Police Officers by the second pay period following their date of hire." (Ans. ¶ 38) However, it asserts that this one-time delay in payment does not supersede the NYPD's established practice and does not rise to a material, substantial, or significant change to the existing practice.

The City asserts that the Union must establish that a change in the *status quo*, in fact, occurred and that the change must not be *de minimis*. According to the City, the NYPD has neither promulgated a new policy, nor issued anything in writing, nor made announcements declaring that

the NYPD had changed its practice "because the NYPD is in fact not instituting such a change." (Ans. ¶ 41) The City describes the delayed payment to the January 6 Class as "a one-time instance" that resulted from "an inordinate amount of payroll work." (Ans. ¶ 30) The City argues that this claim is speculative and unripe for review because the Union is unable to show that there has been a material change that will continue.

Further, the City notes that it gave advance notice to both the January 6 Class and the Union about the delay and made efforts to reduce its effects by issuing supplemental paychecks after the PBA voiced concerns about the delayed payment. Additionally, the City asserts that nothing new was required from the January 6 Class to receive their paychecks and that no change was made to the substance of the benefit as they were made whole by February 12. To the extent there was any impact on members' terms and conditions of employment, it was *de minimis* and therefore not subject to mandatory bargaining.

DISCUSSION

For the reasons set forth below, we find that the City made a unilateral change regarding a mandatory subject of bargaining when the Agreement was in *status quo,* and, accordingly, grant the petition.

Mandatory subjects of bargaining include those "concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *MLC*, 7 OCB2d 6, at 15 (BCB 2014) (*quoting CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009)); *see also* NYCCBL § 12-307(a). Pursuant to NYCCBL § 12-306(a)(4), it is 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." We have held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012); *see also PBA*, 63 OCB 4, at 10 (BCB 1999). "To establish that a unilateral change constitutes an improper practice, the petitioner must demonstrate the existence of such a change from the existing policy or practice and establish that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014) (quotation and internal editing marks omitted) (quoting *DC 37*, 4 OCB2d 19, at 22 (BCB 2011), *affd., Roberts, et al. v. NYC Off. of Collective Bargaining, et al.*, Index No. 106268/2011 (Sup. Ct. N.Y. Co. Apr. 30, 2012) (Torres, J.), *affd.*, 113 A.D.3d 97 (1st Dept. 2013)); *see also 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) (Friedman, J.), *affd.*, 38 A.D.3d 482 (1st Dept. 2007), *lv. denied*, 9 N.Y.3d 807 (2007).[7]

[7] Contrary to our dissenting colleagues' assertion, this Board has consistently held that a finding of failure to bargain in good faith based upon a unilateral change in a mandatory subject of bargaining does not require a refusal to bargain or a request to bargain from the union. *See ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014) ("a unilateral change…accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice.")(citing *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012)); *DC 37*, 65 OCB 36 (BCB 2000); *DC 37, L. 436 and 768*, 4 OCB2d 31 (BCB 2011); *United Steelworkers of America*, 31 PERB 3085 (1998)("a demand to negotiate is not a condition precedent" to an improper practice charge alleging a unilateral change). Moreover, as set forth in the cases cited herein, a showing of bad faith is not part of the standard to establish an improper practice arising out of a unilateral change. Therefore, our dissenting colleagues' claim that because the City's goals were laudable, the Board's holding "stands the [NYCCBL] on its head," is wholly unsupported.

The parties do not dispute that the timing of paychecks is a mandatory subject of bargaining. Indeed, it is well settled that issues related to employee compensation, including the method and timing of payment, are mandatory subjects of bargaining.[8] *See PBA*, 1 OCB2d 14, at 13 (BCB 2008) ("the timing and the method by which the employer distributes compensation to its employees" is a mandatory subject of bargaining); *see also City of Troy*, 28 PERB ¶ 4657, at 4912 (1995), *affd. as modified*, 29 PERB ¶ 3004 (1996) (date on which employees are paid, the method of their payment, and the applicable payroll period are mandatory subjects of bargaining); *City of White Plains*, 8 PERB ¶ 4544 (1995) (pay day is a mandatory subject of bargaining); *County of Orange*, 12 PERB ¶ 3114 (1979), *affd.*, 76 A.D.2d 878 (2d Dept. 1980), *lv. denied*, 51 N.Y.2d 703 (1980) (the timing of a payment is mandatorily bargainable). Therefore, the timing of the Police Officers' first paycheck is a mandatory subject of bargaining.

Accordingly, the issue presented is whether there was a unilateral change to an existing policy or practice regarding the date of the newly hired Police Officers' first paychecks. Here, the parties do not dispute that there was a practice of paying newly hired Police Officers by the second pay period following their date of hire.[9] It is also undisputed that the City did not issue the first paychecks for the January 6 Class until the third pay period following their date of hire and that

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[8] The National Labor Relations Board ("NLRB") has also held that the timing of paychecks is a mandatory subject of bargaining. *See e.g., Abernathy Excavating, Inc.*, 313 NLRB 68, 69 (1993); *American Ambulance*, 255 NLRB 417, 421 (1981), *enfd.*, 692 F.2d 762 (9th Cir. 1982).

[9] To establish whether there was a practice, the Board looks 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." *DC 37, L. 461 & 508*, 8 OCB2d 11, at 15 (BCB 2015) (quoting *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2009)); *County of Nassau*, 38 PERB ¶ 3005 (2005); *see also UFT*, 4 OCB2d 2, at 10-11 (BCB 2011).

no bargaining regarding this delay occurred. Thus, the City made a unilateral change to the date upon which the first paychecks were issued to the January 6 Class.

The City's representation that this was an isolated incident resulting from "an inordinate amount of payroll work" may be true. Nevertheless, this does not negate the City's obligation to bargain.[10] (Ans. ¶ 30) We find no basis for the conclusion that a one-time change renders unilateral conduct lawful. *See, e.g., DC 37*, 4 OCB2d 34, at 13-14 (BCB 2011) (finding a violation when the employer deviated from its policy of issuing annual evaluations by giving one employee an evaluation for a three month period); *Frontier Hotel & Casino*, 323 NLRB 815, 818 (1997); *SMI/div. of DCX-CHOL Enters., Inc.*, 201 L.R.R.M. (BNA) ¶ 1285 (N.L.R.B. Div. of Judges Sept. 23, 2014) (following *Frontier Hotel & Casino*, finding an improper practice when, for a single day, respondent unilaterally changed its practice of allowing the union to access respondent's employee break room). The City's defense, though not stated explicitly, is essentially one of mootness. It is well established that an improper practice claim does not become moot "merely because the acts alleged to have been committed in violation of the law have ceased." *DC 37*, 75 OCB 14, at 12 (BCB 2005) (quoting *ADW/DWA*, 71 OCB 9, at 8 (BCB 2003)) (internal quotations and citations omitted); *see also Local 333, UMD*, 6 OCB2d 25, at 16 (BCB 2013) (noting that rescission of a change does not render the improper practice moot).

Here, there is no dispute that the decision to delay payment to the January 6 Class was made by the agency. The bulk of the payroll work identified includes items that recur every year

[10] In reaching this conclusion, we note that our holding is based on the unique facts in this record and should not be interpreted as holding that every one-time departure from a practice is a unilateral change. *See DC 37*, 4 OCB2d 34, at 14 n. 11 (BCB 2011). Furthermore, we need not resolve any dispute concerning the City's representations regarding the volume of payroll work to reach our conclusion.

around this time, such as tax forms and holiday pay, or are payment obligations that did not have a fixed payment date, such as the payment of retroactive wage increases and uniform allowances owed pursuant to the November 13 Impasse Award. Thus, the City unilaterally decided which payments would be processed first, delayed the paychecks for the January 6 Class to the third payroll period following their date of hire, and deviated from the prior practice.[11] While the City gave the affected bargaining unit members notice of the delay, it neither invited nor engaged in the bargaining with the Union required to make such a change.[12]

Further, we find that the delay to newly hired Police Officers' paychecks was not a *de minimis* change. A *de minimis* change is "a change in form only, which does not require increased participation on the part of the employee, or alter the substance of the benefit to the employee."[13]

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[11] Our conclusion is consistent with *Hyde Park Cent. Sch. Dist.*, 26 PERB ¶ 4637 (ALJ 1993). In that case, the Administrative Law Judge held that the employer's unilateral implementation of a new salary schedule with a three-week gap between the August and September paydays violated its duty to bargain in good faith when the employees had historically been paid every two weeks. *Id.* There was no change to the employees' contractually-mandated salaries, but they received the last payment one week late. *Id.*

[12] We further note that while the City acknowledged discussions occurred between the City and the PBA (*See* fn. 2), it was not alleged that these communications constituted bargaining that satisfies an employer's duty to negotiate. On the contrary, as noted above, the facts show that the decision to delay the paychecks was made solely by the City.

[13] In making its *de minimis* argument, the City quotes the NLRB's use of the terms "material," "substantial" and "significant." (Ans. ¶ 36). However, this Board has explicitly rejected the position that a change is *de minimis* unless it materially, substantially, or significantly changes a term or condition of employment. *See DC 37,* 4 OCB2d 43, at 9, n. 5 (rejecting City's argument that a change must be "material, substantial and significant" in order not to be found *de minimis* and holding that "under the Taylor Law, 'the value of the benefit at issue is not judged by the Board; the only issue is whether it affects terms and conditions of employment.'") (quoting *Board of Education*, 42 PERB ¶ 4568, at 4760 (ALJ 2009), *affd.*, 44 PERB ¶ 3003 (2011)) (other citations omitted); *see also PBA*, 6 OCB2d 33, at 11, n. 8 (BCB 2013), *affd., Matter of City v. NYC Bd. of Collective Bargaining & Patrolmen's Benev. Assn.*, Index No. 400103/14 (Sup. Ct. N.Y. Co. June 16, 2015) (Schecter, J.).

DC 37, 4 OCB2d 43, at 8-9 (BCB 2011) (reduction of City-provided free parking spaces adjacent to the work location was not *de minimis,* despite availability of other free parking spaces nearby); *see also PBA*, 6 OCB2d 36, at 21-22 (BCB 2013), *affd., Matter of City v. Patrolmen's Benev. Assn.*, Index Nos. 400091/14 and 100114/14 (Sup. Ct. N.Y. Co. Apr. 10, 2015) (Schlesinger, J.) (affirming the Board's holding that a unilateral change imposing a new requirement that employees sign their quarterly performance reviews increased employee participation and was not *de minimis*). We find that the change here was not one in form only because it altered the date upon which the January 6 Class received their first paycheck. *See Abernathy Excavating, Inc.*, 313 NLRB 68, 69 (1993) (unilateral change of payday from Thursday to Friday violated the employer's duty to bargain); *Hyde Park Cent. Sch. Dist.*, 26 PERB ¶ 4637 (unilateral change to a payment schedule that resulted in a one week delay in the issuance of a paycheck constituted an improper practice).

Accordingly, we find that the City breached its duty to bargain in good faith in violation of NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the date on which a class of newly hired Police Officers received their first paycheck.[14] Further, because the unilateral change altered the *status quo* during a period of contract negotiations, the City also violated NYCCBL § 12-306(a)(5). *See MLC*, 7 OCB2d 6, at 20-21 (BCB 2014).[15]

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[14] Having found that the City violated its duty to bargain in good faith, we also find a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 461 & 508*, 8 OCB2d 11, at 21 (BCB 2015); *DC 37*, 77 OCB 34, at 18 (BCB 2006), *affd., Matter of Roberts v. City of New York*, Index No. 110680/2007 (Sup. Ct. N.Y. Co. Feb. 5, 2008) (DeGrasse, J.).

[15] The Union requests that the Board make whole any Union member by awarding interest at the maximum legal rate for the period of delay. We have considered the Union's request for interest, and decline to order it in this matter.

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 Police Benevolent Association, docketed as BCB-4159-16, is hereby granted; and it is further

DETERMINED, that the City of New York and the New York City Police Department violated its duty to bargain over a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(1), (4), and (5), by unilaterally changing the date on which a class of newly hired Police Officers received their first paycheck, a mandatory subject of bargaining; and by making said change during a period when the parties' collective bargaining agreement was in *status quo*; and it is further

ORDERED, that the City of New York and the New York City Police Department cease and desist from unilaterally changing when newly hired Police Officers receive their first paycheck until such time as the parties reach a negotiated agreement or exhaust the statutory impasse procedures; and it is further

DIRECTED, that the New York City Police Department post the attached notice for no less than thirty (30) days in locations where notices to employees are customarily posted.

Dated: February 16, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent in a separate opinion attached hereto. M. DAVID ZURNDORFER
MEMBER

I concur in the dissent of Member Zurndorfer. CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER

The Office of Collective Bargaining

OFFICE OF COLLECTIVE BARGAINING

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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 CITYCOLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 10 OCB2d 3 (BCB 2017), determining an improper practice petition between the Police Benevolent Association and the City of New York and the New York City Police Department.

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 Police Benevolent Association, docketed as BCB-4159-16, is hereby granted; and it is further

DETERMINED, that the City of New York and the New York City Police Department violated its duty to bargain over a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(1), (4), and (5), by unilaterally changing the date on which a class of newly hired Police Officers received their first paycheck, a mandatory subject of bargaining; and by making said change during a period when the parties' collective bargaining agreement was in *status quo*; and it is further

ORDERED, that the City of New York and the New York City Police Department cease and desist from unilaterally changing when newly hired Police Officers receive their first paycheck until such time as the parties reach a negotiated agreement or exhaust the statutory impasse procedures; and it is further

ORDERED, that the New York City Police Department post this Notice for no less than thirty (30) days in locations where notices to employees are customarily posted.

The New York City Police Department
(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.

DISSENT OF M. DAVID ZURNDORFER IN BCB-4159-16 IN WHICH CAROLE O'BLENES CONCURS

The Board's erroneous determination that the City refused to bargain in good faith in this case demonstrates how a blind hyper-technical analysis can lead to a result that is truly nonsensical.

On November 13, 2015, an impasse award was issued resolving the PBA's contract dispute with the City for the period August 1, 2010 through July 31, 2012. The award called for police officers to receive wage increases effective August 1, 2010 and August 1, 2011. It also provided for an increased uniform allowance effective August 1, 2011.

The burden of complying with the award fell upon the NYPD's Payroll Section which was required to determine and then process the back pay owed to approximately 40,000 persons who were employed as police officers during some or all of that two year period. That included many individuals who were no longer members of the bargaining unit either because they had since been promoted or because they were no longer employed by the department.

Anticipating that the Union would want these retroactive payments made as soon as possible, the Payroll Section was put under a great strain in order to accomplish that. The timing of the award only further complicated that task as the year-end was an especially busy period for Payroll which already faced the task of issuing over 50,000 W-2's and Section 1127's.

The PBA's petition in this case does not allege a delay in making retroactive payments to the 40,000 police officers. However, the time-consuming work of preparing that retroactive payroll resulted in a brief delay in paying 1,300 new officers who were hired January 6, 2016, and that brief delay is the basis for the Union's complaint. Those officers would normally have received their first paycheck on January 29th, but Payroll -- because it was overwhelmed with this other work -- was unable to process the necessary paperwork on time in order to issue the checks by that date.

As a result, the new officers were informed on January 6th – and again on January 15th – that they would not receive their first paycheck until February 12th. The PBA did not express concern about the delay until January 20th when the Union's Associate General Counsel raised the matter with Lt. Bernard Whalen of NYPD Labor Relations.[1]

In response to the Union's concerns, the NYPD requested a supplemental payroll authorization from the City's Office of Payroll Administration which would allow it to issue a paycheck – covering a period of no more than two weeks -- in between pay periods. The request was granted and, as a result, checks covering the two week period from January 10th through January 23d were issued on February 4th. The new officers were paid for their first four days -- January 6th through January 9th – on February 12th.

In sum, as a result of the Impasse Award, it was necessary for the Payroll Section to delay the planned January 29th payroll for new officers for two weeks, or until February 12th. When the

[1] In addition, the NYPD's Director of Payroll and Benefits discussed the delay with another representative of the PBA.

PBA raised the delay, the NYPD sought and obtained authorization from the City to do a supplemental payroll which enabled it to reduce the delay to approximately one week.

Based on these facts, the Board Majority finds that the City "refused to bargain in good faith". In doing so, the Majority is wrong on two counts. First, the City never "refused to bargain." There is absolutely no evidence that the Union ever requested bargaining. Nor is there any evidence that the City at any time declined to discuss the matter with the Union. To the contrary, when the PBA raised the subject, the City promptly responded by taking steps to reduce the delay.

Second, there is nothing whatsoever in the record that suggests that the City acted in bad faith. The delay was entirely the result of extraordinary circumstances that were beyond the City's control. The worst that can be said about the City's conduct here is that it gave priority to making long-delayed retroactive payments to 40,000 officers over meeting the scheduled payroll for 1,300 new officers.

In ruling on this record that this one-time departure from the practice by delaying new officer paychecks by about a week constitutes a unilateral change and refusal to bargain in good faith, this decision makes a mockery of the Collective Bargaining Law and stands the statute on its head.

For these reasons, I would dismiss the Union's petition in its entirety.