UFT, 3 OCB2d 44 (BCB 2010)

(IP) (Docket No. BCB-2821-09).

Summary of Decision*:** The Union alleged that the City imposed restrictions on the working hours of Hearing Officers (Per Session) in violation of NYCCBL §§ 12-306(a)(1), (4) and (5). The City asserted that the Union's petition was untimely, that its allegations concerned scheduling, a non-mandatory subject of bargaining, and that the Union failed to establish a *status quo* violation. The Board found the petition was timely filed. The Board also found that some of the changes affected hours and were therefore subject to mandatory bargaining, while others pertained to scheduling, which did not require bargaining. 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 Proceeding

-between-

THE UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK

Respondents.

DECISION AND ORDER

On December 10, 2009, the United Federation of Teachers, Local 2, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") on behalf of their members in the title Hearing Officer (Per Session) ("HOP"), employed at the Environmental Control Board ("ECB") Appeals Unit. The Union claims that the City imposed restrictions on the working hours of HOPs at ECB's Appeals Unit in violation of New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a), subdivisions

(1), (4) and (5). The City asserts that the Union's allegations are untimely, concern a non-mandatory subject of bargaining, and fail to establish the violation of any *status quo*. The Board finds the petition was timely filed. Further, the Board finds that the changes affecting hours are subject to mandatory bargaining, while those concerning scheduling do not require bargaining. Accordingly, the Board grants the decision in part and denies it in part.

BACKGROUND

The Union represents HOPs employed by the City at various agencies including ECB, which is under the jurisdiction of the Office of Administrative Trials and Hearings ("OATH"). HOPs hold and adjudicate administrative hearings and are paid on an hourly basis. At ECB, there are nine or ten HOPs that adjudicate in the Appeals Unit; these HOPs are supervised by full-time Hearing Officers. The City-wide job specification states that employees in the HOP title may not "work more than 17 hours per week in any two consecutive weeks, or more than 1,000 hours per year." (Ans., Ex. 1). On September 27, 2007, the Union was certified as the exclusive representative for HOPs, and the parties have since been negotiating for a Collective Bargaining Agreement. The parties have yet to reach an initial agreement.

HOPs have some flexibility in their work scheduling. They are not required to accept every work offer and have the discretion to choose to work no hours in a given day or week. The various agencies that employ HOPs have different frameworks dictating employee work hours and schedules. For example, until recently, HOPs working at ECB's Appeals Unit could work during non-business hours, including, according to the Union, as early as 7:00 AM and as late as 9:00 PM; they could also work in blocks of time that were less than five hours. In contrast, HOPs at other

agencies were more restricted. At the Taxi and Limousine Commission ("TLC") Appeals Unit, HOPs must work in five-hour time blocks between 9:00 A.M. and 5:00 P.M.

In either October or November of 2008, ECB informed HOPs in the Appeals Unit that they would no longer be able to work evening hours. The City asserts that this was so that HOPs hours would match those of their supervisors, full-time Hearing Officers, who work between the hours of 8:30 A.M. and 5:30 P.M. The City claims that evening hours for these HOPs were eliminated by the end of 2008. However, the record contains timesheets from ECB's Appeals Unit, dated from January 19, 2009, to August 14, 2009, which include multiple entries where HOPs recorded that they worked outside of the delineated hours. The timesheets indicate that HOPs began working before 8:30 A.M. on 42 occasions and worked after 5:30 P.M. on 124 occasions.

In September 2009, ECB notified these HOPs that they would be required to work in blocks of time of at least five hours and between the hours of either 8:00 A.M. or 10:00 A.M., and 6:00 P.M.[1] If a HOP works at all during a given week, that employee must now work at least two days during that week.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the City's claim of untimeliness lacks merit. Although the City announced the elimination of evening hours in October 2008, the change was not implemented until

[1] The parties disagree as to whether the new policy requires that HOPs work in blocks of time of at least five hours as the City asserts, or of between five to six hours as the Union asserts. They also disagree as to the time at which HOPs may commence their work day; the City asserts 8:00 AM and the Union asserts 10:00 AM. We find that these disagreements do not create a material issue of disputed fact requiring resolution prior to the issuance of a decision.

September 2009. Therefore, the Union's petition, filed on December 10, 2009, is timely.

In its petition, the Union asserts that the City violated NYCCBL § 12-306(a)(1), (4), and (5).[2]

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[2] NYCCBL § 12-306(a) provides 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;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

NYCCBL § 12-305 provides, in pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

NYCCBL § 12-311(d) provides, in pertinent part:

> Preservation of status quo. During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, . . . the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stoppages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain from unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For the purpose of this subdivision the term "period of negotiations" shall mean the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an

The Union claims that the City imposed changes that affect these HOPs' hours of work when it eliminated evening work hours, began requiring HOPs at ECB's Appeals Unit to work in at least five-hour time blocks and at least two days in a week in which they choose to work. Hours are a mandatory subject of bargaining. The City's unilateral change concerning their hours violates NYCCBL § 12-306(a)(4). An employer may not unilaterally alter the number of hours worked per day or per week because such changes affect hours of employment, a mandatory subject of employment. These new requirements impact the number of hours per day and the length of the work week. The fact that HOPs have flexibility in their scheduling and the ability to reject work assignment offers does not remove this change in hours from being considered a mandatory subject of bargaining.

These new requirements regarding working hours departed from the *status quo* in place at ECB's Appeals Unit during a period of contract negotiations, thereby violating NYCCBL § 12-306(a)(5). In attempting to defend its actions, the City cited practices regarding hours of work at other agencies that employ HOPs. However, the practices in place at other agencies are not relevant to the Union's petition, which only concerns the *status quo* at ECB's Appeals Unit.

As relief, the Union seeks an order requiring the City to cease and desist from changing terms concerning mandatory subjects of bargaining such as hours, including the number of hours worked per day; to reinstate the *status quo* regarding hours of work for HOPs in the Appeals Unit of the ECB; to make unit members whole for expenses incurred or revenue lost as a result of the unilateral change; to bargain over imposing changes in hours and the impact of such changes.

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impasse panel is appointed.

City's Position

The City argues that many of the Union's claims are untimely because they fall outside of the four-month statute of limitations. Specifically, the City asserts that the City eliminated evening scheduling as of October 2008. To the extent that employees had discretion to schedule their work hours at ECB, such discretion ended in November 2008. Therefore, given that the Union filed its petition on December 10, 2009, these claims are untimely.

Pursuant to NYCCBL § 12-307(b), certain subjects pertaining to determining staffing levels are reserved as management rights not subject to bargaining. Scheduling HOPs to work sessions that are not less than five hours is within the City's rights. The only limits upon the City's scheduling of HOPs are those self-imposed restrictions articulated in the job specification, which specifies that HOPs may not work in excess of 17 hours per week or 1,000 hours per year. Further, HOPs may choose whether or not to work during any particular week. The City's only change is that, if HOPs choose to work, they must work a block of time of at least five hours. The parties are engaged in ongoing negotiations, and the Union has failed to establish that the City has refused to bargain over any mandatory subject. Given that this matter concerns scheduling, which falls within management's rights, the City has no obligation to bargain over this change.

Regarding the Union's allegation that the City violated NYCCBL § 12-306(a)(5), there is no current or previous collective bargaining agreement upon which to base a "*status quo*." The City has not had a past practice of granting HOPs total discretion to set their hours of work per day. For example, at TLC, which employs HOPs in its Appeals Unit, HOPs must work in five-hour time blocks between 9:00 A.M. and 5:00 P.M. Therefore, the change at ECB requiring that HOPs in ECB's Appeals Unit work in five-hour time blocks is in line with the *status quo* in effect at TLC's

Appeals Unit. Further, the petition is brought on behalf of nine HOPs who perform appeals work at ECB. There are over 250 HOPs employed throughout the City; to the extent that a practice was changed at ECB's Appeals Unit, that change cannot establish a *status quo* for employees in titles working throughout the City.

DISCUSSION

As a preliminary matter, we find that the petition is timely. Section 12-306(e) of the NYCCBL and §1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), provide that a petition alleging an improper practice in violation of § 12-306 may be filed no later than four months after the disputed action occurred. We do not necessarily consider an action to have occurred on the date a party announces an intended change. Instead, the statute of limitations begins to run "after the intended action is actually implemented and the charging party is injured thereby." *DC 37, L. 1508,* 79 OCB 21, at 19 (BCB 2007).

ECB first notified HOPs that they could not work in the evening in October or November of 2008. However, the record includes documents, which the Union contends are sign-in timesheets from ECB's Appeals Unit where HOPs recorded their work hours. These timesheets, the validity of which the City does not dispute, illustrate that up until at least August 14, 2009, HOPs worked after 6:00 PM. In September 2009, ECB notified the HOPs of the new restriction's implementation, at which point the restriction was effective. Therefore, despite ECB's prior notice of its intention to implement this change, there is substantial evidence in the record that it was not implemented before September 2009, and no evidence that it was. We have long held that "a union appropriately interposes itself only after an action of management has had an immediate impact on the employees

represented by the union or that it necessarily entails on impact in the immediate or foreseeable future." *SSEU, L. 371,* 79 OCB 34, at 7 (BCB 2007); DC 37, 47 OCB 6, at 8 (BCB 1991). By this standard, the Union was within its right to wait until the policy was implemented before bringing its claim. Therefore, we find the Union timely filed its petition within four months of the implementation of the new restrictions on working times.

The substantive issues before us are whether ECB's implementation of new requirements regarding working times constitutes unilateral changes to mandatory subjects of bargaining in departure from the *status quo*. The Union asserts that the new requirements concern hours, and as such, are mandatorily bargainable. In contrast, the City contends that these requirements are purely scheduling matters and do not encompass mandatory subjects of bargaining. In our view, neither position is wholly accurate; we find that the new requirements encompass both mandatory and non-mandatory subjects.

Under NYCCBL § 12-306(a)(4), a public employer commits an improper practice by "refusing to bargain collectively in good faith on matters within the scope of collective bargaining." *DC 37, L. 1457*, 1 OCB2d 32, at 26 (BCB 2008). "Mandatory subjects of bargaining generally include . . . hours." *Id.*; *LEEBA*, 3 OCB2d 29, at 5 (BCB 2010). Other areas, such as scheduling, fall within the managerial prerogative and are not subject to mandatory collective bargaining. *LEEBA*, 3 OCB2d 29, at 33; *Fire Alarm Dispatchers Benev. Assn.*, 55 OCB 1, at 11 (BCB 1995). Thus, "while the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total number of hours employees work per day or per week." *UFOA*, 1 OCB2d 17, at 10 (BCB 2008); *see also PBA*, 15 OCB 23, at 16-17,

19 (BCB 1975), *affd, Patrolmen's Benev. Assn. v. Board of Coll. Barg.*, N.Y.L.J., Jan. 2, 1976, at 6 (Sup. Ct. N.Y. Co.); *LEEBA*, 3 OCB2d 29, at 31-32.

In this case, ECB's newly implemented restrictions include two distinct changes: the requirement that HOPs work during certain hours of the day, and the requirement that HOPs work in five-hour time blocks, at least twice a week in twice in any week worked. As we recently held, it is the "City's prerogative unilaterally to establish and change the work schedules for employees [and] that the City need not seek approval from [a union] for any change in work schedules." *LEEBA*, 3 OCB2d 29, at 45-46. Accordingly, we find that the requirement that HOPs work within certain hours of the day is a matter of scheduling, which is not subject to mandatory collective bargaining.

As a general matter, however, the subject of hours is distinct and compels and opposite result. In *UFOA*, 1 OCB2d 17, at 10, we found that an alleged change to "the number of hours [employees] will be required to work in each day and week . . . and the number of appearances per week that will now be required" were mandatory subjects of bargaining. We find that the changes requiring that HOPs work at least five hours per day and at least twice per week in any week worked relate to hours and therefore must be bargained. Therefore, we find that by implementing these changes requiring that HOPs work in time blocks of at least five-hour time blocks, and at least twice in any week worked, ECB violated NYCCBL § 12-306(a)(4).

We also find that the City violated NYCCBL § 12-306(a)(5). To establish a violation of NYCCBL § 12-306(a)(5), a party may show a departure from a "past practice," one that "was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged." *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2008) (citing *County*

of Nassau, 38 PERB ¶ 3005 (2005)). The City argues that the Union cannot establish a past practice from which to assert a change because some City agencies, such as TLC, previously had similar rules in place which HOPs at these agencies were obliged to follow, and other agencies have rules that differ from those at ECB. Therefore, according to the City, there is no unequivocal and uninterrupted practice upon which to base a *status quo.* Further, the City argues that the HOPs at ECB's Appeals Unit make up such a small fraction of the City's population of HOPs that a *status quo* cannot be established for HOPs throughout the City. The fact that various practices existed at different agencies throughout the City regarding the working hours of HOPs does not in any way undercut the practice applicable to HOPs at ECB. The record establishes that at ECB's Appeals Unit, there existed an unequivocal practice of permitting HOPs to work less than two days in a week and in blocks of time shorter than five hours. There is no evidence of record that any other practice ever existed. We find that by implementing these new requirements concerning hours, the City departed from an existing past practice, which existed for a sufficient duration such that HOPs could reasonably expect it to continue, and thereby violated NYCCBL § 12-306(a)(5).

Finally, the City asserts that there is no collective bargaining agreement upon which to base a *status quo.* However, as we have clearly stated, "[t]he language of the statute is unambiguous–an existing collective bargaining agreement is not a condition precedent to invoking the *status quo* provision." *USCA*, 67 OCB 32, at 7 (BCB 2001). Thus, establishing a violation of NYCCBL § 12-306(a)(5) requires only that the change to a mandatory subject of bargaining be made during a "period of negotiations." *Id.* Such is the case here.

Therefore, we find that the Union has established that, by unilaterally changing the number of hours per day and number of days per week that HOPs work, the City violated NYCCBL § 12-

306(a)(4), (5), and derivatively, NYCCBL § 12-306(a)(1). Accordingly, the petition is granted in part and denied in part.

ORDER

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

ORDERED, the improper practice petition filed by the United Federation of Teachers, Local 2, AFL-CIO, docketed as BCB-2821-09 be, and the same hereby is, granted in part, and denied in part; and it is further

ORDERED, that the City of New York rescind the new requirement that Hearing Officers (Per Session) assigned to work at the Environmental Control Board's Appeals Unit work in five-hour increments and work a minimum of two days per week worked; it is further

ORDERED, that the City of New York cease and desist from implementing changes in the bargainable aspects of working hours, as defined in this decision, until such time as the parties negotiate such changes.

Dated: September 22, 2010
New York, New York

MARLENE A. GOLD
MEMBER

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER