UFADBA, 13 OCB2d 15 (BCB 2020)

(IP) (Docket No. BCB-4372-20)

Summary of Decision: The Union claimed that the FDNY violated § 12-306(a)(1) and (4) of the NYCCBL when it unilaterally discontinued its practice of allowing the three most senior employees in the title Supervising Fire Alarm Dispatchers Level II to use a City-owned vehicle for commuting to and from work. The City argued that no such past practice exists and that it has the managerial right to make changes regarding the use or selection of equipment. It further argued that the public policy of addressing climate change outweighs the minimal economic impact to the employees at issue. The Board found that authorizing the use of agency vehicles for the purpose of commuting is an economic benefit and that the failure to bargain with the Union over the rescission of the vehicles was an improper practice. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-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 January 28, 2020, the Uniformed Fire Alarm Dispatchers Benevolent Association ("Union") filed an improper practice petition against the Fire Department of the City of New York ("FDNY") and the City of New York ("City"). 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") when it unilaterally discontinued its practice of allowing the three most senior employees in the title Supervising Fire Alarm Dispatchers Level II ("SFAD Level II") to use a City-owned vehicle for commuting to and from work. The City argues that no such past practice exists and that it has the managerial right to make changes regarding the use or selection of equipment. It further argues that the public policy of addressing climate change outweighs the minimal economic impact to the employees at issue. The Board finds that authorizing the use of agency vehicles for the purpose of commuting is an economic benefit and that the failure to bargain with the Union over the rescission of the vehicles was an improper practice. Accordingly, the petition is granted.

BACKGROUND

The Union is the certified collective bargaining representative for FDNY employees in the SFAD title, which consists of two levels. The employees in the SFAD Level II title have the in-house position of Chief Dispatcher. There are currently about ten SFAD Level IIs assigned as a Chief Dispatcher. Chief Dispatchers work in the FDNY's Bureau of Communications ("Bureau").

Prior to 1995, employees performing SFAD Level II duties were assigned vehicles for the purpose of responding to off-duty emergencies that they were also permitted to take home. However, beginning in or around August 1995, the title was no longer required to respond to off-duty emergencies. As such, the FDNY ceased assigning vehicles to SFAD Level IIs. At some point in 2014, the FDNY Chief of Communications and the Director of Fire Dispatch Operations assigned the three most senior Chief Dispatchers ("Senior Chief Dispatchers") vehicles to take

home and use for the purpose of commuting to and from work ("take-home vehicles").[1] There is no assertion that the Senior Chief Dispatchers used these vehicles for any work-related purpose, and it is undisputed that the take-home vehicles were not used to respond to off-duty emergencies.

Each year, employees utilizing a take-home vehicle complete the "Annual City Government Vehicle Commuting Authorization Form." (Pet., Ex. A) This form states, in relevant part:

> This form must be filled out on an annual basis. City employees that are authorized to operate a City Government Vehicle must familiarize themselves with the City Vehicle Driver Handbook. Commuting authorization is determined by the authorized drivers' direct supervisor, Agency Transportation Coordinator (ATC), and Agency Head. The ATC will determine the location where the City Government Vehicle will be parked. Authorized drivers must always park in the assigned location. Where an authorized driver does not adhere to all the rules in the City Vehicle Driver Handbook, commuting privileges and/or the vehicle assignment may be revoked.

Id.[2] According to the Union, employees using take-home vehicles do not incur the expenses of driving their own vehicle to and from work, including tolls, gas, and general mileage.[3]

On March 28, 2019, Mayor de Blasio issued Executive Order No. 41 ("EO 41") titled "Citywide Fleet Sustainability, Right-Sizing, and Efficiency Through NYC Clean Fleet Plan." (Ans., Ex. 1) EO 41 calls for the reduction of at least 500 take-home vehicles amongst City

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[1] These three Chief Dispatchers were all promoted to that position prior to 2014.

[2] The form also lists the driver and vehicle information, as well as the location where the vehicle will be parked overnight. It also contains a checklist for the "Purpose of Take-Home Vehicle." (*Id.*) These "purposes" are listed as "Perform work frequently in field locations," "Respond to emergencies during non-business hours," "There is not available secure overnight parking near the work location," or "Other. Explain:___." (*Id.*)

[3] Additionally, the use of a take-home vehicle is considered a fringe benefit for tax purposes. As such, the City asserts that employees assigned a take-home vehicle pay taxes on that benefit.

agencies by June 30, 2021. It also states that "[t]he costs and emissions tied to commuting use shall be minimized to operationally essential and non-avoidable purposes." (Ans. ¶ 67)

The City claims that as a result of EO 41, the FDNY was ordered to reduce its fleet by 110 vehicles, which will not be replaced. The City contends that "[t]o effectuate this reduction, the FDNY set an objective criterion [that] vehicles that were over eight years old and/or had more than 90,000 miles had to be removed from its fleet." (Ans. ¶ 33) According to the City, the three vehicles assigned to the Senior Chief Dispatchers met this criteria and were removed from the Bureau's fleet along with three other vehicles.[4] Therefore, the FDNY "reevaluated the operational needs of the [Bureau] and determined that the Senior [Chief Dispatchers] did not require take-home vehicles because SFADS do not respond to emergencies while off-duty." (Ans. ¶ 35) The Senior Chief Dispatchers were therefore notified on November 1, 2019, via email, that they were required to return their take-home vehicles. They did so on either November 6 or November 20, 2019.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the FDNY made a unilateral change to a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(1) and (a)(4), when it discontinued its practice of providing the Senior Chief Dispatchers with a take-home vehicle for commuting purposes. Citing to precedent of this Board and the Public Employment Relations Board ("PERB"), the Union contends that it is well-settled that the use of a City-owned vehicle for commuting to and from work is an economic benefit that is not subject to unilateral change. The Union contends that

[4] The City claims that the Bureau was issued only three replacement vehicles.

this six-year practice was unequivocal and uninterrupted for a period of time sufficient to create a reasonable expectation that it would continue. The City's admission that the Chief Dispatchers were not required to respond to emergencies while they were off-duty demonstrates that the take-home vehicles were provided on an unconditional basis.

With respect to the City's argument that the public policy of climate change required it to rescind its practice of providing Chief Dispatchers with take-home vehicles, the Union argues that the City has not cited constitutional or statutory duty that would convert this mandatory subject of bargaining to a permissive or any prohibited subject.

As a remedy, the Union requests that the Board issue a Decision and Order finding that Respondents failed to negotiate in good faith when they unilaterally ended the practice of providing take-home vehicles to the Chief Dispatchers and requiring Respondents to rescind the change; immediately engage in negotiations with the Union concerning this mandatory subject of bargaining; make whole every affected Union member; post notices concerning the violation; and grant any such other relief that may be just and proper.

City's Position

The City contends that the petition must be dismissed because it has not failed to bargain over a mandatory subject of bargaining. The City asserts that decisions regarding take-home vehicles concern the selection or use of equipment, and it has the managerial right under the NYCCBL to make such determinations without bargaining. By reallocating its fleet following the reduction required by EO 41, the FDNY determined how its equipment would be used in order to continue providing emergency response services.

Moreover, the City asserts that given the changing history of the assignment of take-home vehicles and the specific employment history of the three Senior Chief Dispatchers, no consistent,

unequivocal practice has been established. Since 1995, any such practice has been inconsistent and changed multiple times. Notably, even during the past six years, the majority of Chief Dispatchers were not given take-home vehicles despite the fact that the responsibilities of the three Senior Chief Dispatchers were no different from the other seven. Furthermore, each of the Senior Chief Dispatchers were promoted to that position long before they were given take-home vehicles, so there could be no reasonable expectation that this benefit would continue.

Citing PERB caselaw, the City argues that if the assignment of take-home vehicles was conditional, the assignment could be withdrawn if that condition ceased. Here, the City contends that the assignment of take-home vehicles has always been conditioned upon the FDNY having a sufficient number of vehicles to assign. The City argues that since EO 41 changed this condition by mandating that vehicles be removed from the FDNY's fleet, the FDNY had the right to make this change without bargaining.

Next, the City asserts that the required reduction in the FDNY's fleet addresses the serious public policy concern of climate change and that this concern rebuts the presumption that the City was required to bargain over take-home vehicles. EO 41 was implemented to address public policy concerns, and it forced agencies across the City to reduce their number of take-home vehicles in an effort to reduce the amount of emissions produced by the City's fleet. Additionally, the City contends that the Senior Chief Dispatchers were required to report their vehicles as a taxable fringe benefit and, thus, any financial benefit they received was offset by taxes. The City therefore maintains that this minimal economic impact is outweighed by the public policy concerning climate change.

Finally, the City argues that if the Board were to grant the petition, it cannot order the restoration of the take-home vehicles because such an order would undercut the Mayor's Executive

Order and would require the FDNY to purchase new vehicles. This would have a Citywide impact because EO 41 was mandated on all agencies. As such, the City contends that any ruling in favor of the Union should be limited and not include the restoration of take-home vehicles.

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."[5] Thus, NYCCBL § 12-306(c) requires that public employers and employee organizations "bargain over matters concerning 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 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

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[5] NYCCBL § 12-306 states, 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 . . . .

negotiate is or relates to a mandatory subject of bargaining." *Doctors Council, L. 10MD, SEIU*, 9 OCB2d 2 (BCB 2016) (quoting *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014)) (quotation and internal editing marks omitted).

The instant case concerns the question of whether the FDNY's unilateral revocation of City-owned vehicles provided to employees for the purpose of commuting to and from work constitutes a mandatory subject of bargaining. In a previous case concerning this precise issue, this Board, relying on well-settled PERB precedent, found that take-home vehicles are an economic benefit that falls under the category of "wages" and is therefore a mandatory subject of bargaining. *See Local 621, SEIU,* 2 OCB2d 27, at 10-11 (citing *County of Nassau*, 38 PERB ¶ 3005 (2005); *County of Nassau*, 35 PERB ¶ 3036 (2002); *County of Nassau*, 26 PERB ¶ 3040 (1993), *affd.*, *County of Nassau v. New York State Pub. Empl. Rel. Bd.*, 215 A.D.2d 381 (2d Dept. 1995), *lv denied*, 86 N.Y.2d 706 (1995); *County of Nassau*, 13 PERB ¶ 3095 (1980), *affg.*, 13 PERB ¶ 4570 (1980), *confirmed*, 14 PERB ¶ 7017 (Sup. Ct. Nassau County 1981), *affd.*, *County of Nassau v. New York State Pub. Empl. Rel. Bd.*, 87 A.D.2d 1006 (2d Dept. 1982), *lv denied*, 57 N.Y.2d 601 (1982)). Here, as in *Local 621, SEIU*, there is no question that the use of a take-home vehicle conferred an economic benefit on the three Senior Chief Dispatchers.

Notwithstanding this precedent, the City nevertheless argues that it has the managerial right to make unilateral decisions regarding take-home vehicles, as these decisions concern the selection or use of equipment. PERB has repeatedly ruled that "the selection of equipment involves the manner and means by which an employer serves its constituency and hence is a management prerogative." *County of Nassau*, 41 PERB ¶ 4552, at 4637 (ALJ 2008) (quoting *City of New Rochelle*, 10 PERB ¶ 3042, at 3079 (1977)) (internal quotation and editing marks omitted). However, PERB specifically rejected the argument that decisions regarding take-home vehicles

concern "equipment," since it found that the use of a take-home vehicle for commuting purposes does not relate directly to the manner and means by which an agency provides its services to the public. *See Town of Islip*, 44 PERB ¶ 3014 (2011) (finding the use of take-home vehicles distinguishable from restrictions on police officers carrying guns on duty, which is a management decision concerning equipment). Here, there is no evidence that the Senior Chief Dispatchers used the take-home vehicles for any purpose other than commuting. As such, we find that the take-home vehicles are an economic benefit and not equipment that relates directly to the manner in which the Senior Chief Dispatchers carry out their duties.

Having found that the use of take-home vehicles in this instance concerns a mandatory subject of bargaining, we must now assess whether the removal of the vehicles assigned to the three Senior Chief Dispatchers was a change to a past practice that violated the NYCCBL. "In determining whether a union has established a past practice, we look at whether the practice was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged." *UFA*, 10 OCB2d 5, at 13 (BCB 2017) (quoting *Local 621, SEIU*, 2 OCB2d 27, at 10; *County of Nassau*, 38 PERB ¶ 3005 (2005)) (internal quotation marks omitted). The City argues that any such practice concerning the use of take-home vehicles was not unequivocal because the practice was both inconsistent and conditioned upon the availability of a sufficient number of take-home vehicles in the FDNY's fleet.

With respect to the City's first argument, although the practice may have changed a number of times prior to 2014, it is undisputed that since that time, the three Senior Chief Dispatchers were continuously provided with a take-home vehicle. Thus, the Senior Chief Dispatchers enjoyed the economic benefits that resulted from their use of take-home vehicles for approximately six years. In *Local 621, SEIU*, 2 OCB2d 27, we found a period of approximately three years sufficient to

establish a past practice concerning take-home vehicles. *Id*. at 13 (finding that "[a]fter providing [employees] with an unconditional economic benefit for over three years, the City cannot unilaterally alter that practice"). Moreover, as we also noted in that decision, PERB has previously found a period of as little as 13 months sufficient to establish a past practice. *See City of Rochester*, 21 PERB ¶ 3040 (1988), *affd.*, *City of Rochester v. New York State Pub. Empl. Rel. Bd.*, 155 A.D.2d 1003 (4 Dept. 1989). *See also DC 37, L. 436 & 768*, 4 OCB2d 31 (BCB 2011) (finding "several years" adequate to establish a past practice). As such, we find that under these circumstances, six years was enough time to create a reasonable expectation that the practice of providing the three Senior Chief Dispatchers with take-home vehicles would continue uninterrupted.[6]

Further, we do not find that the practice concerning take-home vehicles was conditioned upon vehicle availability. In making this argument, the City relies upon *County of Nassau*, 38 PERB ¶ 3030 (2005), where there was an established County vehicle use policy that allowed for an annual process in which to re-evaluate an employee's need for an assigned vehicle. The vehicle use policy stated that: "Continued vehicle assignment shall not be viewed as a permanent right, rather a temporary privilege, granted for the performance of specific duties." *Id*. Relying on these facts, PERB held that "where the employer conditioned the assignment of employer-owned vehicles upon the performance of certain job duties, the cessation of such a benefit in accordance with the cessation of the job duties is not a unilateral change." *Local 621, SEIU*, 2 OCB2d 27, at

[6] We also find that the fact that the Senior Chief Dispatchers were not promised take-home vehicles upon their promotion to the title has no bearing on the analysis concerning their reasonable expectation that the practice would continue after six years of it being uninterrupted. This is because "the expectation of the continuation of the practice . . . may be presumed from its duration with consideration of the specific circumstances under which the practice has existed." *Doctors Council, L. 10MD, SEIU*, 9 OCB2d 2, at 7 (quoting *Chenango Forks Cent. Sch. Dist.*, 40 PERB ¶ 3012 (2007)) (internal quotation marks omitted).

12 (citing *County of Nassau*, 38 PERB ¶ 3030). Here, there is no evidence to demonstrate that the Senior Chief Dispatchers were ever notified or made aware that the use of their take-home vehicle was conditioned upon the number of vehicles in the FDNY's fleet.[7] Notably, the only condition listed in the "Annual City Government Vehicle Commuting Authorization Form" that Senior Chief Dispatchers were required to complete is that the authorized driver park in the assigned location and "adhere to all the rules in the City Vehicle Driver Handbook . . . ." (Pet., Ex. A). Consequently, we do not find that the assignment of take-home vehicles to the three Senior Chief Dispatchers was conditional.

Finally, although we recognize the importance of taking effective steps to address climate change, we reject the City's argument that public policy precludes this Board from finding that the unilateral revocation of take-home vehicles did not violate the NYCCBL. As we have previously noted, "[t]he New York State Court of Appeals has long recognized the 'strong and sweeping' public policy in favor of collective bargaining and the 'presumption . . . that all terms and conditions of employment are subject to mandatory bargaining.'" *DC 37*, 5 OCB2d 8, at 13 (BCB 2012) (quoting *Matter of City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 79 (2000)); *see also Matter of City of N.Y. v. Patrolmen's Benevolent Assoc.*, 14 N.Y.3d 46, 58 (2009). In light of this presumption, this Board has previously held that "where a statutory duty is contained in the NYCCBL, a public policy exception to that duty will be recognized in very limited instances." *United Marine Division, L. 333, ILA*, 2 OCB2d 44, at 22 (BCB 2009) (citing *PBA*, 73 OCB 22, at 9 (BCB 2004); *United Fed'n of Teachers, Local 2 v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 1 N.Y.3d 72, 80 (2003)). Therefore, any such exceptions "must

[7] Moreover, unlike the facts in *County of Nassau*, here there is no evidence that the provision of take-home vehicles to Senior Chief Dispatchers was conditioned on the performance of certain job duties.

be based on public policy considerations, embodied in statutory or decisional law, and must prohibit, in an absolute sense, particular matters being decided." *Id*. at 23 (quoting *New York City Transit Auth. v. Transp. Workers Union of America, Local 100*, 99 N.Y.2d 1, 7 (2002)) (internal quotations and editing marks omitted). Here, the City has not pointed to any statute or case law that contains a public policy to reduce climate change that is so strong it would overcome the City's obligation to bargain over a mandatory subject. Moreover, given the numerous decisions public employers make that have some tangential effect on climate change, a finding that such a public policy overcomes the City's obligation to bargain under the NYCCBL would have sweeping and likely unintended effects.[8]

Accordingly, we find that the City made a unilateral change to a mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(1) and (4). We therefore grant the improper practice petition and order the City to bargain with the Union to the point of either agreement or exhaustion of impasse procedures over the three Senior Chief Dispatchers' use of City-owned vehicles for commuting to and from work.

[8] We note that under the circumstances present here, where the vehicles used by the three Senior Chief Dispatchers may have been eliminated from the FDNY's fleet, nothing in our Order requires the FDNY to increase the size of its fleet.

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 improper practice petition, docketed as BCB-4372-20, 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 be, and the same hereby is, granted; and it is further

DETERMINED, that the Fire Department of the City of New York has violated NYCCBL § 12- 306(a)(1) and (4) by making a unilateral change when it rescinded use of City-owned vehicles from the three most senior Chief Dispatchers for commuting to and from work, a mandatory subject of bargaining; and it is further

ORDERED, that the Fire Department of the City of New York negotiate over the use of City-owned vehicles by the three most senior Chief Dispatchers for commuting to and from work; and it is further

ORDERED, that the Fire Department of the City of New York make the three most senior Chief Dispatchers whole for any financial loss resulting from its improper unilateral change; and it is further

ORDERED, that the Fire Department of the City of New York post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

Dated: August, 3, 2020
New York, New York

SUSAN J. PANEPENTO
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M. DAVID ZURNDORFER
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NOTICE 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 CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 13 OCB2d 15 (BCB 2020), determining an improper practice petition between the Uniformed Fire Alarm Dispatchers Benevolent Association and the Fire Department of the City of New York and the City of New York.

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 improper practice petition, docketed as BCB-4372-20, 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 be, and the same hereby is, granted; and it is further

DETERMINED, that the Fire Department of the City of New York has violated NYCCBL § 12- 306(a)(1) and (4) by making a unilateral change when it rescinded possession of City-owned vehicles from the three most senior Chief Dispatchers for commuting to and from work, a mandatory subject of bargaining; and it is further

ORDERED, that the Fire Department of the City of New York negotiate over the use of City-owned vehicles by the three most senior Chief Dispatchers for commuting to and from work; and it is further

ORDERED, that the Fire Department of the City of New York make the three most senior Chief Dispatchers whole for any financial loss resulting from its improper unilateral change; and it is further

ORDERED, that the Fire Department of the City of New York post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

The Fire Department of the City of New York
(Department)

Dated: ______________________________

Posted By: ______________________________
(Title)