UFADBA, 12 OCB2d 30 (BCB 2019)

(IP) (Docket No. BCB-4248-17)

Summary of Decision*:** The Union claimed that the City violated NYCCBL § 12-306(a)(1) and (4) by not providing fire alarm dispatchers who were transferred to a new facility with a full kitchen containing a stovetop oven and dishwasher, contrary to established past practice, and by requiring them to sign a waiver of liability in order to use the facility's gym when off duty. The City argued that its actions were within its management rights, that there was no change to past practice, that it satisfied any arguable duty to bargain regarding a full kitchen, and that the City's interest in safety outweighed the employees' interest in comfort. The Board found that the absence of a full kitchen and the requirement that employees sign a waiver to use the gym when off duty were not changes from existing policy or practice and that the demand for a full kitchen was not a mandatory subject of bargaining. Accordingly, the petition was denied. ***(Official decision follows).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIRE ALARM DISPATCHERS BENEVOLENT ASSOCIATION,

Petitioner,

- and-

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

Respondents.

DECISION AND ORDER

On September 15, 2017, the Uniformed Fire Alarm Dispatchers Benevolent Association ("Union") filed a verified improper practice petition against the City of New York ("City") and the Fire Department of the City of New York ("FDNY"). The Union alleges that the FDNY violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City

Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to provide employees who were transferred to a new facility, Public Safety Answering Center II ("PSAC II"), with a full kitchen containing a stovetop oven and dishwasher in violation of established past practice and requiring them to sign a waiver of liability in order to use the facility's gym while off duty. The City argues that its actions were within its management rights, that there was no change to past practice, that it satisfied any arguable duty to bargain regarding a full kitchen, and that the City's interest in safety outweighed the employees' interest in comfort. The Board finds that the City's decision not to install a full kitchen at PSAC II was neither a change from an existing policy or practice nor a mandatory subject of bargaining. Regarding the requirement that employees sign a waiver of liability in order to use the gym, the Board finds that it was not a change from an existing policy or practice and does not reach the issue of whether it constituted a mandatory subject of bargaining. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held a three-day hearing and found that the totality of the record, including the pleadings, exhibits, transcript, and briefs, established the relevant facts set forth below.

The Union is the certified bargaining representative for FDNY employees in the titles of Fire Alarm Dispatcher and Supervising Fire Alarm Dispatcher Levels I and II (collectively, "Dispatchers"). UFADBA and the City are parties to a collective bargaining agreement for the period covering 2010 to 2017 ("Agreement"), which expired on December 31, 2017, but remains in *status quo* under NYCCBL § 12-311(d).

Dispatchers receive and transmit reports of fire and emergency alarms generated through the City's 911 reporting system. They also process calls regarding administrative issues or complaints concerning the FDNY. Dispatchers work out of facilities that are staffed twenty-four hours a day, seven days a week. They generally work twelve-hour shifts, which can be extended to eighteen hours in non-emergencies and twenty-four hours in emergencies.[1] Dispatchers are not provided with a fixed lunch break during their shift, but they are permitted to order or prepare food and eat it at their work stations while on duty.

There are five fire dispatch details, one assigned to provide services for each borough, as well as a Field Communications detail operating from FDNY Engine 233, located at 25 Rockaway Avenue in Brooklyn. In addition, nine Dispatchers perform non-dispatch administrative functions at FDNY Headquarters at 9 MetroTech Center in Brooklyn. Prior to the summer of 2009, the fire dispatch detail for each borough worked at a facility located within its respective borough. That year, the City opened Public Safety Answering Center I ("PSAC I"), the first of two planned facilities to consolidate emergency-call taking and dispatch operations. PSAC I is located at 11 MetroTech Center in Brooklyn. PSAC II, which opened in 2017, is located at 350 Marconi Street in the Bronx. Currently, each of the two PSAC facilities houses operators and dispatchers from the New York Police Department ("NYPD"), FDNY Fire Dispatch, and FDNY Emergency Medical Services ("FDNY EMS"), thereby centralizing dispatch operations for the City's emergency services.

Dispatch operations for Brooklyn, Staten Island, and Manhattan were moved to PSAC I in 2009. At the time, the FDNY Bronx dispatch office remained at 1129 East 180th Street in the Bronx, and the FDNY Queens dispatch office remained at 83-98 Woodhaven Boulevard in

[1] Dispatchers performing non-dispatch administrative functions generally work eight-hour shifts.

Queens. In October 2014, the Manhattan dispatch detail was relocated from PSAC I to the Bronx dispatch office at 1129 East 180th Street. In June 2017, the Manhattan dispatch detail was transferred to PSAC II. The Bronx dispatch detail was transferred to PSAC II in August 2017, and the Queens detail followed in September 2017.

At the time of the hearing, the Staten Island dispatch detail worked out of PSAC I and the Manhattan, Bronx, and Queens details worked out of PSAC II.[2] There are approximately 130 Dispatchers working at PSAC II. They work twelve-hour shifts running from either 7 a.m. to 7 p.m. or 7 p.m. to 7 a.m.

The City's Decision Not to Install a Full Kitchen at PSAC II

The five borough dispatch offices each had a kitchen with a stovetop oven and dishwasher for the use of Dispatchers. Neither PSAC I, PSAC II, nor FDNY Headquarters has a kitchen with a stovetop oven and dishwasher. PSAC II has a "vendeteria" on the first floor, where employees can purchase prepared sandwiches, salads, yogurt, cereal bars, drinks, coffee, tea, juices, and candy. (Tr. 165) There are also refrigerators and microwaves that PSAC II that Dispatchers can use.

The parties began bargaining for the Agreement in or around 2015.[3] One of the Union's bargaining demands was that all facilities at which Dispatchers work include a full kitchen with a stovetop oven and dishwasher. Renee Campion, the Commissioner of the City's Office of Labor Relations ("OLR"), testified that OLR met with the Union five or six times in total to negotiate the

[2] The Brooklyn detail operated on a temporary basis from the Queens borough office but expected to return to PSAC I within the year.

[3] At the time, the parties' 2006 to 2010 collective bargaining agreement was expired but remained in *status quo* under § 12-311(d) of the NYCCBL.

new agreement.[4] Campion testified that while the City considered the request for a full kitchen to be a non-mandatory subject of bargaining, it was discussed during multiple conversations at meetings in 2015 and 2016. Similarly, UFADBA President Faye Smyth testified that during bargaining the parties discussed the Union's demand for a full kitchen at PSAC II, but that the City did not agree to the demand.

In June 2016, the FDNY began to seek Dispatchers to volunteer to work at PSAC II in an administrative capacity prior to dispatch operations being transferred to that facility. Soon after, a small number of Dispatchers transferred to PSAC II. On September 30, 2016, the Union filed an improper practice petition ("2016 Petition") alleging that the City "failed to negotiate with [the Union] the provision in PSAC [II] of a refrigerator, oven, dishwasher, and microwave for Bargaining Unit Members prior to their decision to staff that facility with such members." (Union Ex. B at 3)

In the meantime, the parties continued negotiations for a successor agreement. Campion recounted a conversation she had in Fall 2016 with Smyth, OLR Assistant Commissioner Brian Geller, and counsel for the Union, regarding the Union's demand for a full kitchen. For approximately an hour, Campion and Smyth discussed their respective positions in relation to the demand for a full kitchen. Campion testified that during this meeting she told Smyth "we were not going to be able to put their demand of having a kitchen in PSAC II in the Collective Bargaining Agreement." (Tr. 79) Campion testified that she repeated this position multiple times.

Smyth testified that the parties discussed the 2016 Petition at a bargaining session held at some point after its filing. According to Smyth, the City took the position that the claim that the

[4] At the time of her testimony, Campion was First Deputy Commissioner of OLR. She became Commissioner of OLR in February 2019.

City failed to bargain over kitchen facilities in the 2016 Petition was premature because dispatch operations had not yet commenced at PSAC II. Smyth responded that "we can go forward with the contract negotiations, but I am still reserving the right to file [an improper practice petition] . . . when we do actually set foot in the facility properly." (Tr. 254) According to Smyth, Campion replied that "if we get rid of this IP charge now we will go forward with the contract negotiations, notwithstanding your right to actually bring it again." (Tr. 255)

Campion testified concerning a bargaining session held on January 18, 2017, in which the parties had a final conversation regarding the demand for a full kitchen at PSAC II. Campion's unrebutted testimony was that she told the Union that "if they were insisting that [the full kitchen] be part of this agreement . . . that they should not sign this agreement" and that, if that was the case, "we should not conclude bargaining." (Tr. 83) The Agreement was signed by the parties that same day. (*See* City Ex. K) There are no provisions in the Agreement referring to kitchen facilities.

On March 2, 2017, the Union withdrew the 2016 Petition without prejudice. Smyth testified that the 2016 Petition was withdrawn as part of a settlement with the City whereby the City agreed not to raise a timeliness objection to any future petition based on the occasions that Dispatchers had initially worked at PSAC II in an administrative capacity prior to transferring to PSAC II on a full-time basis. She testified that this was done in order to preserve the Union's ability to file an improper practice petition once dispatch operations were transferred to PSAC II.

UFADBA Vice-President Joseph Shovlin testified that when he worked at the Bronx and Queens dispatch offices, Dispatchers would "regularly cook full extravagant meals" such as meatloaf, sausage and peppers, full breakfasts, and Thanksgiving and Christmas dinners. (Tr. 30-31) While Dispatchers would sometimes order food from a restaurant, "half the time or more"

they would cook. (Tr. 40) They would prepare meals for up to twenty Dispatchers at a time. During Hurricane Sandy, when Shovlin worked a 36-hour shift, Dispatchers were able to cook multiple meals and eat satisfactorily despite stores and restaurants being closed.

Shovlin testified that Dispatchers at PSAC II cannot prepare the same meals with a microwave oven that they could when they had access to a stovetop oven. He stated that, because of the lack of a stovetop oven, Dispatchers now usually order food from restaurants. According to Shovlin, when Dispatchers had access to a stovetop oven, it would cost about $5 per person for a meal, but that it now cost a minimum of $10 when ordering meals. In turn, the Union increased the amount of money it allocated each borough detail for Thanksgiving and Christmas meals from $150 per borough detail per holiday to $200.

Carleton Murray, an architect with the City's Department of Design and Construction, testified regarding the difficulties there would be in installing a stovetop oven in PSAC II. He testified that the building has "a tremendous amount of technology in it." (Tr. 126) The seventh through tenth floors of the building are "packed tight" with mechanical systems. (Tr. 131) To protect from any potential terrorist attack, the building has 18-inch thick, blast-resistant concrete walls. Murray testified that installing a stovetop oven would require hiring an architect to design the area for the stovetop oven, hiring a mechanical engineer to outline the mechanical components, and conducting a feasibility study to assess whether it would be possible to install venting. The installation of venting would require either cutting through the reinforced concrete wall, which would "introduc[e] into the skin of the building a weak point of entry," or finding a pathway upwards through the building that could traverse the dense mechanical components housed on the seventh through tenth floors. (Tr. 130) Murray testified that, assuming it was determined to be

feasible, the installation of a stovetop oven for the use of Dispatchers would require "a huge amount of effort." (Tr. 144)

The PSAC II Gym Waiver

PSAC II has a small gym with exercise equipment including free weights, a bench press, stationary bicycles, and a treadmill. The gym is available for voluntary use by all employees stationed at PSAC II, including Dispatchers, when they are off duty.

FDNY Headquarters also has a gym available for use by employees during non-working hours, but neither PSAC I nor the borough offices at which Dispatchers previously worked have gyms or exercise equipment. FDNY employees are generally only permitted to use a gym if it is located at the facility at which they are stationed, though fitness classes held at FDNY Headquarters are open to all FDNY employees, including Dispatchers.

Smyth testified that in or about June 2017, when Dispatchers were relocated to PSAC II, she became aware that the City was requiring that, prior to using the gym, Dispatchers sign a Release and Waiver ("Waiver") releasing the City from any and all liability arising out of the use of the exercise equipment. (Pet. Ex. A) The Waiver states, in relevant part, as follows:

> **Exercise Equipment**
> Release and Waiver
>
> * * * *
>
> I understand that the use of this Exercise Equipment is strictly voluntary . . .
>
> I assume any and all risks, known and unknown, including risks of loss, damage and injury that may be sustained while utilizing the Exercise Equipment. . . .
>
> In consideration for being allowed to use the Exercise Equipment, I hereby agree that the City of New York (the "City") and/or PSAC II, at its sole discussion [sic] shall have the right to exclude my use of the Exercise Equipment. I understand that these rules and guidelines are for my safety and the protection of other participants and PSAC II staff.

> I hereby discharge and release the City and/or PSAC II from any and all claims, arising out of my use of the Exercise Equipment, including, [to] the fullest extent permitted by law, claims arising out of negligence on the part of the City and/or PSAC II and its staff.

(*Id.*)

Smyth testified that she was not aware of similar waivers being required at the FDNY Headquarters gym. Smyth testified that, while she lacked first-hand knowledge, she had been told by Dispatchers that when the PSAC II gym opened there were exposed wires running over the carpet and that the floor surface was uneven. She was unaware if these issues had since been corrected. She testified that she would not sign the waiver because of the risk of being injured while walking in the gym.

Deirdre Evans, FDNY Director of Communications, testified that about 58 Union members had signed the Waiver to use the gym at PSAC II. Evans testified that, since at least the late 1990s, all FDNY employees have been required to sign waivers before being permitted to use the gym at FDNY Headquarters or to take exercise classes there.

In response to the Union's request for all waivers signed by Dispatchers for use of the FDNY Headquarters gym, the City produced a release form ("Headquarters Release") executed by a Union member in October 2015. (City Ex. O) The Headquarters Release provides, in relevant part, as follows:

> I understand that my use of the FDNY exercise facility is not a benefit or other term or condition of my employment with the City of New York or FDNY, that I may only use the facility during non-working hours, and that permission to use the facility may be revoked at any time . . .
>
> RELEASE FROM LIABILITY: In consideration of FDNY's permission to use the FDNY exercise facility, I HEREBY RELEASE THE CITY OF NEW YORK, its agencies, officers, employees and agents, including FDNY ("Releasees"), from any and all claims, causes of action, suits, damages, or judgments,

> whatsoever, which against the Releasees, I, my heirs, executors, administrators and assigns, ever had or will have, arising from any injury resulting from my use of the FDNY exercise facility.

(*Id.*)

The City also produced releases executed by three Union members covering any claims arising in connection with their participation in Zumba, Yoga, and Self-Defense classes given at the FDNY Headquarters gym ("Gym Class Release"). (City Ex. P) The Gym Class Release states, in part, that the classes "are voluntary recreational or informational activities that are not required or expected of my employment and not covered under New York's workers' compensation statutes." (*Id.*) The Union did not produce any witnesses who had utilized a gym or exercise equipment at FDNY facilities without first signing a release.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the City and FDNY violated NYCCBL § 12-306(a)(1) and (4) by not providing Dispatchers at PSAC II with a full kitchen containing a working stovetop oven and dishwasher in violation of established past practice and by requiring Dispatchers to sign the Waiver as a condition of using the PSAC II gym.[5]

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[5] NYCCBL § 12-306(a)(1) and (4) provide, in pertinent part, as follows:

> 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;
>
> * * * *

The Union asserts that it is well-settled that lunch facilities are mandatory subjects of bargaining because they relate to employees' health and comfort. The Union argues that a kitchen with a stovetop oven and dishwasher should similarly be considered a mandatory subject of bargaining because it allows Dispatchers to prepare fresh and hot meals. In addition to affecting employees' comfort and health, the Union alleges that the absence of a full kitchen at PSAC II has had an economic impact on members who must now spend more money on food. The Union argues that the absence of a dishwasher similarly impacts employees because "[h]aving a machine clean your dishes is infinitely more healthy and comfortable" than washing them by hand. (Union Br. at 12)

The Union argues that the Agreement does not address the Union's demand for a full kitchen and that the parties did not intend the Agreement to finally determine this issue. The Union points out that the 2016 Petition regarding kitchen facilities was still pending at the time that the parties executed the Agreement. It maintains that the parties had agreed to separate the discussion of kitchen facilities from contract negotiations and resolve the issue later before this Board. The Union contends that the City cannot prove it satisfied its duty to bargain because the Agreement does not clearly address the demand for a full kitchen and "Smyth's unrebutted testimony is . . . that [the parties] intended otherwise." (Union Br. at 16)

> (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.

§ 12-305 provides, in pertinent part, as follows:

> 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 . . .

The Union argues that the provision of a full kitchen at each of the borough dispatch offices and at FDNY Engine 233 created a past practice that reasonably led Dispatchers to expect those same amenities at PSAC II. The Union asserts that, "while the prior leadership for UFADBA did not file an Improper Practice Charge" regarding the absence of a stovetop oven and dishwasher at PSAC I, the Union had discussions with the City regarding this matter and "there was an expectation that the utilities provided in the other facilities would be provided in PSAC I." (Rep. at 14) Thus, according to the Union, its members continued to have a reasonable expectation that there would be a stovetop oven and dishwasher at PSAC II.

With regard to the Gym Waiver, the Union asserts that PERB precedent establishes that "only [the] union can execute waivers on behalf of its members." (Union Br. at 17) It argues that the Waiver constitutes a mandatory subject of bargaining because it gives the City the right to preclude any Dispatcher from using the exercise equipment at its sole discretion and waives members' rights to file claims arising out of negligence by the City, "which presumably includes worker's compensation claims or a private negligence claim against staff." (Pet. ¶ 20) It further contends that the City did not produce convincing evidence that, prior to the opening of PSAC II, Dispatchers were required to sign waivers of liability in order to use worksite gym facilities.

The Union acknowledges that, given the unique design of PSAC II, it would be difficult for the City to install a stovetop oven there. Accordingly, the remedy requested by the Union is that the Board order a hearing to determine what monetary damages are owed to its members due to the absence of a stovetop oven at PSAC II. In addition, the Union maintains that, since the City presented no evidence that a dishwasher could not be installed at PSAC II, the Board should order that the City install a dishwasher for the use of Dispatchers. The Union requests that the Board order that any gym waivers signed by its members be invalidated and that the City cease requiring

them. The Union further requests that the City be ordered to negotiate regarding these matters, to otherwise make whole all affected employees, and to post a notice of violation.

City's Position

The City argues that the decision to install a stovetop oven and dishwasher at PSAC II is a management right pursuant to NYCCBL §12-307(b). According to the City, the design, construction, and planning of City facilities is not a mandatory subject of bargaining.

While the City disputes that the provision of a kitchen with a stovetop oven and dishwasher is a mandatory subject of bargaining, it argues that it nevertheless satisfied any duty to bargain it may have had in regard to this demand during negotiations for the Agreement. The City maintains that it addressed the Union's demand for a kitchen at multiple bargaining sessions and clearly informed the Union that it would not install a stovetop oven and dishwasher at PSAC II. Despite its rejection of this demand, the City asserts, the Union never provided a counter-offer or otherwise modified its proposal. The City argues that Commissioner Campion explicitly warned the Union that it should not sign the Agreement if it still sought to negotiate for a stovetop oven and dishwasher, yet the Union nevertheless chose to enter into the Agreement. The City contends that the provision in the Agreement stating that it encompasses "all economic and non-economic matters" clearly and unambiguously indicates that it is a comprehensive agreement concluding bargaining on all matters for the 2010-2017 period. (City Ex. K at 1)

The City argues that the Union has not met its burden of demonstrating that there has been a unilateral change to an existing past practice concerning the provision of kitchens at dispatch facilities. The City asserts that there has never been a practice of providing stovetop ovens and dishwashers at PSAC facilities, and that Dispatchers have been aware of this since PSAC I opened in 2009. Although stovetop ovens and dishwashers were available for Dispatchers' use at borough

dispatch offices, the City maintains that, given their absence at PSAC I, Dispatchers did not have a reasonable expectation that they would be available at PSAC II. The City also submits that the past practice cases cited by the Union do not address a situation like this one in which employees were transferred from one facility to another.

The City argues that, even if the Board finds that the provision of a stovetop oven and dishwasher is generally a mandatory subject of bargaining, it must still conduct a balancing test weighing employees' interest in comfort versus the City's safety and operational concerns. PSAC II houses emergency response operations for the NYPD, FDNY Fire Dispatch, and FDNY EMS in multiple boroughs. Because of this centralization of emergency response operations, the City argues that the potential risks in the event of a cooking-related workplace fire are far greater than they were when FDNY fire dispatch operations were located in borough offices. A fire at PSAC II would be disastrous for City residents attempting to access emergency services. The City asserts that these critical safety and operational concerns outweigh any interest that employees may have in a full kitchen.

The City contends that it did not fail to negotiate over a mandatory subject of bargaining when it required employees to sign the Waiver in order to use the PSAC II gym. The City asserts that this waiver requirement falls within its management right to determine the manner in which its facilities are operated. It argues that, while a public employer cannot require employees to waive rights provided in their collective bargaining agreement, the liability waiver in question does not affect any contractual rights. Furthermore, it contends, the requirement that employees sign the Waiver in order to use the gym at PSAC II is not a deviation from past practice. The City asserts that the evidence demonstrated that the FDNY has always required employees to sign similar liability waivers to use the gym at FDNY Headquarters or participate in fitness classes held

there. The City submits that Dispatchers who used the exercise equipment at FDNY Headquarters or took fitness classes there were required to sign waivers of liability.[6]

DISCUSSION

It is well established that "a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith." *UFA*, 10 OCB2d 5, at 13 (BCB 2017) (citations omitted). To prove that a violation has occurred, a petitioner "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)).

NYCCBL § 12-307(a) provides that the City must bargain regarding wages, hours, and working conditions.[7] *See* NYCCBL § 12-307(a). As we have often stated, "[s]ince neither the NYCCBL nor the Civil Service Law expressly delineates the nature of 'working conditions,' or 'conditions of employment,' both this Board and PERB determine on a case-by-case basis the

[6] At the hearing, the City objected to the Union's submission of a settlement agreement between the City and the Union withdrawing the 2016 Petition, which was attached as an exhibit to the Union's reply. In deciding this matter, we do not rely on the terms of that settlement agreement.

[7] NYCCBL § 12-307(a) provides, in relevant part, as follows:

> Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law . . .

extent of the parties' duty to negotiate." *DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006) (citations omitted). This determination "takes the form of a balancing test which weighs the interests of the public employer and those of the union with respect to that subject under the circumstances of the particular case." *CEU, L. 237, IBT*, 2 OCB2d 37, at 14 (BCB 2009) (citations omitted); *see also State of New York (Dept. of Corr. Serv.)*, 38 PERB ¶ 3008 (2005) (PERB applies the balancing test under the Taylor Law); *Matter of Levitt v. Bd. of Collective Bargaining of the City of New York*, 79 N.Y.2d 120 (1992) (upholding Board's use of balancing test). Some subjects require no further analysis by this Board because they have been "'pre-balanced' by the Legislature . . . [including those] identified in NYCCBL § 12-307(b) as reserved for managerial discretion." *CEU*, 2 OCB2d 37, at 14-15 (citations omitted).

This Board has found that facility planning and management of City property are generally non-mandatory subjects of bargaining. *UFA*, 43 OCB 4, at 190 (BCB 1989) (citing *Chateaugay Central School District*, 12 PERB ¶ 3015 (1979)). However, we have held that "the City's prerogative with respect to capital improvements is not always absolute." *UFA*, 61 OCB 6, at 6 (BCB 1998) (citing *UFA*, 43 OCB 4, at 190 (BCB 1989)). For example, a demand for adequate ventilation is "related to the comfort of employees" and has been held to be a mandatory subject of bargaining. *UFA*, 43 OCB 4, at 190 (BCB 1989). In making a determination, the Board may consider whether the provision of a particular amenity is "a regular and traditional practice." *Id.* at 46 (citing *UFA*, 37 OCB 43, at 12 (BCB 1986) (furnishing of clean-up facilities for fire marshals found to be a regular and traditional practice affecting working conditions); *NYSNA*, 11 OCB 2 (BCB 1973)).

The duty to bargain in good faith includes an obligation to not make unilateral changes to past practices that involve mandatory subjects of bargaining. *See County of Nassau*, 13 PERB ¶

3095 (1980), *affd.*, 14 PERB 7017 (Sup. Ct., Nassau Co. 1981). In order to establish the existence of such a past practice, a petitioner must demonstrate that the practice "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 2009) (internal quotation marks omitted) (quoting *County of Nassau*, 38 PERB ¶ 3005 (2005)).

The Demand for a Full Kitchen at PSAC II

We find that there was not an unequivocal practice of providing Dispatchers with a full kitchen at worksites where they are employed. While up until 2009 Dispatchers were assigned to borough offices that had a full kitchen, it is undisputed that since 2009 Dispatchers have not had access to a full kitchen at PSAC I. In addition, PSAC II more closely resembles PSAC I than it does the borough offices. PSAC I and PSAC II differ from the borough offices in that they are substantially larger, combine Dispatchers from various boroughs, consolidate dispatch services for various City agencies, utilize updated technology, and have been designed to be more secure against potential attack. Given the absence of a full kitchen at PSAC I, where Dispatchers have worked since 2009, we find that Dispatchers could not reasonably expect that a full kitchen would be provided at PSAC II.

Our finding that the absence of a full kitchen at PSAC II was not a change in policy or practice suffices to dismiss this allegation. However, due to the importance of this issue to the Union and the possibility that it will recur in the future, we now address whether it is a mandatory subject of bargaining.

This Board has not previously considered whether a demand for a full kitchen in which employees can cook their own food constitutes a mandatory subject of bargaining. In *County of Nassau*, 32 PERB ¶ 3005 (1999), PERB performed a balancing test weighing employees' interest

in having food-heating appliances at their work stations against the employer hospital's interest in patient safety. It found that the prohibition of these appliances was not a term and condition of employment that required bargaining. PERB explained its decision as follows:

> Although employees' opportunity to have hot beverages or food available when they want affects their personal comfort and convenience, the inherent nature of such appliances poses substantial risks to patient safety, a recognized managerial prerogative. . . . Balancing the employees' convenience against the County's right and duty to protect patients' safety while in a hospital persuades us that the predominant effect of the County's prohibition is upon its mission-related interests.

County of Nassau, 32 PERB ¶ 3005 (1999).[8]

Similarly, in the present matter, Dispatchers have an interest in the economy and convenience of cooking their own food in a full kitchen. *See e.g.*, *UFA*, 43 OCB 4, at 190 (BCB 1989) (demand for adequate ventilation found to be a mandatory subject of bargaining "related to the comfort of employees"). Food purchased from the vendeteria or brought from home and heated in a microwave oven may be less palatable and more expensive than food cooked with a stovetop oven. However, these employee interests must be weighed against the City's interests in safety and security. *See CEU, L. 237, IBT*, 2 OCB2d 37, at 14 (BCB 2009) (balancing test applied to determine the extent of the parties' duty to negotiate). The City presented unrebutted evidence that the installation of a kitchen at PSAC II would create a fire hazard and that a fire at PSAC II would threaten the provision of emergency services in multiple boroughs. In addition, there is no dispute that PSAC II was designed with features such as 18-inch thick concrete walls in order to withstand a terrorist attack or natural disaster. The City's witness testified that installation of

[8] *Compare City of Newburgh*, 16 PERB ¶ 4516 (ALJ 1983), *affd.*, 16 PERB ¶ 3030 (1983) (employer-provided meals found to be a mandatory subject of bargaining); *County of Erie*, 30 PERB ¶ 4542 (ALJ 1997) (cafeteria service found to be a mandatory subject of bargaining).

required venting for a kitchen in the existing structure could compromise building security. There was no evidence to show that the City's interests in fire safety and preserving the building's secure structure were not legitimate.

In these circumstances, we find that Dispatchers' interests in having a full kitchen at PSAC II are outweighed by the City's interests in maintaining PSAC II in such a way as to protect the structural integrity and security of its facility, protect safety, and ensure the provision of emergency services to City residents. *See CEU, L. 237, IBT*, 2 OCB2d 37, at 15-16 (BCB 2009) (requirement that officers cover tattoos while on duty found to be a non-mandatory subject of bargaining because City's interest in preserving safe environment and atmosphere of respect for clients of Department of Homeless Services outweighed employees' interests); *DC 37, L. 1457*, 1 OCB2d 32, at 34 (BCB 2008) (Department of Juvenile Justice's decision to search employees for narcotics found to be a non-mandatory subject of bargaining because City's interest in providing a safe environment for juveniles outweighed employees' interests); *DC 37*, 75 OCB 13, at 9-10 (BCB 2005) (Department of Transportation's decision to search lockers, desks, and file cabinets found to be a non-mandatory subject of bargaining because City's interest in ensuring the safety and security of transportation services outweighed employees' interests). Accordingly, we find that, under the circumstances, the provision of a full kitchen at PSAC II is not a mandatory subject of bargaining.[9]

We therefore dismiss the Union's allegation that the City violated NYCCBL § 12-306(a)(1) and (4) by not installing a full kitchen at PSAC II.[10]

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[9] There was insufficient evidence in the record to support the Union's assertion that having a dishwasher would affect Dispatchers' health and comfort.

[10] The petition did not allege that the City failed or refused to engage in impact bargaining; therefore, our decision only addresses the Union's request for decisional bargaining regarding the installation of a full kitchen at PSAC II.

The PSAC II Gym Waiver

We now consider whether the requirement that Dispatchers sign the Waiver in order to use the PSAC II gym when off duty violated NYCCBL § 12-306(a)(1) and (4). A petitioner alleging a violation of NYCCBL § 12-306(a)(4) must demonstrate that the City's action concerns a mandatory subject of bargaining and is a change from existing policy. *See DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011). We find that the City's requirement that Dispatchers sign the Waiver in order to use the PSAC II gym while off duty was not a change from existing policy. The FDNY Director of Communications' unrebutted testimony was that the City required that employees sign similar releases to use the FDNY Headquarters gym since at least the late 1990s, and the City provided evidence that, in fact, some Dispatchers had signed releases in order to use the FDNY Headquarters gym or take exercise classes there. While the specific wording of the FDNY Headquarters and PSAC II waivers varies, they are the same in substance: they release the City from liability arising out of employees' use of the gym and give the City the right to revoke employees' permission to use the facility.[11]

We therefore dismiss the Union's allegation that the City violated NYCCBL § 12-306(a)(1) and (4) by requiring that Dispatchers sign the Waiver in order to use the PSAC II gym when off duty.[12]

Accordingly, the petition is denied in its entirety.

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[11] The Waiver states, and we find, that it applies only to the extent permitted by law. For example, it would not permit the City to discriminatorily or retaliatorily deny employees access to the PSAC II gym in violation of NYCCBL § 12-306(a)(1) and (3).

[12] Having found that the Union has not met its burden of establishing that the requirement that Dispatchers sign the Waiver in order to use the PSAC II gym while off duty constitutes a change from existing policy, we decline to address whether it constitutes a mandatory subject of bargaining.

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 Uniformed Fire Alarm Dispatchers Benevolent Association against the Fire Department of the City of New York and the City of New York, docketed as BCB-4248-17, is hereby dismissed in its entirety.

Dated: October 2, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER