Local 237, IBT, 13 OCB2d 17 (BCB 2020)

(IP) (Docket No. BCB-4377-20)

Summary of Decision*:** The Union alleged that NYCHA violated NYCCBL § 12-306(a) (4) and (5) by unilaterally rescinding its practice of granting two hours of excused time in December of each year. NYCHA argued that it did not violate the NYCCBL because it did not rescind the practice but instead asked that employees forego taking the excused time. The Board found that NYCHA unilaterally rescinded the practice in violation of NYCCBL § 12- 306(a) (1) and (4) but did not violate § 12-306(a)(5) because the agreement between the parties was not in *status quo*. Accordingly, the petition was granted in part and denied in part. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CITY EMPLOYEES UNION LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

DECISION AND ORDER

On March 5, 2020, City Employees Union Local 237, International Brotherhood of Teamsters ("Union") filed an improper practice petition against the New York City Housing Authority ("NYCHA"). The Union alleges that NYCHA violated §§ 12-306(a)(4), (5), and 12-307(a) of the New York City Collective Bargaining Law ("NYCCBL") by unilaterally rescinding its practice of granting two hours of excused time in December of each year. NYCHA argues that it did not violate the NYCCBL because it did not rescind the practice but instead asked that

employees forego taking the excused time. The Board finds that NYCHA unilaterally rescinded the practice in violation of NYCCBL § 12- 306(a)(1) and (4) but did not violate § 12-306(a)(5) because the agreement between the parties was not in *status quo* pursuant to § 12-311(d). Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Union is the certified collective bargaining representative for NYCHA employees in 27 titles. The Union and NYCHA are parties to a collective bargaining agreement ("Agreement") and several memoranda of understanding, which incorporate and modify the Agreement. The current memorandum of understanding covers the period of May 30, 2018 through December 29, 2021.

In 2016, this Board addressed a claim filed by the Union alleging that NYCHA discontinued a past practice of providing full-time bargaining unit members with two hours of excused time in December of each year. *See CEU, L. 237*, 9 OCB2d 22 (BCB 2016) ("2016 BCB Decision"). In that decision, we found that granting two hours of excused time in December was a past practice and that NYCHA violated NYCCBL § 12-306(a)(1) and (4) by failing to provide employees with this excused time in 2015. We found that, while the specifics of when the leave could be taken varied over the years, "NYCHA has granted excused time in December since at least 1985." *Id.* at 2. In many years, "a high-level supervisor . . . distributed a memorandum to either all staff or all supervisors establishing the number of leave hours granted and specifying when such leave may be taken." *Id.* The decision cited a 2014 memorandum stating that "[t]hese two hours may be taken on any one day or divided among multiple days from December 1 to December 31. . . . [P]lease obtain the necessary approvals from your supervisor to ensure proper coverage at your work location." *Id.* The Board ordered NYCHA to cease and desist from making

future changes to the practice of granting two hours of excused time in December without first negotiating with the Union either to agreement or to impasse.

Thereafter, NYCHA granted employees two hours of excused time in December 2016, 2017, and 2018. However, in December 2019, NYCHA did not issue a memorandum instructing employees regarding the two hours of excused time. The Union inquired about the provision of excused time in December, and the parties had some discussions regarding this matter.[1] On December 23, 2019, the Director of the Union's Housing Division, Carl Giles, emailed a copy of the 2016 BCB Decision to Kerri Jew, NYCHA Executive Vice-President and Chief Administrative Officer, along with other NYCHA and Union personnel. On December 24, Jew responded to Giles by email, stating:

> We have received your email on the 2 hours of holiday time. We understand that this has been identified as a past practice but are requesting that the staff consider not taking the time this year. We feel the time taken reduces available staff across the agency and directly impacts compliance and basic service efforts. We look forward to continuing our conversation regarding this issue in 2020.
>
> Further, we want to advise that this practice is difficult to support in light of the conditions of NYCHA apartments [and the] lack of ability to provide basic services to residents, including administrative services, and that we will want to discuss changing the practice in future years. To the extent this practice impedes compliance with the Monitor agreement, it may also come under review of the monitor as NYCHA and the monitor begin to assess rules and practices that impact NYCHA compliance efforts.
>
> It is difficult to provide this time off when property conditions are so poor and [we] ask the union [to] consider our request with the understanding we will open discussion on the practice in the future.

(Pet., Ex. E.)

[1] The pleadings and accompanying exhibits indicate that the parties held limited discussions regarding the excused time in December 2019 but do not describe the substance of those conversations. At the conference before the Trial Examiner in this matter, the parties declined to supplement the record and agreed that a hearing was not warranted.

Giles promptly responded to this message stating, "We have been discussing this matter with your office for weeks. It is unacceptable that you wait until Christmas Eve to tell us that you are not honoring a decision made by OCB. We will be re-filing with them." (Ans., Ex. A.) Vito Mustaciuolo, NYCHA's General Manager, then responded stating, "We are not saying no but rather asking staff to consider not taking the time." *Id.* It is undisputed that no bargaining unit members utilized the two hours of excused time.

The Union subsequently filed a grievance concerning this issue.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that NYCHA has again violated NYCCBL §§ 12-306(a)(4), (5), and 12-307(a) by unilaterally rescinding its practice of granting employees two hours of excused time.[2] The Union asserts that work hours are a mandatory subject of bargaining. Further, it explains that

[2] NYCCBL § 12-306(a) provides, in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> * * *
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees; . . .
>
> (5) to unilaterally make any change to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in [NYCCBL § 12-311(d)].

NYCCBL § 12-307(a) provides, in pertinent part, that public employers and employee organizations "shall have the duty to bargain in good faith on wages . . . hours (including but not limited to overtime and time and leave benefits), working conditions . . ..

NYCHA has an "established practice of granting two (2) hours holiday season excused time during the month of December to all bargaining unit employees." (Pet. ¶ 19) Therefore, a change to that practice may not be instituted without bargaining in good faith. The Union maintains that NYCHA has failed to bargain in good faith regarding the two-hours of excused time.

The Union asserts that, because NYCHA did not issue a memorandum to full-time employees informing them of the leave and specifying when it could be taken, no eligible staff received the two-hour leave in 2019 as either actual excused time off or as compensatory time. It states that NYCHA has always placed restrictions on when this excused time may be utilized, which were set forth in a memorandum in prior years. The Union argues that NYCHA's contention that it merely requested staff consider not taking the two-hour excused time is contradicted by the fact that NYCHA first made this proposal in an email sent to the Union on December 24, 2019, when it was effectively too late to arrange for employees to use their leave time, and after several weeks of discussions between the parties regarding excused leave in December. As a remedy, the Union requests an Order directing that NYCHA comply with the 2016 BCB Decision, compensate bargaining unit members for the two hours of excused time that were unilaterally rescinded in December 2019, and bargain with the Union with respect to any proposed change to the benefit. The Union also requests any other relief the Board deems just and proper.

NYCHA's Position

NYCHA argues that it did not violate the NYCCBL as alleged by the Union because it did not rescind the practice of granting bargaining unit members two hours of excused time in December and did not refuse to bargain over the matter. NYCHA argues that the Union has failed to show a change from the existing practice. NYCHA asserts it did not state that employees were not permitted to take excused time. Instead, NYCHA maintains that it told the Union it was requesting that employees consider NCYHA's operational difficulties and the economic impact of

large numbers of its workforce taking time off and forego taking their two hours of excused time. Further, NYCHA argues that the 2016 BCB Decision did not require it to release an annual memorandum concerning excused time in December. Therefore, its failure to do so cannot be considered a change to the existing practice or a violation of the Board's prior order.

DISCUSSION

A unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith. *See CEU, L. 237*, 9 OCB2d 22, at 6 (BCB 2016) (citing *ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014); *DC 37*, 79 OCB 20, at 9 (BCB 2007)). "A party asserting that such a unilateral change has occurred must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) there has been a change from existing policy." *CEU, L. 237*, 9 OCB2d 22, at 6 (citing *DC 37, L. 436 & 7*68, 4 OCB2d 31, at 13 (BCB 2011)); *see also Doctors Council, SEIU*, 67 OCB 21, at 7 (BCB 2001).

The NYCCBL expressly states that "time and leave benefits" are within the scope of mandatory bargaining. *See* NYCCBL § 12-307(a). Thus, "unilateral changes regarding paid leave constitute a violation of an employer's bargaining obligation." *CEU, L. 237*, 9 OCB2d 22, at 6 (citing *DC 37*, 6 OCB2d 14, at 16-17 (BCB 2013), *affd., Matter of City of New York v. Bd. of Collective Bargaining*, Index No. 451081/13, (Sup. Ct. N.Y. Co. Oct. 28, 2014) (discussing mandatory negotiability of leave time); *UFOA, L. 854*, 67 OCB 17 (BCB 2001) (determining that employer's holiday leave policy was a mandatory subject of bargaining); *DC 37, L. 436 & 768*, 4 OCB2d 31, at 14 (finding mandatorily negotiable a change in policy regarding payment for days in which employees do not work because their work locations are closed due to inclement weather)). In our 2016 BCB Decision, in which we considered the same two-hour leave at issue here, we determined that "[t]he provision of excused time in December represents a grant of paid

leave and is accordingly a mandatory subject of bargaining." *CEU, L. 237*, 9 OCB2d 22, at 6.

When determining whether a unilateral change has occurred, we accept evidence of a past practice. *See CEU, L. 237*, 9 OCB2d 22, at 6 (citing *DC 37, L. 436 & 768,* 4 OCB2d 31 at 14). Specifically, we examine whether the "practice was unequivocal and existed for such a period of time such that the unit employees could reasonably expect the practice to continue unchanged." *Local 621, SEIU,* 2 OCB2d 27, at 10 (BCB 2009) (quoting *County of Nassau*, 38 PERB ¶ 3005 (2005)). In our 2016 BCB Decision, we determined that the two-hour leave benefit constituted a past practice that had been consistently maintained since at least 2001. *See CEU, L. 237*, 9 OCB2d 22, at 7. In particular, we found that in every year since 2001, a high-level NYCHA supervisor "submitted a memorandum to all staff or all supervisors setting forth the circumstances under which unit members may take [two hours or more] of holiday excused time." *Id.* at 8.

It is undisputed that NYCHA did not distribute a similar memorandum to staff or supervisors regarding the availability of two hours of excused time in December 2019. However, NYCHA contends that it did not refuse to grant the excused time, but instead proposed to the Union that employees not take it. We find that, under the circumstances, the failure to advise employees of the excused time in December 2019 constituted a failure to grant the excused time. In the previous 18 years, NYCHA had issued employees a memorandum each December informing them of the excused time and instructing them when the time off could be taken consistent with the employer's scheduling needs. No such memorandum was issued in 2019, and NYCHA has not alleged that employees were informed in any other manner regarding the existence of the excused time or when they could utilize it. In effect, all employees eligible to use the excused time in December 2019 were denied the opportunity to do so.

The email that NYCHA sent to the Union on Christmas Eve, stating for the first time that it was "requesting that the staff consider not taking the [excused] time this year," is insufficient to

establish that NYCHA did not unilaterally change the practice of granting employees two hours of excused time. In our 2016 BCB Decision, we found that NYCHA had allowed employees to take two hours of excused leave at any time in December with prior approval from their supervisor to ensure work coverage. In contrast, by the time that NYCHA proposed to the Union that employees voluntarily not use their excused leave in 2019, there was only a week left in December. NYCHA has not alleged facts that would support a conclusion that it would have been practicable on such short notice to notify and schedule all employees for two hours of excused leave during the last week of the year while maintaining work coverage at its facilities.

For these reasons, we find that NYCHA breached its duty to bargain in good faith with the Union in violation of NYCCBL § 12-306(a)(1) and (4).[3] We order NYCHA to restore the practice of granting two hours of excused time to full-time employees each December. We clarify that this practice includes giving eligible employees reasonable notice of the availability of the two hours excused time and of when they may utilize it consistent with the employer's scheduling needs. We further direct NYCHA to make whole those unit members who were affected by the change in December 2019 for their loss of two hours of excused time. We leave it to the parties to determine how the make-whole remedy should be implemented, as they are best situated to determine this via the bargaining process. We further direct NYCHA to cease and desist from implementing any

[3] When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37*, 8 OCB2d 11, at 23 (BCB 2015); *Local 621, SEIU*, 2 OCB2d 27, at 14 (BCB 2009); *USCA*, 67 OCB 32, at 8 (BCB 2001). The Union also alleged a violation of NYCCBL § 12-306(a)(5), which prohibits unilateral changes to a mandatory subject of bargaining during the period when a collective bargaining agreement has expired but remains in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d). *See* NYCCBL §§ 12-306(a)(5) and 12-311(d); *see also PBA*, 11 OCB2d 37, at 11 (BCB 2018); *UFA*, 10 OCB2d 5, at 18 (BCB 2017). Because the Agreement was not in *status quo* at any time pertinent to this decision, we dismiss this allegation.

changes to the provision of two hours of excused time in December until such time as the parties negotiate either to agreement or to impasse with respect to such changes.[4]

[4] We advise the parties that the Board may consider additional remedies if NYCHA again violates this past practice without bargaining to agreement or impasse.

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 City Employees Union, Local 237 against the New York City Housing Authority, docketed as BCB-4377-20, is granted as to the claim that the New York City Housing Authority violated NYCCBL § 12- 306(a)(1) and (4) by making a unilateral change to a mandatory bargaining subject by not providing at least two hours of excused time in December 2019 to full-time employees, and it is further

ORDERED, that the improper practice petition is denied as to the claim that the New York City Housing Authority violated NYCCBL § 12-306(a)(5), and it is further

ORDERED, that the New York City Housing Authority make whole unit members who were not given two hours of excused time in December 2019; and it is further

ORDERED, that the New York City Housing Authority cease and desist from implementing any changes to the provision of two hours of excused leave in December to full-time employees until such time as the parties negotiate either to agreement or to impasse with respect to such changes.

ORDERED, that the New York City Housing Authority 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 conspicuously posted for a minimum of thirty days, and must not be altered, defaced, or covered by any other material.

Dated: August 3, 2020
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

OFFICE OF COLLECTIVE BARGAINING

OFFICE ADDRESS
100 Gold Street
Suite 4800
New York, New York 10038

MAILING ADDRESS
Peck Slip Station
PO Box 1018
New York, New York
10038-9991

212.306.7160
www.ocb-nyc.org

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 17 (BCB 2020), determining an improper practice petition between City Employees Union Local 237, International Brotherhood of Teamsters and the New York City Housing Authority.

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

ORDERED, that the verified improper practice petition filed by City Employees Union, Local 237 against the New York City Housing Authority, docketed as BCB-4377-20, is granted as to the claim that the New York City Housing Authority violated NYCCBL § 12- 306(a)(1) and (4) by making a unilateral change to a mandatory bargaining subject by not providing at least two hours of excused time in December 2019 to full-time employees, and it is further

ORDERED, that the improper practice petition is denied as to the claim that the New York City Housing Authority violated NYCCBL § 12-306(a)(5), and it is further

ORDERED, that the New York City Housing Authority make whole unit members who were not given two hours of excused time in December 2019; it is further

ORDERED, that the New York City Housing Authority cease and desist from implementing any changes to the provision of two hours of excused leave in December to full-time employees until such time as the parties negotiate either to agreement or to impasse with respect to such changes; and it is further

ORDERED, that the New York City Housing Authority 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 conspicuously posted for a minimum of thirty days, and must not be altered, defaced, or covered by any other material.

New York City Housing Authority
(Department)

Dated: _____

Posted By: _____
(Title)