

**LEEBA, 16 OCB2d 8 (BCB 2023)**

(Docket No. BCB-4475-22)

**Summary of Decision:** The Union claimed that the City violated NYCCBL § 12-306(a)(5) when it terminated unvaccinated bargaining unit members and ceased their health benefits. The City argued that termination is the consequence of failing to comply with the Vaccine Mandate, which was a managerial prerogative due to the public health emergency caused by the COVID-19 pandemic. The Board found that the City did not have a duty to bargain over the decision to terminate employees for failing to comply with the Vaccine Mandate. Further, the Board found that the City did not refuse to bargain over termination procedures. Accordingly, the petition was dismissed. *(Official decision follows.)*

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

**In the Matter of the Improper Practice Petition**

*-between-*

**LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,**

*Petitioner,*

*-and-*

**CITY OF NEW YORK, OFFICE OF LABOR RELATIONS OF THE CITY  
OF NEW YORK, AND NEW YORK CITY DEPARTMENT OF  
SANITATION,**

*Respondents.*

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**DECISION AND ORDER**

On February 4, 2022, the Law Enforcement Employees Benevolent Association (“Union” or “LEEBA”) filed a verified improper practice petition alleging that the City of New York (“City”), the Office of Labor Relations of the City of New York (“OLR”), and the New York City Department of Sanitation (“DSNY”) violated § 12-306(a)(5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) when

it terminated unvaccinated bargaining unit members who had been placed on Leave Without Pay (“LWOP”) and ceased their health benefits.<sup>1</sup> The City argues that termination is the natural consequence of failing to comply with the Mayor’s order requiring that all City employees be vaccinated (“Vaccine Mandate”), which was a managerial prerogative due to the public health emergency caused by the COVID-19 pandemic. The Board finds that the City did not have a duty to bargain over the decision to terminate employees for failing to comply with the Vaccine Mandate. Further, the Board finds that the City did not refuse to bargain over termination procedures. Accordingly, the petition was dismissed.

### **BACKGROUND**

The Union represents Sanitation Enforcement Agents and Associate Sanitation Enforcement Agents employed at DSNY. The collective bargaining agreement covering this bargaining unit has expired and remains in *status quo* pursuant to NYCCBL § 12-311(d).

On August 31, 2021, the Mayor issued Executive Order (“EO”) No. 78, mandating that as of September 13, 2021, City employees and covered employees of City contractors be vaccinated against COVID-19 or submit to a weekly test. Thereafter, on October 20, 2021, the Mayor issued EO No. 83 and announced that these employees would no longer have the option of weekly testing and would instead be required to be fully vaccinated. Specifically, employees would be required to have their first dose of a vaccine by October 29, 2021. On the same day that EO No. 83 was announced, the City’s Commissioner of Health and Mental Hygiene (“Health Commissioner”) issued an order similarly requiring all City employees to be vaccinated and provided further details,

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<sup>1</sup> On the same date, the Union filed a related petition for injunctive relief, docketed as BCB-4474-22, which was denied by the Board on February 18, 2022.

including that any employee who had not provided proof of having received a first dose of a vaccine by October 29, 2021, would be “excluded from the premises at which they work beginning on November 1, 2021.”<sup>2</sup> (Ans., Ex. 1 ¶ 3)

On October 20, 2021, the same day the Vaccine Mandate was announced, OLR emailed the Union a letter from Commissioner Renee Campion stating that, although the City believed the implementation of the Vaccine Mandate was a managerial prerogative, she was available to meet to bargain over the impact of the Vaccine Mandate. Similar letters were sent to other unions that represent City employees. The Union did not respond to the City’s letter. We take administrative notice that, beginning on October 25, 2021, the City met with numerous other unions “to discuss implementation.” *MLC*, 15 OCB2d 34, at 5 (BCB 2022).

On October 22, 2021, OLR Associate Commissioner Dan Pollak emailed the Union guidance issued to City agencies regarding the implementation of the Vaccine Mandate that included details on the vaccine requirements, the process for applying for a reasonable accommodation, deadlines to apply, and directives that allowed employees to remain on payroll pending determination of their reasonable accommodation requests. Pollak stated in the email that the City was “willing to discuss and negotiate these procedures where appropriate during impact bargaining.” (Ans., Ex. 8 at 1) One of the attachments was a “FAQ on New York City Employees Vaccine Mandate” (“FAQ”). Regarding the “penalty for non-compliance,” the FAQ stated that employees who did not comply with the Vaccine Mandate would be placed on LWOP and would “be terminated in accordance with procedures required by the Civil Service Law or applicable

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<sup>2</sup> The Board takes administrative notice that, on February 6, 2023, the Mayor announced that the Vaccine Mandate will end on February 10, 2023, and that permanent competitive and labor class employees who were terminated for failure to comply with the Vaccine Mandate are eligible to apply for reinstatement. While this order might affect the reinstatement of bargaining unit members, we do not find it impacts the issues before the Board or our holdings.

collective bargaining agreements.” (*Id.* at 14) The FAQ did not state how long an employee would be on LWOP “before termination.” (*Id.*) However, the FAQ stated that employees on LWOP “may be subject to discipline or other adverse employment action,” “[a]bsent any collective bargaining agreement providing for other procedures,” and that further guidance would be forthcoming. (*Id.*) The Union did not respond to Pollak’s email.

On October 29, 2021, the Vaccine Mandate went into effect, and several bargaining unit members who failed to comply with the Vaccine Mandate before the deadline were placed on LWOP. Soon thereafter, numerous unions reached agreements with the City on issues relating to the implementation of the Vaccine Mandate. *See MLC*, 15 OCB2d 34, at 5-6 (identifying 18 unions who reached such agreements with the City). These agreements covered a variety of topics including: “separation benefits such as continuation of health benefits up to June 30, 2022, for employees who refused to vaccinate and opted to leave City employment.” *MLC*, 15 OCB2d 34, at 5-6.<sup>3</sup>

On February 1, 2022, several members of the Union’s bargaining unit were notified that their employment with DSNY would be terminated if they did not submit proof of receipt of a COVID-19 vaccine by February 11, 2022. The letter indicated that “[c]ompliance with this requirement is a condition of your continued employment with the City.” (Pet., Ex. A)

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<sup>3</sup> We take administrative notice that the memorandum of agreement regarding “the processes and rules surrounding the implementation of the [Vaccine Mandate]” that certain unions reached with the City provided that employees placed on LWOP due to vaccination status could 1) opt to resign, receive payment for unused sick leave, and continue to be eligible for health benefits through June 30, 2022, if they waived of their rights to challenge their resignation or 2) opt to extend their LWOP status through June 30, 2022, and continue their health benefits during that time, if they signed a waiver of their rights to challenge any future resignation.

The same day, the Union's President, Jakwan Rivers, emailed Pollak to request the policies regarding vaccination exemption, waiver, leave time, and termination for failure to vaccinate. In response, Pollak re-sent the Vaccine Mandate and the FAQ. In addition, Pollak stated that the City had reached agreements with some unions providing that unvaccinated employees would have the option to sign a waiver and remain on LWOP with health benefits through June 30, 2022. However, since the City did not have such an agreement with the Union, he stated that "that option is not available for LEEBA members." (Ans., Ex. 9)

On February 11, 2022, eight unvaccinated bargaining unit members were terminated.

### **POSITIONS OF THE PARTIES**

#### **Union's Position**

The Union claims that the City violated NYCCBL § 12-306(a)(5) when it unilaterally terminated unvaccinated bargaining unit members and ceased their health benefits.<sup>4</sup> The Union argues that health benefits and wages are mandatory subjects of bargaining under NYCCBL § 12-307 and challenges the City's authority to terminate affected unit members and deprive them of their health benefits pursuant to the Vaccine Mandate.

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<sup>4</sup> NYCCBL § 12-306(a) provides that "[i]t shall be an improper practice for a public employer or its agents ...

(5) to unilaterally make any change as 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 subdivision d of section 12-311 of this chapter.

NYCCBL § 12-311(d) defines a "period of negotiations" as "the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded, or an impasse panel is appointed."

The Union relies upon the court's ruling in *PBA v. City*, Index No. 151531/2022, 2022 N.Y. Misc. LEXIS 5420 (Sup. Ct. N.Y. Co. Sept. 23, 2022), for the assertion that the Health Commissioner does not have the authority to enforce the Vaccine Mandate by excluding employees from the workplace and ultimately terminating them. According to the Union, it did not bargain with the City about terminations when the Vaccine Mandate was issued because "there was no way to anticipate [that] terminations were even being considered." (Additional Briefing at 2) Asserting that the Vaccine Mandate requires only exclusion from the workplace, the Union contends that "[t]ermination is non-bargained-for punishment," unconnected to the City's emergency powers, that is reserved for gross misconduct or repeated infractions under progressive discipline standards and usually occurs after a hearing with a right to appeal. (Rep. ¶ 20) According to the Union, the City "said nothing about termination" until 11 days prior to terminating unvaccinated bargaining unit members. (Additional Briefing at 2) The Union argues that unvaccinated bargaining unit members should have been allowed to remain employed with health benefits, regardless of their pay status, because the City had "no problem with other similarly-situated employees in other unions remaining on health benefits until at least June 30, 2022."<sup>5</sup> (*Id.* ¶ 3)

The Union argues that the City's October 20, 2021, letter, which did not discuss or offer to bargain over termination, was insufficient to fulfill the City's obligation to bargain. The Union asserts that the City offered terms to the MLC that provided an option for unvaccinated employees to continue their health benefits through June 11, 2022, but did not offer the Union the same terms or offer to bargain prior to the February 2022 terminations. According to the Union, despite

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<sup>5</sup> According to the Union, "[t]ermination makes it more difficult for employees to be returned to their prior work and prior pay after the conclusion of the pandemic because reinstatement has specific conditions under the Civil Service Law." (Additional Briefing at 2)

“multiple conversations with OLR on various topics” during that time period, the City did not warn or notify the Union of the terminations or that the Union “would not be part of the negotiations.” (Additional Briefing at 3) Noting that the City does not deny that there was no invitation to bargain in February 2022, the Union argues that the City did not meet its obligation to bargain mandatory subjects.

As a remedy, the Union requests that the termination of unvaccinated bargaining unit members “be reversed and their health coverage restored.” (Additional Briefing at 4) At this point, since “the COVID-19 situation has significantly changed” and the Mayor no longer requires vaccination for the public, the Union seeks to have unvaccinated bargaining unit members returned to the workplace, to full duty, and full pay. (*Id.* at 3)

### **City’s Position**

The City argues that it did not violate its duty to bargain in good faith when it acted pursuant to the Health Commissioner’s lawful order. The City asserts that the Vaccine Mandate was a critical expression of public policy, supported by medical and scientific data, during a deadly pandemic and that it was obligated to address the public health emergency to prevent the spread of a communicable disease among its workforce and the public. It maintains that the Vaccine Mandate is still necessary at this stage of the pandemic as COVID-19 remains a leading cause of death, CDC guidance regarding the vaccine has not changed, and vaccination continues to prevent hospitalizations. The City notes that *PBA*, 2022 N.Y. Misc. LEXIS 5420, cited by the Union is at odds with decisions issued by other courts, which have consistently found that the Vaccine Mandate was a lawful condition of employment that does not implicate disciplinary procedures.<sup>6</sup>

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<sup>6</sup> The City has appealed *PBA*, 2022 N.Y. Misc. LEXIS 5420, and pursuant to an automatic stay, no unvaccinated former employees have been returned to duty.

Further, the City notes that its efforts to bargain with the Union on October 20 and 22, 2021 were met with “complete silence.”<sup>7</sup> (Supplemental Aff. ¶ 7) It claims that in light of the references to termination and adverse employment actions in the FAQ, it was not reasonable for the Union to assume that LWOP and health benefits would continue indefinitely for those employees who failed to vaccinate. Further, it maintains that employees who fail to obtain or maintain qualifications do not have a fundamental right to continued employment or any economic or fringe benefits.

As a matter of public policy, the City argues that it should not be forced to use taxpayer money to retain, pay, or continue to insure individuals who chose not to comply with a valid condition of employment and did not work during the pandemic when they were needed to continue providing services to the public. The court in *Garland v. New York City Fire Dept.*, 574 F. Supp.2d 120 (E.D.N.Y. 2021), refused to restore unvaccinated individuals to pay status, and the City claims that the Union is “essentially attempting to relitigate a claim in the *Garland* case by making a claim for continuation of health benefits while on leave without pay.” (Supplemental Aff. ¶ 69) The City contends that a ruling that allows public servants to remain at home on payroll indefinitely with health insurance would set a terrible precedent for future pandemics and have dire consequences for the provision of public services and the protection of public health.

### **DISCUSSION**

NYCCBL § 12-307(a) provides that parties “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

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<sup>7</sup> The City asserts that the Union “should not be permitted to now seek a finding of impact at this late stage . . . after failing to seek such bargaining for months despite an invitation to do so.” (Ans. ¶ 132)

benefits), [and] working conditions.” 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) (citations omitted). 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) (citation omitted). In order to establish that a unilateral change has occurred in violation of the NYCCBL, the 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) (internal quotation marks omitted) (quoting *DC 37, 79 OCB 20*, at 9 (BCB 2007)).

Here, the Union does not challenge the Vaccine Mandate itself.<sup>8</sup> Like the petitioners in *MLC*, 15 OCB2d 34, the Union’s challenge is limited to aspects of how the City implemented the Vaccine Mandate.<sup>9</sup> Specifically, the Union challenges the City’s unilateral decision to terminate bargaining unit members who failed to comply with the Vaccine Mandate.<sup>10</sup>

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<sup>8</sup> Moreover, in another decision issued today, this Board found that the Vaccine Mandate was a legitimate exercise of the City’s authority during the COVID-19 pandemic. *See UFA*, 16 OCB2d 7, at 14 (BCB 2023).

<sup>9</sup> In *MLC*, the Board found that the City violated the NYCCBL by failing to bargain over mandatory subjects contained in its policies and procedures to implement the Vaccine Mandate. Specifically, the Board found that “the use of paid leave for those who failed to comply” with the Vaccine Mandate and “the deadlines and appeals process for employees whose requests for a reasonable accommodation are denied” are mandatory subjects of bargaining. *MLC*, 15 OCB2d 34, at 12, 14.

<sup>10</sup> As the cessation of health benefits in this instance is a consequence of termination, we do not address it separately. *See Broecker v. New York City Dept. of Educ.*, 585 F. Supp. 3d at 322 (noting that health benefits terminate with employment).

As noted in *MLC*, a majority of courts have held that the Vaccine Mandate is “a lawful qualification or condition of employment.” *MLC*, 15 OCB2d 34, at 13 n.8; see *New York Mun. Labor Comm. v. City of New York*, 75 Misc. 3d 412, 415 (Sup. Ct. N.Y. Co. 2022); *Marciano v. de Blasio*, 589 F. Supp. 3d 423, 436 (S.D.N.Y. 2022); *Broecker v. New York City Dept. of Educ.*, 585 F. Supp. 3d 299, 316, 318-319 (E.D.N.Y. 2022); *Garland v. N.Y. City Fire Dept.*, 574 F. Supp. 3d 120, 127 (E.D.N.Y. 2021). It is well-established that the failure to meet a qualification of employment “results in forfeiture of employment.”<sup>11</sup> *Felix v. N.Y. City Dept. of Citywide Admin. Servs.*, 3 N.Y.3d 498, 501 (2004); see *Matter of Carr v. New York State Dept. of Transp.*, 70 A.D.3d 1110, 1112 (3d Dept. 2010); *DC 37*, 75 OCB 26, at 9 (BCB 2006). Further, “[p]ersonnel decisions concerning termination of employees because of economic or other legitimate reasons are within management’s statutory right to direct its employees and maintain the efficiency of its operations.” *CWA, L. 1180*, 63 OCB 19, at 11 (BCB 1999); see also *DC 37*, 6 OCB2d 2, at 14 (BCB 2013). Accordingly, we do not find that the City’s decision to terminate bargaining unit members who failed to comply with the Vaccine Mandate is a mandatory subject of bargaining.<sup>12</sup>

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<sup>11</sup> We note that, despite the Union’s contention to the contrary, it was not reasonable for it to assume that unvaccinated bargaining unit members would remain on LWOP indefinitely. The FAQ announced that unvaccinated employees would be placed on LWOP and then terminated. Moreover, termination is the inevitable consequence of failure to meet a qualification of employment. See *Felix v. N.Y. City Dept. of Citywide Admin. Servs.*, 3 N.Y.3d at 501.

<sup>12</sup> As we explained in *UFA*, 16 OCB2d 7, at 16-18, the court’s decision in *PBA*, 2022 N.Y. Misc. LEXIS 5420 does not compel a different result. In *PBA*, the petitioners’ challenged the authority of the Health Commissioner to impose adverse employment actions on unvaccinated staff of the New York City Police Department. The court concluded that the mandate was lawful and appropriate. *Id.* at 4. However, it found that the Health Commissioner did not have statutory authority to impose the Vaccine Mandate as a condition of employment. In *UFA*, we found that the Mayor has the authority to impose the Vaccine Mandate on the City’s workforce. 16 OCB2d 7, at 14. Accordingly, our findings regarding the City’s duty to bargain here are consistent with that decision.

However, “[t]he procedures under which an employee is discharged from employment are necessarily mandatory subjects of bargaining because termination from employment on any ground occasions the loss of all terms and conditions incident to that employment.” *DC 37, L. 2507 & 3621*, 63 OCB 35, at 13 (BCB 1999) (finding that “[w]hile the employer has the right to terminate the employment of individuals pursuant to § 71 of the [Civil Service Law (“CSL”)], we find that the procedures by which such terminations are implemented are terms and conditions of employment and, thus, mandatory subjects of bargaining); *see DC 37, 75 OCB 14*, at 15 (BCB 2005) (“Even though enforcement of the City residency requirement is a management right, a change in the procedures by which that right is implemented is mandatorily bargainable.”); *see also Matter of Long Beach v. New York State Pub. Empl. Relations Bd.*, 39 N.Y.3d 17, 25-26 (2022) (holding that “although it is undisputed that the City’s right to terminate [under CSL §71] is not a subject of mandatory negotiation, the City must negotiate the procedures necessary to effectuate that right”).

The fact that the City reached an agreement on these issues with other unions does not mean that it breached its bargaining obligations to the Union. *See CWA*, 63 OCB 19, at 14-15 (finding no refusal to bargain when the City and the Health and Hospitals Corporation reached an agreement over the impact of layoffs with some unions, but not others, prior to implementing the layoffs). The option for unvaccinated employees to continue to receive health benefits through June 30, 2022, in exchange for a waiver of their right to challenge their resignation was the product of collective bargaining by these other unions. As we have explained in the past, a union is not automatically entitled to terms negotiated by other unions without going to the bargaining table. *See LEEBA*, 79 OCB 18, at 22 (BCB 2007) (noting that “there is no automatic entitlement to a benefit exactly as negotiated by another union”); *see also CWA*, 63 OCB 19, at 16 n.17 (noting

that the union had not signed the agreement that it belatedly claimed should have been applied to its members).

Moreover, it is undisputed that the City offered to bargain over the impact of the Vaccine Mandate. In addition to OLR Commissioner Campion's October 20, 2021, letter to all unions, the Associate Commissioner's October 22, 2021 email expressed that the City was "willing to discuss and negotiate these procedures where appropriate during impact bargaining." (Ans., Ex. 8 at 2) However, there is no evidence that the Union responded to the City's offer to bargain.

Accordingly, the Union's petition is dismissed.

**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-4475-22, filed by the Law Enforcement Employees Benevolent Association against the City of New York, Office of Labor Relations of the City of New York, and New York City Department of Sanitation, is hereby dismissed.

Dated: February 10, 2023  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

CAROLE O'BLNES  
MEMBER

CHARLES G. MOERDLER  
MEMBER