DC 37, L. 924, 12 OCB2d 38 (BCB 2019)

(IP) (Docket No. BCB-4297-18)

Summary of Decision: The Union alleged that the Department of Homeless Services violated NYCCBL §§ 12-305, 12-306(a)(1) and (a)(4) by unilaterally changing the work schedule of day-shift Laborers to include weekend days, which affected available overtime. The City argued that it did not alter how overtime is assigned or distributed and that schedule changes are within its managerial discretion; thus, there is no duty to bargain. The Board found that the City did not violate the NYCCBL. Accordingly, the Board dismissed the improper practice petition. (***Official decision follows***).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 924,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES,

Respondents.

DECISION AND ORDER

On November 7, 2019, District Council 37, AFSCME, AFL-CIO ("DC 37"), and its affiliate, Local 924 (collectively, "Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Homeless Services ("DHS"). The Union alleges that DHS violated §§ 12-305, 12-306(a)(1) and (a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

("NYCCBL") by unilaterally changing the work schedule of day-shift Laborers employed in its Fleet Services Division ("Fleet Services") to include weekend days, which affected overtime. The City argues that the petition should be dismissed as scheduling is within DHS' managerial discretion and thus there is no duty to bargain. It also contends that it did not alter how overtime is assigned or distributed to the employees at issue. The Board finds that the City did not violate NYCCBL §§ 12-305, 12-306(a)(1) and (4). Accordingly, the Board dismisses the improper practice petition.

BACKGROUND

The Union is the certified collective bargaining representative of employees in the Laborer title. The City and the Union are parties to a Consent Determination ("Consent Determination") covering Laborers for the period of July 1, 2012 to October 15, 2017.[1] Pursuant to the Consent Determination, "a regularly scheduled work week is the five [] days posted by the Department which are to be worked by a particular employee within a calendar week except in Agencies where there is now an existing different practice." (Ans., Ex. 4)

Prior to June 2018, day shift Laborers in Fleet Services had a regular weekly schedule in which they worked five consecutive days and had two days off.[2] It is undisputed that at least two of the nine day shift Laborers' regular weekly schedule was Tuesday through Saturday. (*See* Pet ¶ 8, Ans. ¶ 28 and Stipulation of Facts ¶ 4) However, the City maintains that "there were numerous

[1] The Consent Determination remains in effect pursuant to the *status quo* provision of the NYCCBL. *See* NYCCBL § 12-311(d).

[2] In addition, one Laborer on the day shift does not work five consecutive days in a calendar week as a result of a reasonable accommodation.

Laborers whose regular work schedule was not Monday through Friday." (Ans. ¶ 7) According to the Union, it was DHS's practice to permit the day-shift Laborers to work "their choice of schedules based on their length of employment," and the majority of overtime was available on the weekends. (Pet. ¶ 15)

On June 8, 2018, DHS implemented a change in the regular work week of day shift Laborers.[3] Under the newly implemented schedule, all day shift Laborers are now required to work one weekend day as part of the regular work week. However, they still work five consecutive days and the hours in a regular work week remain the same. In addition, overtime assignments continue to be available to Laborers on the basis of seniority subsequent to the implemented change.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that DHS violated NYCCBL §§ 12-305, 12-306(a)(1) and (a)(4) by implementing a change in the weekly schedules of the day shift Laborers to mandate that they work at least one weekend day without first bargaining over such a change.[4]

[3] Shifts are divided into day and evening tours. The change currently affects Laborers who chose to remain on the day shift.

[4] 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 and shall have the right to refrain from any or all of such activities."

NYCCBL § 12-306(a)(1) provides, in pertinent part: "It shall be an improper practice for a public employer or its agents . . . to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter."

The Union does not dispute the City's right to adjust the work schedule of newly-hired Laborers, but rather it contends that this right does not extend to existing Laborers based on the past practice that "long term employees had their choice of schedules based on their length of employment." Pet. ¶ 15. The Union argues that the change to the day Laborers' weekly schedule, which now includes one weekend day, has affected how overtime is distributed. It asserts that while the same or greater amount of overtime is offered, the majority of overtime is now available on weekdays, not weekends. The Union argues that the City's reasons for changing the schedules are pretextual because changing the schedule of the current Laborers does not cure the City's asserted operational and functional needs.

As a remedy, the Union is requesting that the City bargain over the changes implemented in the work schedule.

City's Position

The City argues that work schedules are not a mandatory subject of bargaining unless there has been a change to the number of hours or number of days worked. It asserts that there has been no change to the actual hours or number of work day of the Laborers. Additionally, it argues that the changes made to the Laborers' schedules are proper and within its management rights pursuant to NYCCBL § 12-307(b).[5] The City contends that DHS made the schedule change in order to

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NYCCBL § 12-306(a)(4) provides, in pertinent part: "It shall be 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."

[5] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the [C]ity . . . 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

"best meet the staffing needs of the Department . . . [and] so that the most robust coverage could be provided with the staff available." (Ans., Ex. 5)

Moreover, the City argues that absent an express limitation in the collective bargaining agreement, it has the right "to act unilaterally in certain areas outside the scope of mandatory bargaining." (Ans. ¶ 32) It maintains that there is no contractual provision in the Consent Determination or agency policy that restricts its ability to change the Laborers' schedule.

In addition, the City argues that the determination and assignment of overtime is a managerial right. Further, it has made no change to the method or procedure by which overtime is assigned to Laborers. In this regard, it contends that the Union has merely speculated that the scheduling change has resulted in reduced overtime. Since the Union has not alleged any facts to show that the implemented schedule changes are a violation of the NYCCBL, the City asserts that the petition must be dismissed.

DISCUSSION

NYCCBL § 12-306(a)(4) makes it 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." Thus, NYCCBL § 12-306(c) requires that public employers and employee organizations "bargain over matters concerning

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> of the [C]ity . . . 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.

wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009).

The Board has long 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). In order to establish that a unilateral change has occurred in violation of the NYCCBL, a union "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) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)) (internal quotation marks omitted).

It is well established that the scheduling of work is generally not a mandatory subject of bargaining. *See UFT, L. 2*, 4 OCB2d 54, at 12 (BCB 2011) (quoting *DC 37, L. 2021*, 51 OCB 36, at 15 (BCB 1993)) (internal quotation marks omitted) (stating that "management has the unilateral right to assign work in the way that it deems necessary to maintain the efficiency of governmental operations"); *Local 237, CEU*, 13 OCB 6, at 15 (BCB 1974) (holding that the decision to schedule work on weekends and holidays is not a mandatory subject of bargaining). Further, while an employer must bargain over the number of hours employees work per day and per week, scheduling which includes "starting and finishing times," are distinctive. *UFT*, 3 OCB2d 44, at 8 (BCB 2010).[6]

However, the Board has stated that "the parties may negotiate and agree to embody in the collective bargaining agreement an express limitation on management's right to schedule

[6] There is no allegation that this case pertains to a change in hours. *See NYSNA*, 51 OCB 37, at 7-8 (BCB 1993) (holding that the number of hours worked per day and the length of the work week or number of appearances required per week are mandatory subjects of bargaining).

employees. If this occurs, management's prerogative is limited and its right to take unilateral action has been waived for the length of the collective bargaining agreement." *Local 237, IBT*, 57 OCB 13, at 8 (BCB 1996) (citing *UFA*, 39 OCB 21 (BCB 1987)) (additional citations omitted). "[U]nless the work schedule is made a part of the contract, the City is free unilaterally to change the configuration of existing work schedules." *Local 2627, DC 37*, 59 OCB 14, at 6 (BCB 1997).

Here, the June 2018 change altered the days on which day shift Laborers are regularly scheduled to work but it did not alter the number of work days. The Consent Determination does not limit the City's ability to determine the work schedule, as long as the Laborers are allotted five work days during a calendar week. Accordingly, we find that the implemented change was limited to a schedule determination and was not a mandatory subject of bargaining.[7]

In addition, while the distribution of overtime is a mandatory subject of bargaining, "when or how much overtime the Department deems necessary" falls within managerial prerogative. *LEEBA*, 3 OCB2d 29, at 33-34 (BCB 2010). Although the Union asserts that DHS has changed the days on which overtime is available, it has not alleged that DHS has implemented a change in the overtime assignment procedures. It is undisputed that overtime continues to remain voluntary, based on seniority, and is available for both weekday and weekend shifts. Instead, the sole claim that the Union advances is that there is now more overtime available during the weekday shifts than on the weekends. While this may be true, it is a result of the schedule change and concerns when overtime is now available. As stated earlier, determining the amount and availability of overtime falls within the scope of management's authority. Therefore, we find that there has been no change to the manner in which overtime is distributed.

[7] Here, since the scheduling of hours is not mandatorily bargainable, we need not assess whether there has been a unilateral change to a past practice. *See UFT, L. 2*, 4 OCB2d 2, at 11 (BCB 2011).

Accordingly, we find that the City did not breach its duty to bargain in good faith in violation of NYCCBL §§ 12-305, 12-306(a)(1), and (4) by unilaterally changing the day-shift Laborers' schedules.

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 District Council 37, AFSCME, AFL-CIO, and its affiliate, Local 924, docketed as BCB-4297-18, against the City of New York and the New York City Department of Homeless Services, hereby is dismissed in its entirety.

Dated: December 3, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER