

DC 37, L. 371, 12 OCB2d 32 (BCB 2019)

(Scope/IP) (Docket No. BCB-4294-18)

Summary of Decision: The Union alleged that HHC failed to bargain over the impact of the terms and conditions of employment for its unit members effected by new State regulations. HHC argued that the claims are untimely and that, even if they are determined to be timely, implementation of State regulations is not a mandatory subject of bargaining. The Board found a practical impact because the unit members were responsible for additional fees arising from compliance with the new regulations. The Board therefore ordered impact bargaining over fees and dismissed the Union’s remaining claims. (*Official decision follows*).

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Scope of Bargaining/Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 371,

Petitioner,

-and-

NEW YORK CITY HEALTH + HOSPITALS,

Respondent.

DECISION AND ORDER

On November 1, 2018, District Council 37, AFSCME, AFL-CIO (“DC 37”), and its affiliate, Local 371 (collectively, “Union”), filed a verified improper practice petition against New

York City Health + Hospitals (“HHC”).¹ The Union alleges that HHC failed to bargain over the impact on its unit members of newly required New York State Office of Alcoholism and Substance Abuse Services (“OASAS”) regulations.² HHC argues that the petition is untimely and that, even if deemed timely, the petition should be dismissed because there is no duty to bargain over mandatory State regulations. The Board finds a practical impact because the unit members are responsible for additional fees arising from compliance with the new OASAS regulations. The Board therefore, orders impact bargaining over fees and dismisses the Union’s remaining claims.

BACKGROUND

The Union is the certified collective bargaining representative of employees in the Addiction Counselor and Senior Addiction Counselor titles (collectively, “Addiction Counselors”) at HHC.³ On February 8, 2018, HHC met with the Union to inform it that OASAS adopted new regulations and requirements that would become effective on July 1, 2018.⁴ On March 9, 2018,

¹ We refer to New York City Health and Hospitals Corporation as “New York City Health + Hospitals” or “HHC” throughout this Decision and Order.

² In the improper practice petition, the Union also alleged violations of NYCCBL § 12-306(a)(1) and (4). However, in its reply, the Union concedes that it is not seeking to bargain over HHC’s decision to comply with the new OASAS regulations, only the impact of the regulations. (*See Rep. ¶ 20*) Therefore, we only address the claims of practical impact.

³ Addiction Counselors Level I & II perform clinical functions such as counseling, assessment and treatment planning, but not administrative or clinical supervision. Senior Addiction Counselors Level I perform clinical functions and administrative supervision, but not clinical supervision. Senior Addiction Counselors Level II perform clinical functions and clinical and administrative supervision.

⁴ OASAS is the State agency authorized by the Mental Hygiene Law to “adopt standards including necessary rules and regulations pertaining to chemical dependence services.” 14 NYCRR § 800.1. Accordingly, it is the only agency that “plans, develops and regulates the state’s system of

HHC sent a system-wide memorandum notifying employees of the most recent requirements.⁵ The memorandum states, in pertinent part: “On January 2, 2018, OASAS introduced the Substance Abuse Disorder Counselor Scope of Practice framework detailing mandatory requirements and certifications for various levels of providers performing functions that relate to substance abuse and addiction counseling.” (Ans., Ex. 1) The memorandum notes that the changes directly affect Addiction Counselors.⁶

On May 7, 2018, the Union sent a letter to HHC’s Director of Labor Relations stating, in relevant part:

I am writing to demand impact bargaining on the matter regarding the new qualifications and certification for the title Addiction Counselor. Due to the requirement for a state certification exam for the Certified Alcohol Substance Abuse Counselor, the fees associated with the exam, and the increased educational requirements related to this certification, we are demanding bargaining on these changes, which are a mandatory subject. At the labor management meeting on 2/8/18 you indicated all new hires after July 1, 2018 would be subject to the increased requirement.

(Pet., Ex. F)

On June 6, 2018, the Union met with HHC to discuss the new regulations. According to the Union, it requested to bargain over the impact of Credentialed Alcoholism and Substance Abuse Counselor (“CASAC”) certification, fees, training, potential staffing issues. The Union

chemical dependence...agencies.” *Id.* The new regulations apply to current and newly-hired employees.

⁵ HHC employs Addiction Counselors at both OASAS and non-OASAS sites.

⁶ According to the Union, the new OASAS regulations affect at least 40 current Addiction Counselors.

also sought to bargain the effects of the new requirements on employees not eligible to receive a grace period in which to acquire Advanced-Level Counselor status.

OASAS Regulations for Addiction Counselors

Pursuant to the new regulations, OASAS requires all Addiction Counselors who work at OASAS sites and provide alcoholism and substance abuse counseling to be CASAC-certified, at a minimum. Additionally, all employees are required to obtain Supporting Recovery, Medication for Addiction Training (“MAT”) and other OASAS-required trainings by July 1, 2018.⁷ OASAS sets the fees for all required certifications, examinations, and processing.⁸

In addition, OASAS regulations allow current employees to apply for grace periods. The grace period provision, which HHC refers to as the “grandfathering” provision, allows CASAC and non-CASAC certified Addiction Counselors to request additional time to obtain the required certifications and trainings for their level.⁹ CASAC-certified staff who meet the requirements are eligible for a grace period between January 1, 2018, and December 31, 2020, to complete the required trainings. Non-CASAC certified staff who meet new certification requirements can be permanently grandfathered into Advanced-Level Counselor status.

After the OASAS regulations became effective, HHC assessed all Addiction Counselors and began to reassign those who failed to acquire the requisite credentials for grace period provisions by July 1, 2018, to other positions and/or other sites within HHC. It plans to continue

⁷ CASAC certified Addiction Counselors must complete a one-time MAT three-hour training and a continuing six-hour OASAS-approved ethics training with each renewal.

⁸ The new fees associated with obtaining a CASAC range from \$100 to \$245.

⁹ CASAC and non-CASAC certified Addiction Counselors were required to provide proof of eligibility for their applicable grace period by June 1, 2018 to HHC.

to do so on a case-by-case basis for those employees who fail to acquire the requisite credentials upon the conclusion of each grace period.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that HHC violated NYCCBL § 12-307(b) by failing to bargain over the impact of new qualification requirements for Addiction Counselors.¹⁰ The Union asserts that while the new OASAS regulations are mandated by New York State (“State”), the impact of the new education and training requirements is bargainable.¹¹ Specifically, the Union points to the fact that current employees must now incur fees associated with the requirements, such as taking the CASAC exam and clinical supervision training. The Union further asserts that some of the employees are ineligible to meet the requisite criteria to invoke the grace period provisions. As a

¹⁰ NYCCBL § 12-307(b) provides, in pertinent part:

It is the right of . . . any [] public employer acting through its agencies, to . . . direct its employees . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . and exercise complete control and discretion over its organization . . . Decisions of . . . any [] public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

¹¹ Although the Union is not seeking decisional bargaining, in response to HHC’s arguments, it asserts that implementation of the new regulations did not occur until July 1, 2018. It further asserts that its improper practice claims were filed within four months of that date, and therefore, are timely.

result, the Union argues that there has been an impact on the work assignments of who could not meet the requirements.

Because HHC has refused to bargain over the impact that the newly implemented regulations have on current employees, the Union requests that the Board order HHC to bargain over the impact of the new requirements on its unit members. Specifically, the Union seeks to bargain over “the cost of the required clinical training . . . fee exams, and the impact of reassignment for Addiction Counselors who did not meet the OASAS regulations and could not be grandfathered into the advanced-level counselor status.” (Rep., p. 2)

HHC’s Position

HHC argues that all of its OASAS sites are required to comply with OASAS regulations.¹² It asserts that the recently implemented “OASAS examination, certification and training requirements, and associated fees complained of, were not a creation or new procedure established by [HHC].” (Ans. ¶ 61) Accordingly, HHC contends that it had no discretion in the application or implementation of the regulations and requirements. HHC also argues that enforcement of these regulations and requirements for current employees is within its managerial rights pursuant to NYCCBL § 12-307(6)(b) and is therefore not a mandatory subject of bargaining. Additionally, HHC argues that enforcement of the OASAS regulations for newly hired employees falls within its managerial right to set qualifications for initial employment and, as such, is not a mandatory subject of bargaining.

Further, HHC argues that it has not failed to bargain with the Union. According to HHC,

¹² Because the Union initially filed improper practice claims, HHC also raised several arguments related to the timeliness of those claims. HHC argued that the Union had notice of the new regulations since February 8, 2018. As such, it contends that all of the Union’s improper practice claims are untimely.

it met with the Union on multiple occasions to discuss the issues in dispute, and the Union conceded that it met with HHC on two of those occasions. Since the Union has not alleged any facts to show a violation of the NYCCBL, HHC asserts that the petition must be dismissed.

DISCUSSION

The Union is only pursuing a claim that HHC implemented newly mandated regulations without bargaining over the impact on its members. This Board has expressly stated that the four-month statute of limitations, as defined in NYCCBL § 12-306(e), is not applicable to such a claim. *See UFA*, 5 OCB2d 3, at 10-11 (BCB 2012). As such, the Union's allegations are timely and we address the merits of this claim.

It is undisputed that HHC must comply with State-mandated requirements for Addiction Counselors at all OASAS sites. The Union does not challenge that HHC was required to implement the new requirements. Its claim relates only to whether a practical impact exists. NYCCBL § 12-307(b) grants the City the right to “maintain the efficiency of governmental operations, . . . determine the methods, means and personnel by which government operations are to be conducted . . . [and] exercise complete control and discretion over its organization and the technology of performing its work.” *UFA*, 43 OCB 4, at 179 (BCB 1989). Further, the statute “provides public employers the discretion to act unilaterally in certain enumerated areas outside the scope of bargaining . . .” *UFA*, 7 OCB2d 4, at 18 (BCB 2014). Notwithstanding these limitations, a duty to bargain arises under NYCCBL § 12-307(b) where an action taken by management has a practical impact on terms and conditions of employment. *See UFA*, 71 OCB 13, at 5 (BCB 2003).

There is no dispute that to meet the new OASAS requirements, Addiction Counselors must pay fees they were not previously required to pay. Addiction Counselors are required to pay for the following: a continuing six-hour OASAS-approved ethics training with each renewal; certification fees ranging from \$100 to \$245. There is no dispute that these fees, along with the newly mandated certifications, did not exist prior to July 2018. This Board has previously stated that a managerial decision that creates a “greater expense...than existed prior” warrants a finding of a practical impact. *See UFA*, 71 OCB 13, at 6 (stating that allegations of practical impact may relate to “other things” such as a financial impact). Furthermore, the fact that OASAS set the required fees, not HHC, does not preclude bargaining over the impact of the additional costs. *See State of New York (State University of New York at Binghamton)*, 27 PERB ¶ 3018, at 3045 (1994) (noting that “[t]he licensing requirements under the Vehicle and Traffic Law are directed to the public at large in the State’s capacity as sovereign and as an aspect of its control over the regulation of motor vehicles generally” and finding that “[a]ny costs incurred by the employees in conjunction with securing the necessary license can be addressed in the context of any impact bargaining as may be demanded”). Accordingly, we order HHC to bargain over the impact of the costs incurred by unit members resulting from the implementation of the OASAS regulations.

The Union also requests that the HHC bargain over the “staffing issues” resulting from those employees who do not meet the CASAC requirements or qualify for the grace period provisions.¹³ It is clear that certain Addiction Counselors did not obtain the required certifications by the State-imposed deadline and therefore were no longer qualified to perform all of their duties. HHC reassigned several Addiction Counselors who did not meet the newly mandated requirements

¹³ The Union refers to this claim as a workload impact claim. However, it only alleges facts relating to the reassignment of Addiction Counselors who do not meet the newly mandated requirements.

by July 1, 2018, to sites where they are not required to possess a CASAC. This Board has long held that an employer has a right under NYCCBL 12-307(b) to direct, assign, and reassign personnel. *See CEU, L. 237, IBT*, 11 OCB2d 19, at 16 (BCB 2018); *NYSNA*, 71 OCB 23, at 11 (BCB 2003); *SSEU, L. 721*, 43 OCB 59, at 22 (BCB 1989). As such, we do not find that HHC has the duty to bargain over its reassignment of Addiction Counselors.

Accordingly, the petition is granted as to the allegation of a practical impact on unit members of incurred costs resulting from the implementation of the OASAS regulations. We direct bargaining over this practical impact and deny the petition as to all other claims.

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 scope of bargaining/improper practice petition filed by District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 371, docketed as BCB-4294-18, hereby is granted as to petitioner's practical impact claims regarding new fees; and it is further

DIRECTED, that the District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 371, and New York City Health + Hospitals collectively bargain concerning the practical impact on unit members who must pay fees for training and certification mandated by the OASAS regulations implemented on July 1, 2018, and schedule mutually agreeable bargaining sessions as soon as practicable; and it is further

ORDERED, that the remaining claims in the verified improper practice petition are hereby dismissed.

Dated: October 2, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER