UFT, 16 OCB2d 14 (BCB 2023)

(IP) (Docket No. BCB-4408-20).

Summary of Decision*:** The Union alleged that the City and OATH violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain over changes it made to working conditions of Hearing Officers (Per Session) following the shift to remote work due to the COVID-19 pandemic and, to the extent they are not mandatory subjects of bargaining, the practical impact of those changes. Additionally, the Union alleged that the City and OATH violated NYCCBL § 12-306(c)(4) by refusing to provide information relevant to claims within the scope of bargaining. The City argued that OATH's decision to assign Hearing Officers to remote work during the COVID-19 pandemic and the resulting working conditions fall squarely within the City's management rights under the NYCCBL. The Board found that the City and OATH failed to bargain in good faith on issues of payment and reimbursement for equipment required to work remotely, changes to lunch breaks and the number of days per week a HOPS must work, and a workload impact. In addition, it found that the City and OATH failed to provide information the Union requested relating to workplace health and safety. In all other respects, the Board found that the City and OATH did not violate NYCCBL § 12-306(a)(1) and (4). 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-

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Petitioner,

-and-

CITY OF NEW YORK and
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS,

Respondents.

DECISION AND ORDER

On December 21, 2020, the United Federation of Teachers, Local 2, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") and the Office of Administrative Trials and Hearings ("OATH"). The Union alleges that the City and OATH violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4) by failing to bargain over changes it made to working conditions of Hearing Officers (Per Session) ("HOPS") following the shift to remote work due to the COVID-19 pandemic and, to the extent they are not mandatory subjects of bargaining, the practical impact of those changes. Specifically, it contends that the City and OATH violated the NYCCBL when they unilaterally required HOPS to continue to work remotely after other OATH employees were permitted to return to their offices, required HOPS to use personal equipment for work, failed to compensate HOPS for equipment they purchased in order to work remotely, failed to negotiate regarding changes to the number of work hours per day and week, required HOPS to routinely work beyond their scheduled hours to complete their duties, altered the past practice on monthly scheduling requests, reduced the lunch break, interfered with the past practice regarding break time, eliminated paid training, and failed to compensate HOPS for all hours worked. Additionally, the Union alleges that the City and OATH violated NYCCBL § 12-306(c)(4) by refusing to provide information relevant to claims within the scope of bargaining.

The City argues that OATH's decision to assign HOPS to remote work during the COVID-19 pandemic and the resulting change in working conditions fall squarely within the City's management right under the NYCCBL to take all necessary actions to carry out its mission in emergencies and to determine the method, means and personnel by which governmental operations are to be conducted. The Board finds that the City and OATH failed to bargain in good faith on issues of payment and reimbursement for equipment required to work remotely, changes to lunch

breaks and the number of days per week a HOPS must work, and a workload impact. In addition, it found that the City and OATH failed to provide information the Union requested relating to workplace health and safety. In all other respects, the Board found that the City and OATH did not violate NYCCBL § 12-306(a)(1) and (4). Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Trial Examiner held nine days of hearings. Considering the testimony, pleadings, and documentary evidence, the record established the following relevant facts.

OATH is a centralized administrative law tribunal of the City. The Union is the certified representative of HOPS who are employed by the City to preside over adjudications at OATH. HOPS conduct hearings and render determinations on summonses issued by various City agencies to enforce laws or City rules.[1] HOPS are paid on an hourly basis and are not full-time salaried employees.

The Union and the City are parties to a collective bargaining agreement covering HOPS ("Agreement"), which provides, in Article V, § 3, that "[t]he parties agree that the Agency has the discretion to schedule [HOPS] based on the needs of the Agency." (Pet., Ex. A)

Twelve HOPS from OATH offices in four different boroughs, a Union representative, and five management witnesses testified concerning working at OATH before and after the switch to remote work in March of 2020.[2]

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[1] The summonses are issued by the Departments of Buildings ("DOB"), Sanitation ("DOS"), Environmental Protection ("DEP"), Consumer and Worker Protection ("DCWP"), Health and Mental Hygiene ("DOHMH"), and the Taxi and Limousine Commission ("TLC"), among others.

[2] HOPS Anthony Feldmesser, Linda Agoston, and Adele Cohen testified from the Brooklyn Office; Janet Winter, Rachel Potasznik, Clive Morrick, Neil Toliciss, and Deena Greenberg

On March 20, 2020, OATH offices closed due to the COVID-19 pandemic, and OATH moved its in-person hearings to telephonic hearings conducted remotely.[3] Around that time, case filings and hearings dropped drastically as agencies either stopped issuing summonses or issued fewer summonses, and parties rescheduled cases. The cases that did proceed between March 20, 2020, and the summer of 2020 were assigned to a combination of managing attorneys, full-time staff attorneys, and a few HOPS selected by OATH who agreed to test the remote hearing system.[4]

On June 10, 2020, a Managing Attorney in the Bronx office, Joel Tucker, sent a scheduling request to Bronx HOPS regarding their availability in July 2020. He noted that "at this time, no hearing officers will be allowed to conduct hearings in person at the hearing office." (Union Ex. WW) He further noted, in relevant part:

> Agency needs, and certain requirements and factors, will be considered for selecting hearing officers for remote hearing work assignments.

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testified from the Manhattan Office; Robert Weingarten testified from the Manhattan Office Appeals section; Rhonda Leader and Sue Ellen Dodell testified from the Bronx Office; Bracha Etengoff testified from the Queens Office; and Mark Goichman testified from the Bronx and Queens Offices. OATH's Executive Agency Counsel Assistant Commissioner for Appeals Peter Schulman testified from the Manhattan Appeals Office; Executive Agency Attorney Assistant Commissioner Carmena Schwecke testified from the Bronx and Queens Offices; Senior Managing Attorney Louis Rasso testified from the Manhattan Office; Managing Attorney Therese Tomlinson testified from the Brooklyn Office; and Executive Director of Human Resources, Equity and Inclusion Marcia Grant also testified. We note that the Manhattan Appeals division only adjudicates appeals, which are written on the papers without a live hearing. To the extent there was testimony concerning significant relevant differences in operating procedures between other borough offices, they are noted.

[3] The time period prior to March 23, 2020, will be referred to in this Decision as pre-March 2020, and the time period from March 23, 2020 to the present will be referred to as post-March 2020.

[4] Cases have always been assigned to a combination of managing attorneys, full-time staff attorneys, and HOPS. Full-time staff attorneys hear the same types of cases as HOPS; however, they are sometimes assigned the cases that will take longer to write. Post-March 2020, some managers heard a larger number of cases on average than they had pre-March 2020.

> Therefore, before requesting remote hearing assignments, please know that you must accept and agree to the following additional requirements:
>
> • HOs must have access to a computer and a cell phone or land line;
>
> • Must be comfortable adjudicating all types of OATH cases;
>
> • Must be able to write up all cases on the same day of their hearings; and
>
> • Must be ready to start hearings at 8:30AM. (The assigned hours are from 8:30AM to 4:30PM.)
>
> You will be sent an email confirming your assignment(s) before the end of this month.

(*Id*.)

On November 5, 2020, and March 8, 2021, a Managing Attorney in the Queens Office, Arthur Anik, sent similar emails to Queens HOPS with several additions and a change to the stated start time. Specifically, the March 8, 2021, email provided that HOPS "[m]ust be comfortable using [the Administrative Tribunal Automated System ("ATAS")], because all remote hearings are adjudicated in ATAS;" "may not refuse to accept an assigned case and must continue to adjudicate cases until instructed otherwise. In other words, [HOPS] may not request time to write up their cases;" "[m]ust be ready to start hearings at **8:00AM** or **8:30AM (no half days are allowed); and"** HOPS **"must work a minimum of 2 days per week for the month.**"[5] (Union Ex. M) (emphasis in original)

[5] ATAS is an adjudication platform that had been used by OATH for a minority of cases, including DOHMH and DCWP cases, for several years prior to the COVID-19 pandemic. With the switch to remote work, OATH began using ATAS for all hearings. HOPS use ATAS to pull up information about each case and to electronically submit their decisions.

On June 4, 2021, OATH issued an email to HOPS with the subject "Message from the Commissioner to Per Session Hearing Officers" stating, "[g]iven the success that the OATH Hearings Division has had with telephonic hearings, we will continue to offer telephonic hearings at least through the end of the calendar year." (Union Ex. ZZZ) The email further indicated that "[b]ased on our determination of the agency's needs, we will be continuing to schedule [HOPS] to work remotely, rather than in the office, throughout this period."[6] (*Id*.)

Multiple HOPS testified that they would prefer to return to the office for reasons including, but not limited to, the challenges of using personal equipment and networks versus office equipment and networks and the lack of space at home. HOPS Agoston testified that, at the office, you could ask colleagues for help if a case had a new issue or if you were having a computer issue, but "when you were at home you were completely alone." (Tr. 542) As of the closing of the record in this matter, HOPS were still required to conduct hearings remotely.[7] In 2021, OATH posted for and hired a new class of HOPS.

Monthly Scheduling

Pre-March 2020, it is undisputed that HOPS were assigned hours on a monthly basis. They responded to monthly scheduling requests by indicating their availability for the upcoming month

[6] The June 4, 2021, email noted that "OATH will also conduct a limited number of in-person hearings" that would be handled at borough offices by staff attorneys. (Union Ex. ZZZ) Managers, supervisors, and staff attorneys returned to working in the OATH offices sometime between May and September of 2021, though some went back to working remotely at times due to increases in the number of COVID cases.

[7] Manhattan Appeals HOPS Weingarten testified that he informed his managers that he did not have the equipment or the space to work remotely and was subsequently granted permission to work in the office two afternoons a week, from February to June of 2021.

and would be notified of their schedule prior to the upcoming month.[8] Although it is undisputed that HOPS were not guaranteed the hours they requested, multiple HOPS testified that they usually received most of their requested hours.

The monthly requests for availability stopped shortly after OATH offices closed in March 2020 and resumed approximately three months later in the summer of 2020, at which time cases continued to be assigned to a combination of managing attorneys, full-time staff attorneys, and HOPS. Some HOPS testified that they started receiving their requested schedules right away and others stated they did not receive any hours for several months after June 2020. Other HOPS testified that they were not assigned as many hours as they requested, and some weren't assigned any hours at all.[9] HOPS Feldmesser testified that HOPS "don't get evaluations, [they] don't get disciplinary memos, there's no corrective activity or corrective action taken, generally speaking" instead OATH "wield[s] the schedule, that's the discipline, and I think most hearing officers are aware of that." (Tr. 77) Additionally, he testified that "it is well-known" that "cooperation ensures

[8] For example, on August 9, 2019, the Queens Deputy Managing Attorney sent several HOPS a scheduling request for September 2019 asking that they indicate the days and hours that they are available between 8:00 a.m. to 5:00 p.m. She noted that "indicating your availability to work does not guarantee that you will be scheduled. Scheduling will be done in accordance with Tribunal needs. . . ." (Union Ex. K) If a HOPS did not submit their availability, they did not receive hours for the upcoming month.

[9] HOPS Winter testified that pre-March 2020 she had been assigned hours every month, but after March 2020, she wasn't assigned any hours despite regularly requesting them. HOPS Greenberg testified that pre-March 2020 she regularly worked five days a week, but post-March 2020, she did not get assigned any hours until November 2020, and then she was assigned significantly fewer hours than requested. HOPS Cohen testified that pre-March 2020 she generally worked eight to 12 days a month, but post-March 2020, she was not scheduled for any hours until August 2021 despite requesting five days a week starting in the summer of 2020. HOPS Potasznik testified that pre-March 2020 she usually worked two full days and two half-days a week, but post-March 2020 she did not get assigned any hours until October 2020 despite requesting them for prior months.

that I will be on the schedule the following month" and if I raise issues "it may be at my peril with regard to hours." (Tr. 78)

Case Assignments

Pre- and Post-March 2020, case respondents receive summonses that have start times as early as 8:00 a.m. and as late as 1:30 p.m. However, cases are not always heard at the scheduled start time.

Pre-March 2020, after respondents checked in at the Clerk's office, their case file would be sent to "the Bridge," a room that connects the respondents' waiting room with the HOPS offices. HOPS started their workday by signing in with CityTime, checking-in with their managers, and getting their computers up and running. Then they would either pick up a case file from the Bridge or be handed a case file from a supervisor.[10] HOPS had the discretion to review the case file for a few minutes prior to calling the respondent and starting the hearing. If a HOPS had a question about something in a file, they might also ask a supervisor or a colleague before starting the hearing. Similarly, once a hearing concluded, HOPS could take notes, ask questions, and organize the evidence before requesting another case file from the Bridge. HOPS' caseloads varied by office and by day. On lighter days, the last case was generally assigned for hearing by around 2:00 p.m., and on busier days the last case might be assigned after 4:00 p.m.[11]

[10] Paper case files generally contained copies of the summonses unless the case was in ATAS. Senior Managing Attorney Rasso testified that HOPS would come up to the Bridge, see which types of cases were available, and then choose their cases.

[11] HOPS Feldmesser testified that he usually heard his last case around 1:00 or 1:30 p.m., he would take a lunch break, and then he would generally finish writing his decisions within 30 minutes of his scheduled departure around 5:00 p.m.

Post-March 2020, HOPS monthly work schedules were made by their assigned borough office, but daily case assignments were not and their discretion in selecting cases was eliminated. Instead, multiple HOPS testified that early in the morning they would get an email or call from their manager asking them to confirm their start time and their preferred lunch time, if any. At their scheduled start time, HOPS are added to a central HOPS' availability list ("Availability List") and are then assigned any type of case from any office.

On the day of the hearing, the respondent is given a phone number and conference code or pin number, calls the phone number, is prompted to enter some information and is then connected to a virtual waiting room and added to the queue of hearings to be assigned, which is called the Dashboard.[12] The Dashboard is operated by managing attorneys, deputy managing attorneys, and some staff attorneys from all of the boroughs. The Dashboard manager for the day typically takes the first case in the queue and assigns it to the first HOPS on the Availability List. That HOPS gets an email and/or phone call with the pertinent information for that case.

Some HOPS have the system set so that when they are assigned a case, their phone rings, they answer, enter their pin, and the respondent is connected to the call. Other HOPS chose to get the assignment by email and then call into the system. HOPS were instructed to begin their hearings as soon as their phone rang or they received the assignment email.[13] As a result, HOPS

[12] At some point in 2021, respondents were given an option to get a call-back when a HOPS was assigned to their case and ready to begin the hearing instead of having to remain on the line until the HOPS commenced the hearing.

[13] An email dated November 19, 2020, from Managing Attorney Tomlinson to several HOPS provided that "[y]ou must call into Court Call as soon as you are assigned a hearing. After connecting with the respondent, you can place respondent on hold and call or email [supervisors] with any questions you have regarding the call." (Union Ex. AA) Similarly, Assistant Commissioner Schwecke sent an email on April 13, 2021, reminding HOPS to get on the phone with respondents as soon as they are assigned a hearing. HOPS Feldmesser testified that, on

testified that they did not have time to prepare for a case before initiating the hearing. Instead, they might ask the respondents to wait and/or review documents during the hearing. HOPS Etengoff testified that there were times that respondents had been waiting for over an hour so it "did not seem fair or really practical to say to them you got to wait another 15 minutes while I look over your case . . . it was a lot of pressure to hear the cases right away." (Tr. 196-97) In addition, HOPS complained that they had difficulties retrieving the case documents remotely. Moreover, several HOPS testified that holding hearings strictly with audio is more challenging than in-person because there is background noise, people talking over each other, and there are no visual cues such as facial expressions, gestures, or even a clear way to ensure correct identification of voices.

Similarly, HOPS testified that the new process does not provide them with time between hearings. Once a HOPS hangs up the phone at the conclusion of a hearing, the Dashboard manager is notified that the HOPS is available for another case. Multiple HOPS testified that they are assigned the next case almost immediately so they don't have time to take notes about the last case or write up decisions. HOPS Potasznik testified that the new hearing process was "extremely stressful" because "the hearings were just one after the other after the other which was not the case prior. . . . there was no time generally to ever write up during the time of hearing because there were hearings until the end of the day and sometimes beyond the end of the day." (Tr. 472, 481) HOPS' caseloads varied by HOPS and by day, but generally they heard cases much later in the day post-March 2020. Moreover, post-March 2020, HOPS were expected to email their supervisors in advance of stopping work for the day and to submit case reports so that they weren't assigned any additional cases and their supervisors knew the status of all the HOPS cases.

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occasion, when he has taken approximately ten minutes to pull the necessary documents and review them before calling in, he has received a call from Tomlinson asking him to get on the call as soon as possible and prepare while on the call.

Caseload

The evidence shows that the number of cases heard daily varied among HOPS and among borough offices both before and after March 2020. Generally, pre-March 2020, HOPS heard anywhere from eight to 15 cases per day. Post-March 2020, they heard anywhere from 12 to 24 cases per day.

Pre-March 2020, different types of cases were heard on different days of the week and different types of cases were heard in different borough offices. For example, DOB cases were heard one day, and Fire Department cases were heard on another day. Since most HOPS worked the same days each week in the same offices, they developed an expertise in certain types of cases.[14]

Post-March 2020, case types were no longer unique to certain borough offices or certain days of the week. As described earlier, each day there was one list of all cases citywide and one list of all available HOPS citywide. Thus, all HOPS "[m]ust be comfortable adjudicating all types of OATH cases." (Union Ex. L, M, and WW) As a result, HOPS testified to a feeling of "being on an assembly line doing cases that I was not familiar with in areas that I wasn't familiar with, and being told that we really just had to get the numbers out." (Tr. 725)

Writing Time

Pre-March 2020, typically HOPS had time to write their decisions on days they were originally scheduled to work, either between or after hearings or on other scheduled days. HOPS

[14] There was some evidence that OATH's desire to have HOPS be able to hear cases of all types was communicated to HOPS pre-March 2020. However, there was no evidence that any steps were taken to implement this by modifying the case scheduling process pre-March 2020.

were not uniformly required to write up all cases on the same day of their hearings.[15] Indeed, some HOPS testified that they regularly had scheduled days that were dedicated to writing decisions. However, even on dedicated writing days, HOPS would occasionally hear a few cases if it was a busy hearing day. HOPS would also occasionally ask permission to come to the office to write on days they weren't originally scheduled to work. HOPS were paid for the time they spent writing decisions as long as they got approval and properly recorded their time.

Post-March 2020, emails from OATH supervisors instructed HOPS that they must be able to write up all their cases on the same day as their hearings.[16] HOPS testified that they were unable to complete decisions during the same workday as the hearing due to several factors including: hearing more cases, having less time between hearings and less dedicated uninterrupted writing time, and being assigned to hear cases late in the workday.[17] Instead, they often had to finish

[15] HOPS Feldmesser testified that, in the Brooklyn office, they were generally expected to finish writing decisions on the same day as the hearing, while HOPS Etengoff testified that, in the Queens office, there was a "push" to finish writing decisions by the end of the month. (Tr. 251) Assistant Commissioner Schwecke in the Bronx office and Managing Attorney Rasso in the Manhattan office testified that HOPS would sometimes ask for an extra day at the end of the month to write up cases if they had a backlog.

[16] The requirement that HOPS complete decisions on the same day as the hearings seems like it was not uniformly enforced because some supervisors and/or HOPS interpreted it to mean that they had to write up all cases before the start of their next scheduled workday. Additionally, as time went on, the amount of time allowed to write up cases seems to have been extended to within ten days or longer.

[17] HOPS Cohen spent four to six hours a week and HOPS Feldmesser spent approximately four hours a week writing on unscheduled time. HOPS Goichman testified that when he first started working remotely, he regularly worked late, sometimes until 2:00 a.m., to finish writing decisions. For instance, on August 19, 2021, HOPS Goichman emailed his supervisors and received permission to write after hours because he had 19 cases to write up that night, which would take him between six to ten hours. He testified that he never refused to finish writing a decision in the allotted time because he was afraid of not getting scheduled for future hours. Indeed, Managing Attorney Anik emailed HOPS Etengoff on July 29, 2021, advising her to finish a decision the next morning because "if you don't, you know that Amy [Slifka] & Kelly [Corso] will tell Carmena

writing decisions late at night or on days they weren't originally scheduled to work.[18] Assistant Commissioner Schwecke confirmed that "hearings have always been a priority . . . . So if we have a lot of hearings scheduled, the hearings have to be done before you can write up." (Tr. 1214)

While HOPS Dodell testified that there was a cap on the number of additional unscheduled writing hours for which a HOPS would be paid, the record indicates that some HOPS were paid for writing on unscheduled time as long as they got approval in advance from their supervisor and recorded their time in CityTime.[19] Indeed, Managing Attorney Anik advised HOPS Etengoff to "sign into CityTime so that you'll earn a little extra cash." (Union Ex. W) HOPS Feldmesser was also paid for any hours he spent writing decisions in excess of his regularly scheduled hours.

[Schwecke] and me not to schedule you in the future." (Union Ex. W) The email provided that because "it's the end of the month for OATH on Friday, as well as the fact that you are not scheduled in August, Amy & Kelly are expecting that you complete the decision early on Friday, so that Joanne or Kelly will get the opportunity to review it and, hopefully, this time approve the decision." (Union Ex. W)

[18] Most HOPS were required to request permission to write decisions on days when they weren't originally scheduled to work. Multiple HOPS testified that they did not want to work additional hours on unscheduled days. Managing Attorneys Rasso and Tomlinson testified that HOPS are not required to work on unscheduled days. However, several HOPS requested time to finish writing decisions during future scheduled hours and instead were told that they could have additional hours on unscheduled days. For example, on October 30, 2020, HOPS Dodell emailed her supervisors that she had 12 hearings to write up from that morning and that she was not scheduled to work for approximately two weeks. She requested permission to use the rest of the day to write or the assignment of easier cases. In response, Assistant Commissioner Corso responded that Dodell might need to continue doing hearings because "everyone has lots of write up" and suggested that she ask her manager if she could "sign in on a day [she was] not scheduled to write." (Union Ex. PPP)

[19] HOPS Dodell was never told in writing that she could not be compensated for decisions she wrote on her own time. She was "fairly certain we were told we were limited to just two hours on a work day and four hours on a day that we were not scheduled to work," which she understood to mean that she would not get paid for additional hours. (Tr. 711) Accordingly, she did not enter the time she worked beyond two hours into CityTime. She testified that she did not know if her supervisor was aware that she was not entering all of her time.

Start Time

Pre-March 2020, HOPS generally arrived at work between 8:00 a.m. and 10:00 a.m. Their start times varied based on a number of factors including work location and personal preference. Some HOPS came in earlier than usual on days that DOB cases were scheduled. Assistant Commissioner Schwecke testified that HOPS in the Bronx could start work as late as 9:30 to 10:00 a.m., while most HOPS in Queens started work by 8:30 a.m. HOPS in Brooklyn could start work anytime between 8:00 a.m. and 9:00 a.m. In Manhattan, Managing Attorney Rasso testified that, hearing officers started hearing cases "[s]hortly after 8:00. We would have hearing officers come in prior to 8:00 and between 8:00 and 8:30" a.m. (Tr. 1268) While Manhattan HOPS testified to starting between 8:00 a.m. and 10:00 a.m.

Post-March 2020, HOPS in the Bronx and Queens were instructed to start hearings at either 8:00 a.m. or 8:30 a.m.[20] Schwecke testified that "8:30 was when most cases were assigned, so [managers] needed judges to be available at that time."[21] (Tr. 1218)

Work Hours

As noted earlier, pre-March 2020, HOPS' had input into their scheduled work hours. As a result, the hours and schedules they worked varied. According to Assistant Commissioner Schwecke, Queens HOPS were not required to work a minimum of two days per week for every week they were scheduled. She testified that while there were very few HOPS who worked less

[20] Brooklyn Managing Attorney Therese Tomlinson testified that HOPS in the Brooklyn Office could still start anytime between 8:00 a.m. and 9:00 a.m. However, Brooklyn HOPS Feldmesser testified that he planned to start his first remote hearing day at 9:00 a.m., like he had pre-March 2020, but he got a call from Tomlinson that morning informing him that he was expected to start work at 8:30 a.m.

[21] Schwecke testified that post-March 2020 some HOPS were permitted to start after 8:30 a.m. However, there was no written policy distributed to HOPS reflecting this.

than two days a week, she was not aware of any pre-March 2020 availability requests stating that HOPS must work a minimum of two days per week. HOPS Etengoff confirmed that, pre-March 2020, HOPS in Queens were not required to work a minimum of two days per week for every week they were scheduled. Post-March 2020, Queens Managing Attorney Anik's November 5, 2020, and March 8, 2021 emails announced a requirement to work a minimum of two days per week.

Moreover, the record reflects that pre-March 2020, HOPS in certain locations worked half-days. This included the Manhattan office Appeals division.[22] In addition, Manhattan HOPS Potasznik regularly worked four-to-five-hour days pre-March 2020. The record contains very little evidence regarding whether HOPS in other offices were allowed to work half-days pre-March 2020.[23] However, Schwecke testified that in the Bronx and Queens, half-days were only allowed for emergencies and doctors' appointments, etc. And HOPS Feldmesser testified that HOPS in the Brooklyn office were required to work a seven- or eight-hour day pre-March 2020.

Post-March 2020, HOPS in the Manhattan office Appeals division could still work half-days. However, Queens Managing Attorney Anik's November 5, 2020, and March 8, 2021 emails provided that "no half days are allowed." (Union Exs. M, WW) (emphasis removed). It is not clear from the record if anything happened regarding half-days at other work locations.[24]

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[22] The Appeals division only adjudicates appeals, which are written on the papers without a live hearing. Because of the nature of their work, HOPS in this unit did not have set work hours.

[23] HOPS Goichman, assigned to the Bronx and Queens, and HOPS Etengoff, assigned to Queens, stated that they generally understood that pre-March 2020 half-days were allowed at those locations, but they did not work half-days pre-March 2020.

[24] For example, it is not clear if HOPS Potasznick requested and/or was denied the opportunity to work half-days post-March 2020.

Lunch and Breaks

Pre-March 2020, there was no written rule governing the length of HOPS' lunch breaks and the practice varied. Several witnesses testified that HOPS in the Bronx, Queens, and Brooklyn offices were allowed to take up to an hour for lunch. However, Manhattan Senior Managing Attorney Rasso testified that Manhattan HOPS were only allowed to take up to 30 minutes.

Additionally, pre-March 2020, there was no uniform written requirement that all HOPS notify their supervisors before taking a lunch break and practices seemed to vary by office and possibly even by individual HOPS.[25] Moreover, pre-March 2020, HOPS were allowed to take short breaks throughout the day and did not need to inform their supervisors or request permission.

Post-March 2020, HOPS in the Bronx and Queens were told they were limited to 30 minutes for lunch. For example, in a June 3, 2021, email, Anik told Queens HOPS Etengoff that "[r]emote hearing officers only get a half hour for lunch." (Union Ex. O) However, Brooklyn Managing Attorney Tomlinson testified that HOPS can still take an hour for lunch. She testified that "I've not sent out a notice to anyone restricting their break time, nor have I seen any."[26] (Tr.

[25] For example, Brooklyn Managing Attorney Tomlinson testified that HOPS in Brooklyn would notify her before taking a lunch break so that she did not give them the next case and she could manage the number of HOPS that were unavailable to hear cases at one time. There were times when she asked a HOPS if they could wait a few minutes before taking lunch because there were several HOPS already on lunch. Brooklyn HOPS Feldmesser confirmed that he would notify his supervisor in advance of leaving for lunch and every once in a while, the supervisor would ask that he wait for a few HOPS to come back before he left for lunch. Assistant Commissioner Schwecke testified that she asked Queens HOPS to notify her before taking a lunch break, but that HOPS did not always do so. HOPS Goichman, who worked in the Bronx and Queens, testified that each morning he would tell his supervisor when he planned to take lunch. HOPS Dodell, who worked in the Bronx, testified that she didn't have to notify her supervisor before taking lunch.

[26] Brooklyn HOPS Feldmesser testified that post-March 2020 he never took an hour for lunch, but he acknowledged that it wasn't clear whether he was allowed to take a full hour because no specific protocols were provided.

1461) Additionally, post-March 2020, HOPS are expected to notify their supervisors in advance of stepping away from their workstation for longer breaks including lunch.

Moreover, HOPS testified that post-March 2020 there was almost no time in their schedules to take breaks. HOPS testified that while there was no express prohibition on breaks, assignments to hear cases one right after the other made it difficult. One HOPS testified that she brings her phone to the bathroom out of fear that it will ring. HOPS Goichman testified that hearing cases until as late as 5:00 p.m. without a break and then having to finish writing every case before the next day was "maddening," "tough," "burdensome," and "horrible." (Tr. 366, 414, 417)

Equipment

Pre-March 2020, HOPS had access to City computers, printers, phones, and other supplies at their assigned OATH office. The computers were maintained and updated by the City. HOPS were not required to purchase any equipment or office supplies to perform their work.

Post-March 2020, OATH specified via email that HOPS were required to work remotely and were required to have access to a computer and telephone. It is undisputed that HOPS were not issued any equipment by OATH, were required to use their own furniture, supplies, and equipment, including computers, and were not compensated for purchasing any of these items.[27] Several HOPS testified that they purchased computers and/or software, monitors, headphones, desk chairs, printers, and ink. A few HOPS, including Weingarten, told management that they would not be able to work remotely because they did not have the right equipment.

Several HOPS testified that they encountered challenges installing and updating software on their personal computers. Additionally, multiple HOPS testified that they were not

[27] Assistant Commissioner Schulman testified that while he was not reimbursed for any expenses that he incurred in order to work remotely, he saved money on commuting, food, and clothing.

compensated for the hours they spent setting up the equipment and software necessary to hold hearings remotely. HOPS Leader sent an email on August 1, 2020 to multiple OATH employees, including Assistant Commissioner Schwecke and Managing Attorney Tucker, expressing frustration with "spending unpaid time" trying to access ATAS from her personal equipment and asked for assistance. (Union Ex. ZZ) In the summer of 2021, HOPS Morrick and Greenberg had to purchase and set up new computers when an unannounced software update rendered their old computers unusable. They weren't reimbursed for the cost of the new computers, the time it took to set them up, or for the scheduled hours they were unable to work until their new computers were up and running.

UFT Special Representative Ilene Weinerman testified that HOPS working remotely now had to safeguard information on personal equipment and potentially around family members. A bargaining unit member forwarded her an April 21, 2020, email with the subject "Proper Safeguard of Electronically Stored Information on Personal Devices," which cautioned that remote work creates information that may be subject to discovery and FOIL and that personal devices might be subject to search. (Union Ex. JJJJ) One HOPS testified that he had to install several programs on his personal computer that made it more vulnerable to viruses.[28]

Training

Starting around 2016, OATH began a formal one-to-two-week paid training program for newly hired HOPS that included substantive law classes in different areas, such as DOS, TLC, DCWP, and DOB cases. Depending on when they were hired, some HOPS were also trained on using ATAS. Additionally, pre-March 2020, some offices held regular staff meetings at which

[28] Weinerman testified that HOPS working remotely also faced wear and tear on their personal equipment.

developments in the law and penalties were discussed on work time.[29] Additionally, supervisors would send emails to HOPS with digests of new law, updates, and relevant cases ("Legal Memos"). HOPS also had access to the Legal Memos in an electronic law reference folder.

Post-March 2020, HOPS continued to receive Legal Memos from their supervisors, have access to the electronic law reference folder, and could ask their supervisors questions. However, there are no regular staff meetings, and HOPS Etengoff testified that there is no longer time to review any instructional emails during scheduled work hours.

Post-March 2020, there is no dispute that OATH did not require formal training on ATAS. Instead, supervisors advised HOPS that PowerPoints were available to explain how to use ATAS. Senior Managing Attorney Rasso and Assistant Commissioners Schwecke and Schulman testified that supervisors went through ATAS tutorials or troubleshooting sessions with any HOPS that requested assistance. There was no testimony that HOPS sought or were paid for additional time they spent reviewing PowerPoints, troubleshooting or familiarizing themselves with ATAS outside their regularly scheduled work hours.[30] However, to the extent they did this work during scheduled work hours, it was compensated.

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[29] HOPS Etengoff testified that the staff meetings were held weekly. HOPS Goichman and Assistant Commissions Schwecke testified that the staff meetings were held around once a month, more frequently if something came up, and that they would be held at different times during the day so that more HOPS could attend, although not all did.

[30] Schwecke testified that HOPS were asked to review the ATAS PowerPoints before they were scheduled for work hours and, as far as she knew, they were not paid for the time they spent reviewing the PowerPoints. Schulman testified that HOPS in the Appeals division were given ATAS training during work hours.

Bargaining Demands and Information Requests

On April 15, 2020, the Union demanded bargaining over the health and safety concerns of members raised by bargaining unit members reports concerning an imminent return to the office.[31] In response, the Acting General Counsel for OATH stated that the Union's request would be "addressed at the appropriate time," indicating that "DCAS and DOHMH have not yet set forth a plan for the safe reconstitution of the office." (Union Ex. C) The General Counsel noted that when OATH receives the recommendations from those agencies, "these matters will be discussed with the union in the ordinary course and in a manner consistent with the terms of the contract." *Id.* The Union demanded bargaining again on May 2, 2020. The General Counsel responded on May 8, 2020, stating that it was premature to discuss the implementation of any safety procedures and protocols as the agency was still waiting for recommendations from DCAS, DOHMH and the Law Department and that it would "discuss their recommended policies with staff before implementation." (Union Ex. E)

On August 18, 2020, Special Representative Weinerman reiterated the Union's bargaining request and submitted a request for information. The information requested was:

1. All documentation, including drafts, notes, working documents, emails, or any other writings in any medium ("documents") relating to the safety measures and protocols which New York City and OATH (together "OATH") are reviewing or intend to implement relating to the "reconstitution" of the workforce when OATH offices are reopened.

2. Provide all documentation referred by OATH in its correspondence dated April 13, 2020 regarding the "applicable safety measures recommended by DCAS and DOHMH for the reconstituting of a work force, such as regular disinfection, staggered work hours, and teleworking" and any subsequent documents received concerning same or providing details concerning such issues.

[31] In March 2020, Weinerman was told that in person hearings would be rescheduled to July 2020. Thereafter, HOPS received email communications periodically from the City and/or OATH extending the date for a return to in-person work.

3. Provide all schedules submitted by Hearing Officers Per Session for remote work for the period of March 23, 2020 through June 2020. Provide copies of all communications by OATH with Hearing Officers Per Session during this timeframe regarding schedules and the method employed by OATH to select which Hearing Officers were contacted to perform remote work.

4. Provide a copy of "agency wide bulletin soliciting input, concerns and questions" regarding the "reconstitution" process referred to by Olga Statz, General Counsel, OATH, in her letter dated May 8, 2020 including the distribution list for the same.

5. Provide copies of all documents issued by OATH to Hearing Officers Per Session, or available to Hearing Officers Per Session by other sources (and name the source) regarding reconstitution of the workforce, including but not limited to any documents concerning safety and health protocols, reopening of offices, FAQs, guidelines, remote work, equipment required or provided, hours to be worked, scheduling procedures.

6. Provide all documents regarding remote work for Hearing Officers Per Session, including documentation related to the platform to be used for remote hearings, dates such platform was to be in operation, training to be provided, type of equipment required to utilize the hearing platform including computer equipment or internet resources, issuance of any equipment to Hearing Officers Per Session for remote work and reimbursement for equipment and supplies.

7. Provide all documents issued to Hearing Officers Per Session notifying them of institution of remote work and its requirements, including technical aspects as well as information regarding submission of schedules for such work.

8. Provide a listing of all Hearing Officers Per Session scheduled for remote hearings during the period of May 23, 2020 to the present, by pay period, with all hours worked each day by each Hearing Officer Per Session during each such pay period.

9. Provide schedules submitted by Hearing Officers Per Session for remote hearings during the Period of May 23, 2020 to the present whether or not such individual was scheduled for remote hearings or work. Please describe the "agency needs" taken into account in scheduling the Hearing Officers Per Session.

10. Provide documentation regarding the number of cases to be heard by Hearing Officers Per Session from March 23, 2020 [to] the present broken down by pay period.

11. Provide a listing of any Hearing Officers Per Session who are deemed to be essential employees or who have been requested to be physically present at a worksite for OATH.

12. Provide any documentation relating to leave protection for employees who are diagnosed with COVID-19 or required to care for a family member with COVID-19, or quarantined

> for potential exposure to COVID-19, who cannot appear for scheduled sessions, whether remote or in-person, as a result.

(Union Ex. G)

On August 27, 2020, the General Counsel responded that the Union "has no right to bargain on these issues under either the agreement between the union and this agency or under the Collective Bargaining Law. The former makes no specific grant, and the latter allows bargaining over the practical impact of policies adopted, not respecting the policies themselves." (Union Ex. H) Accordingly, OATH "declined" the Union's demand to bargain. (*Id*.) There is no evidence in the record that the City subsequently agreed to bargain with the Union over these matters. The General Counsel further informed Weinerman that much of the information sought by the Union was provided to it in the aftermath of a labor-management meeting held on July 2, 2020. Weinerman testified no documents were exchanged at the July 2, 2020, meeting, although OATH did respond to some questions.

On September 21, 2020, the Union again demanded bargaining and reiterated its request for information described in its August letter. The Union "strenuously disagree[d] that certain decisions made by OATH are not within the ambit of legally required bargaining. Moreover, absent production of relevant documentation requested by the [Union] it is difficult to determine whether certain decisions made are subject to bargaining." (Union Ex. I) The Union asserted that it is "without challenge that impact bargaining is required under the present circumstances" and demanded that OATH bargain "immediately, at a minimum over impact." (*Id*.) There is no evidence of any response from OATH in the record.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the City violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain over changes it made to HOPS' working conditions following the shift to remote work due to the COVID-19 pandemic.[32] Specifically, it claims that the City violated the NYCCBL by unilaterally requiring HOPS to continue to work remotely after other OATH employees were permitted to return to their offices; not providing or paying for all necessary equipment; failing to negotiate regarding changes to the number of work hours per day and week; requiring HOPS to routinely work beyond their scheduled hours to complete their duties; altering the scheduling practice; reducing lunch and other breaks; eliminating training during paid time; and not adequately responding to the Union's information requests.

The Union does not contest the City's authority to unilaterally "determine the methods means and personnel by which government operations are to be conducted," including initially closing its offices and assigning OATH staff to remote work as a "stopgap measure."[33] (Union Br., at 29 (quoting NYCCBL § 12-307(b)) However, the Union argues that the City was obligated to engage in bargaining regarding this change and its effects "within a reasonable time after its institution." (*Id*.)

Regarding the shift to remote work, the Union asserts that while the Board has found it a managerial prerogative to assign employees to different work locations, including in emergencies, the alternative site must be "authorized." (Union Br., at 30) It distinguishes prior Board cases,

[32] After the hearing, the Union withdrew an allegation of direct dealing contained in its petition.

[33] According to the Union, OATH never directly notified the Union in writing of the shift to remote work.

noting that the locations at issue there were "under the jurisdiction of, or legally accessible to, the Employer." (*Id.*) In this instance, the City has unilaterally implemented a non-City operated work location – the employee's home – without legal authority or through bargaining, and for the employer's benefit. At least since May 2021, managers, supervisors, and staff attorneys have been permitted to return to the office to conduct telephonic hearings, but HOPS are still required to conduct hearings remotely. Therefore, the Union argues that on balance an employee's interest in maintaining the "integrity, privacy and legal authority over their home far outweighs an employer's desire to unilaterally appropriate that space to carry out its functions." (*Id*. at 31)

Further, the Union argues that the "instant case is not about the exercise of a managerial prerogative to determine what technology should be used, but the failure of Respondents to provide the equipment necessary for the HOPS to perform their jobs." (Union Rep., at 45). The City's failure to provide the necessary equipment or compensate HOPS for the use of their personal equipment and supplies impacts wages and is an undisputed change to a mandatory subject of bargaining. According to the Union, the City's implication that the HOPS' costs for equipment are offset by the reduction in commuting costs is "totally irrelevant and unsupported." (Union Br., at 32)

The Union argues that the City unilaterally required HOPS to work a minimum of two days per week and eliminated half-days. In addition, it asserts that the City's post-March 2020 instructions regarding decision writing caused an increase in the number of total hours per day and days per week that HOPS were required to work beyond their regular schedules. Post-March 2020, hearings did not end until close of business some days, but HOPS were told that they "must be able to write up all cases on the same day of their hearings." (Union Br., at 34) In addition, the Union contends that HOPS were required to work on unscheduled days to finish writing their

decisions. The Union argues that these excessive hours violated established past practice and eliminated the flexibility that HOPS enjoyed. While the City claims that it permitted some HOPS to write up their cases on a scheduled day post-March 2020, this was a rare exception to the rule.

According to the Union, there is no dispute that the City unilaterally reduced the duration of the lunch break from one hour to one-half hour for HOPS assigned to the Brooklyn, Bronx, and Queens offices and altered the past practice regarding taking breaks. The Union asserts that employee breaks are a mandatory subject of bargaining and that, while the City presented evidence that breaks were sometimes permitted post-March 2020, it did not reference any policy on the subject, and the documents it presented were "suspiciously issued" after the petition was filed. (Union Br., at 38)

As to the changed method of scheduling work, the Union argues that OATH altered HOPS' work hours, a mandatory subject of bargaining. According to the Union, from at least March through May 2020, OATH selected whichever HOPS it desired and left the majority of HOPS without any work hours. It argues that, even after work schedules were circulated in June 2020, OATH routinely scheduled hours unevenly, giving some HOPS no hours and others more than they could reasonably handle. Further, the Union maintains that post-March 2020, work previously assigned to HOPS was regularly assigned to supervisors outside the bargaining unit and that the City sought to hire new HOPS while reducing or eliminating the hours of many existing HOPS.[34]

According to the Union, the unilateral elimination of training during work time violates the NYCCBL because training is a mandatory subject of bargaining when required for continued

[34] The Union asserts that "[a]lthough lower-level supervisors previously did some hearings during the day, the number of supervisors doing cases increased significantly post-COVID." (Union Br., at 25, footnote 27)

employment or "there exists a practice of the employer's supporting employee participation in such training or education." (Union Br., at 39) (quoting *DC 37*, 69 OCB 20 (BCB 2002)) It argues that the City acknowledged that, as a requirement of continued employment, post-March 2020 all HOPS had to use the ATAS computer platform, which was previously used in only approximately 10% of cases, and adjudicate all case types, which is contrary to the practice pre-March 2020.

Even assuming that certain identified issues are not mandatory subjects of bargaining, the Union argues that it has demonstrated a practical impact on HOPS, which gives rise to a duty to bargain. In support of a workload impact, it asserts that the record is "replete with unchallenged testimony of HOPS working onerous hours, well beyond the scheduled day, in order to complete writing decisions." (Union Br., at 41) The Union maintains that these oppressive hours were the result of a doubling of HOPS' cases per day and the hearings ending closer to 5:00 p.m. instead of 2:00 p.m.

In addition, the Union argues that the unilateral changes in working conditions resulted in a reduction in force. According to the Union, it "defies logic" to take the position that a failure to provide working hours to an employee for months or years is not a layoff, which gives rise to a *per se* practical impact that requires immediate bargaining. (Union Br., at 42) Moreover, some HOPS were unable to work remotely due to lack of adequate remote workspace, equipment, and training.

Finally, the Union asserts that the City violated NYCCBL § 12-306(c)(4) when it refused to provide information requested by Special Representative Weinerman. For example, the City refused to provide any information regarding which HOPS were working or their schedules. The Union maintains that the requested information is relevant to claims within the scope of bargaining and regarding practical impact.

As a remedy, the Union seeks an order directing the City to cease and desist its illegal conduct and to make affected HOPS whole with back pay, pension credit, interest, and compensation for all financial harm and expenditures suffered since March 23, 2020, as a result of the City's unlawful conduct. It further requests that the City be ordered to bargain over the mandatory subjects, engage in practical impact bargaining, respond to the Union's information requests, and pay attorneys' fees, costs, and disbursements of this proceeding.

City's Position

The City argues that the petition should be dismissed in its entirety because the evidence does not support the Union's claims that OATH made unilateral changes to mandatory subjects of bargaining. Instead, it asserts that OATH properly exercised its management prerogative with regard to such changes. The City contends that the Union also failed to establish that remote hearings created a practical impact that mandates bargaining, or that OATH refused to furnish information to the Union.

The City argues that OATH's decision to shift HOPS to a remote platform to conduct hearings falls within its managerial right under NYCCBL § 12-307(b) to take all necessary actions to carry out its mission in emergencies and that "any new work rules that flowed out of this decision to work remotely fall squarely within" that statutory right.[35] (City Br., at 46)

Specifically, the City argues that nothing about its scheduling practice changed post-March 2020. Moreover, "special consideration" should be given to OATH's scheduling decisions during the first months of the COVID-19 pandemic. (City Br., at 47) It asserts that OATH always

[35] The City argues that its decision to use the ATAS and Court Call software systems falls within its managerial discretion regarding selection or use of equipment and is thus outside the scope of bargaining. Similarly, the City asserts that changes in the types of cases assigned to HOPS is a managerial prerogative that does not affect any mandatory subject of bargaining.

assigned cases to a combination of HOPS, managing attorneys, and staff attorneys. According to the City, the only scheduling change was that the number of cases assigned to any particular employee dropped when the pandemic began. However, the City maintains that OATH was acting within its managerial prerogative by selecting certain employees to work during these initial months and not scheduling more employees than necessary to complete the work at hand.

Further, the City argues that HOPS have never been guaranteed that their requests for hours would be granted. According to the City, there is no contractual language limiting OATH's right to determine staffing and manning levels, and the parties have agreed that HOPS are not guaranteed a minimum number of days or hours per week or month.[36] The City notes that PERB has "repeatedly rejected" the contention that an employer is obligated to create work for its employees and contends that this Board has held that there can be no minimum hour requirement for HOPS. (City Br., at 49)

The City maintains that HOPS have always been expected to be ready to begin work between 8:00 and 8:30 a.m., and that OATH continues to accommodate later start times "when needed." (City Br., at 52) To the extent that there was a change in work schedules, the City argues that a change to start times is not a mandatory subject of bargaining.

According to the City, OATH's directions that HOPS notify their supervisors when they are signing out, and taking breaks is not a new practice. Instead, it claims only the format of those notifications has changed. The City argues that the notifications are necessary so the Dashboard staff can more efficiently virtually assign cases to HOPS who are actually able to accept cases.

[36] Specifically, the City cites Article V, § 3 of the Agreement, which provides that "[t]he parties agree that the Agency has the discretion to schedule [HOPS] based on the needs of the Agency." (Pet., Ex. A)

Thus, requiring HOPS to notify their managers by email is a "mere adaptation[] to the new remote work environment." (City Br., at 54)

The City also asserts that training subjects are not a mandatory subject of bargaining.[37] It claims that HOPS have never received training on every topic they handle, and that, when confronted with an unfamiliar area of law, they use online resources and support from colleagues. Regarding the absence of regular training or instructional meetings, the City argues that they emailed HOPS the updates they would have received during those meetings and "fielded all calls from HOPS to answer their questions both as they wrote decisions and heard cases." (City Br., at 59-60)

The City argues that the Union has not established a practical impact merely by showing that there has been an increase in employees' duties. According to the City, HOPS are not responsible for significantly more cases per day than pre-March 2020. Therefore, the City contends that HOPS have not been subjected to an excessive or burdensome workload as defined by the Board.

The City denies that it violated NYCCBL § 12-306(c)(4) by refusing to respond to the Union's requests for information. It claims that much of the information requested is either now moot or has already been provided. The City describes the remaining information requests as demands for information regarding how OATH schedules HOPS and how it selects technology tools, both of which it claims are not mandatory subjects of bargaining.

[37] The City asserts that there has been no change to the provision of Continuing Legal Education ("CLE"), and that a 2015 Side Letter Agreement explicitly forbids HOPS from being compensated for CLE except when it is provided as part of a mandatory training by OATH.

DISCUSSION

NYCCBL § 12-306(a)(4) provides that it is 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." Under NYCCBL § 12-307(a), mandatory subjects of bargaining generally include wages, hours, working conditions, and any subject with a significant or material relationship to a condition of employment.[38] 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 negotiate is or relates to a mandatory subject of bargaining." *Doctors Council, L. 10MD, SEIU*, 9 OCB2d 2, at 10 (BCB 2016) (quoting *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014)) (quotation and internal editing marks omitted).

However, not every decision by a public employer that affects a term and condition of employment is a mandatory subject of bargaining. *See Local 1182, CWA*, 61 OCB 4, at 6 (BCB 1998). Rather, NYCCBL § 12-307(b) provides that:

> It is the right of the city. . . acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . .

[38] NYCCBL § 12-307(a) provides, in pertinent part:

> [P]ublic employers and certified or designated employee organizations 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 benefits), working conditions . . . .

> relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other 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.

Thus, NYCCBL § 12-307(b) "reserves to the City exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining, such as assigning and directing its employees, determining their duties during working hours, and allocating duties among its employees, unless the parties themselves limit that right in bargaining." *COBA*, 63 OCB 26, at 9-10 (BCB 1999) (*citing PBA*, 63 OCB 12 (BCB 1999)), *affd., Matter of Savage v. DeCosta*, Index No. 120860/1998 (Sup. Ct. N.Y. Co. Jan. 13, 1999) (Gangel-Jacob, J.); *Local 621, SEIU*, 51 OCB 34 (BCB 1993).[39]

Assignment to Remote Work

"The Board has long found assignments to work locations to be managerial prerogatives." *DC 37*, 6 OCB2d 14, at 21 (BCB 2013), *affd., Matter of City of New York and DCAS v. New York City Bd. of Collective Bargaining, et al.*, Index No. 451081/13 (Sup. Ct. N.Y. Co. Oct. 28, 2014) (Madden, J.) (finding "that instituting alternative work locations and including flexible and

[39] Although a scope of bargaining petition is the proper procedural mechanism through which to assert a claim of practical impact, the Board has exercised its discretion to consider scope claims as alleged in an improper practice petition. *See, e.g., Local 1182, CWA*, 5 OCB2d 41 (BCB 2012); *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15 (BCB 2012); *NYSNA*, 71 OCB 23 (BCB 2003); *SBA*, 41 OCB 56 (BCB 1988).

staggered hours in a City-wide emergency are managerial prerogatives") (citing *UFA*, 3 OCB2d 16, at 26 (BCB 2010) (finding assignment of firefighters to a steam pipe explosion at a location containing asbestos was a managerial prerogative)). PERB has also held that "[i]n general, the location(s) where an employer assigns an employee to perform his or her work duties is a nonmandatory subject of bargaining. The mere act of assigning an employee to perform duties at another employer's work location does not alter the employer-employee relationship." *Manhattan and Bronx Transit Operating Auth.*, 40 PERB ¶ 3023 (2007).

Our prior decisions concerning an employer's change to employee work locations concerned assignments from one location to another. This situation is slightly different as it involves a direction to work remotely. The Union does not dispute that the initial assignment of HOPS to temporary remote work due to the closing of OATH offices at the start of the COVID-19 pandemic was within the City's management rights pursuant to NYCCBL § 12-307(b). We agree. In other cases involving the City's actions during the COVID-19 pandemic, we have noted that NYCCBL § 12-307(b) explicitly states that "[i]t is the right of the [C]ity . . . [to] take all necessary actions to carry out its mission in emergencies." *See, e.g., UFA*, 16 OCB2d 7, at 13 (BCB 2023).

Here, the Union essentially argues that once OATH instructed other employees to return to the office, there was no longer an emergency requiring HOPS to work remotely. Therefore, at that time, the decision to continue to assign HOPS to conduct hearings remotely became a mandatory subject of bargaining, since it affected their terms and conditions of employment.

Working remotely is vastly different than reporting to an office. Whereas an employee has access to a defined workspace, equipment, and in-person support and supervision in an employer's facility, such things may not be available or easily accessible when working remotely. These

factors became immediately apparent at the start of the COVID-19 pandemic due to the widespread closure of corporate and government offices and instructions for employees to work remotely. Businesses and governments had to respond rapidly to modify their operations and ensure that employees had the means to perform work remotely. Many of these modifications were made possible with the use of modern technology that had not necessarily been used in offices, or if so, only occasionally. Employees, however, also had significant adjustments to make in terms of trying to find an adequate, comfortable space to work and locate equipment as well as learning new methods and technologies in order to perform their work.

We have not previously addressed whether the decision to require employees to work remotely is a mandatory subject of bargaining. However, remote work existed even prior to the COVID-19 pandemic and public sector employers and unions across the country have agreements governing remote work, telework, and hybrid schedules. Nevertheless, it is well established that whether parties negotiate a subject is not determinative of whether it is a mandatory subject of bargaining. *See UFA*, 43 OCB 4, at 15 (BCB 1989), *affd*., *Matter of Uniformed Firefighters Assn. v. Office of Collective Bargaining*, Index No. 12338/1989 (Sup. Ct. N.Y. Co. Oct. 30, 1989) (Santaella, J.), *affd*., 163 A.D.2d 251 (1st Dept. 1990); *see also City of Johnstown*, 25 PERB ¶ 3085, at 3173-76 (1992).

Our prior decisions finding the employer's right to determine work location were not all actions taken during an emergency but all of these cases were also premised on the rights enumerated in NYCCBL § 12-307(b). *See L. 371, SSEU,* 69 OCB 1, at 7 (BCB 2002) (agency creation of a new work location and transfer of employees to that new location was within management's right and was not a mandatory subject of bargaining); *UPOA*, 41 OCB 46, at 8-9 (BCB 1988) (an agency's transfer of multiple employees to new work locations fell within the

agency's management right to assign, reassign, and transfer employees as defined in NYCCBL § 12-307(b)); *Doctors Council*, 53 OCB 18, at 12 (BCB 1994) ("It is well settled that the right to assign, reassign and transfer employees falls within the scope of management rights defined in [NYCCBL] § 12-307b"); *Ass'n of Bldg Insp.*, 7 OCB 4 (BCB 1971). Specifically, our work location cases rely upon management's right to "maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted." NYCCBL § 12-307(b). Based on the particular circumstances and arguments before us, we do not find a basis upon which to distinguish an employer's ability to unilaterally assign employees to its facilities or to work in the field distinguishable from its decision to assign employees to work remotely. In either instance, the decision surrounding employee work location is essentially a determination of the methods and means of how the operation is conducted. Thus, we find that OATH's decision to have HOPS work remotely was and continues to be a managerial prerogative.[40] However, we note that, in reaching this conclusion, management is not precluded from bargaining issues related to remote work. *See SSEU*, 1 OCB 11, at 5 (BCB 1968) ("Management prerogatives, nevertheless, may constitute voluntary subjects of discussion").

In addition, as discussed below, there may be terms and conditions of employment and/or the impact of the decision to have employees work remotely that are mandatory subjects of bargaining.[41] *See generally*, *UPOA*, 41 OCB 46, at 8-9 (noting that "even though the right to

[40] Our conclusion is limited to OATH's instruction for HOPS to work remotely, which had no express limitation on location, such as a requirement to work only from the employee's primary residence.

[41] We note that no contractual limitations on the City's ability to reassign its employees have been raised. *Cf. UPOA*, 41 OCB 47, at 11 (BCB 1988).

assign and reassign employees, itself, is a non-mandatory subject of collective bargaining, the impact of decisions made in association with such right may be within the scope of bargaining").

Equipment

As noted above, NYCCBL § 12-307(b) reserves to the City the sole discretion to determine the "methods [and] means . . . by which government operations are to be conducted[,]" and to "exercise complete control and discretion over its organization and the technology of performing its work." Consequently, the Board has held that "decisions regarding the selection or use of equipment involve the City's discretion over the methods, means and technology of performing its work, and that to the extent a union's demands usurp that discretion, they infringe on the exercise of managerial prerogative and are rendered non-mandatory." *UFA, L. 94*, 13 OCB2d 9, at 39 n.26 (BCB 2020) (quoting *LEEBA*, 3 OCB2d 29, at 43-44 (BCB 2010)) (internal quotation marks omitted); *see also County of Nassau*, 41 PERB ¶ 4552 (ALJ 2008) (holding that the selection of equipment is a management prerogative) (citing *City of New Rochelle*, 10 PERB ¶ 3042 (1977)).

Here, the Union asserted that the City is required to bargain over the equipment that HOPS used while working remotely. The "issue of whether employees should pay for the equipment is a mandatory subject of bargaining . . . [t]hus, to the extent the Union's demands seek the provision of required equipment 'at no cost to each employee,' they are mandatory subjects of bargaining." *UFA*, 43 OCB 4, at 61-62 (citations omitted); *see also City of New Rochelle*, 10 PERB ¶ 3042, 3079 (union's demand that employees be provided with equipment so long as the equipment "is required" was a mandatory subject of bargaining because it was "an economic matter of whether the employees should be required to acquire and pay for the equipment they must use in the performance of their duties"). Accordingly, the issue of payment or reimbursement for equipment required for the assignment is a mandatory subject of bargaining. *See Local 1182, CWA*, 7 OCB2d

5, at 14 (holding that the NYPD's implementation of a new job requirement that employees purchase, at their own expense, a belt whistle holder and LED traffic wand, was a mandatory subject of bargaining); *UFA*, 43 OCB 4, at 61-62; *City of New Rochelle*, 10 PERB ¶ 3042.

It is undisputed that the City did not provide HOPS with any equipment to facilitate working remotely nor did it reimburse HOPS for any equipment they purchased for that purpose. Thus, we find that OATH violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain with the Union on the issue of payment and reimbursement for required equipment.[42] *See Local 1182, CWA*, 7 OCB2d 5, at 14.

Case Assignment Process

It is undisputed that, in March 2020, hearings went from being held in-person in OATH offices where HOPS and managers worked alongside each other to being held remotely using a new process for assigning cases. The Union does not dispute that the selection and use of ATAS and Court Call to assign and conduct hearings were within the City's management rights pursuant to NYCCBL § 12-307(b). However, the City's decision to use ATAS and Court Call to carry out its remote work caused several significant changes including HOPS' need to learn how to use

[42] In reaching this conclusion, we note that equipment is not limited to computers and telephones but may include internet service or anything else required to perform HOPS' job duties remotely. Further, other than equipment, additional costs to employees who are required to work remotely may be a mandatory subject of bargaining. For example, demands relating to employee comfort or costs incurred might be mandatory subjects of bargaining. *See e.g.*, *UFA*, 43 OCB 4, at 190 (demand for adequate ventilation found to be a mandatory subject of bargaining "related to the comfort of employees"); *City of Newburgh*, 16 PERB ¶ 4516 (ALJ), *affd*., 16 PERB ¶ 3030 (1983) (employer-provided meals); *Town of Haverstraw and Rockland County Patrolmen's Benevolent Assn. Inc.*, 11 PERB ¶ 3109 (1978), *affd sub nom*, *Town of Haverstraw v. Newman*, 75 A.D.2d 874 (2d Dept. 1980) (cost of cleaning and maintaining uniforms); *New York City Transit Auth.*, 22 PERB ¶ 6601 (1989) (toilet facilities in all work areas and allowing employees to visit off-site facilities in event that facilities on-site are inadequate).

ATAS, the requirement to hear all types of cases, and the process for taking breaks and starting and ending the workday.

The Union argued that the lack of appropriate training on ATAS and subjects covering all case types required bargaining. Generally, the Board has held that training is a non-mandatory subject of bargaining under NYCCBL § 12-307(b). Indeed, the Board has found that "the determination of the quantity and quality of training provided is a management prerogative." *UFA*, 71 OCB 19, at 11 (BCB 2003) (citations omitted); *see also PBA*, 73 OCB 12, at 18 (BCB 2004) (holding that the employer could "establish unilaterally the kind of training it will provide . . . in order to maintain the quality of service to be delivered to the public"), *affd.*, *Matter of Patrolmen's Benevolent Assn. v. New York City Bd. of Collective Bargaining*, Index No. 112687/2004 (Sup. Ct. N.Y. Co. Aug. 8, 2005) (Friedman, J.), *affd.*, 38 A.D.3d 482 (1st Dept 2007), *lv. denied*, 9 N.Y.3d 807 (2007); *Niagara Falls City Sch. Dist.*, 46 PERB ¶ 4597 (ALJ 2013) (holding that the employer had no duty to negotiate a change to the past practice of scheduling unit employees for in-house training because such matters were a managerial prerogative).

Post-March 2020, because cases were centrally assigned to HOPS working remotely, case types were no longer unique to particular OATH offices or days of the week and HOPS became responsible for adjudicating all case types. Additionally, regular staff meetings, where legal issues were sometimes discussed and Legal Memos issued, stopped around March 2020. In order to familiarize themselves with all the necessary case law, HOPS continued to receive Legal Memos,

had access to the electronic law reference folders, and could consult their supervisors on unfamiliar issues.[43]

With respect to ATAS, pre-March 2020, HOPS were not widely trained on the adjudication platform because it was only used for a minority of case types. Post-March 2020, there is no dispute that PowerPoints were made available to HOPS to explain the platform, and the evidence shows that supervisors provided technical assistance to HOPS as necessary on an individual basis. However, OATH did not require formal training on ATAS. Thus, we do not find that OATH's discontinuation of staff meetings and specialized trainings during which relevant legal developments were discussed with HOPS or its failure to provide formal training on ATAS were changes that required bargaining. *See UFA*, 71 OCB 19, at 11; *PBA*, 73 OCB 12, at 18. Therefore, we dismiss all claims related to training.[44]

[43] We note that while HOPS testified about the challenges of having to get up to speed on new or unfamiliar subject matter areas as cases were assigned, there was insufficient evidence to conclude that HOPS were unable to do so.

[44] The Union appears to rely upon *Local 2507, DC 37*, 69 OCB 20, at 5-6 (BCB 2002) for the proposition that training becomes a mandatory subject of bargaining when it relates to a new qualification for continued employment. In that case, the Board represented this factor as an exception to the rule that training is not a mandatory subject of bargaining. However, it had previously found no exceptions to the holding that training is not a mandatory subject of bargaining. Instead, it had found that in certain circumstances training procedures, not the quantity or quality of training, may be a mandatory subject of bargaining. *See NYSNA*, 11 OCB 2 (BCB 1973) (union's demand for tuition reimbursement found to be a mandatory subject of bargaining based on the fact that there was an industry/employer practice of fostering and encouraging continuing education and that there was a pay differential offered for completion of additional training); *UFA,* 37 OCB 43, at 15 (BCB 1986) (defining exceptions to rule that training procedures are not mandatory subjects of bargaining to include where new training is required "as a qualification for continued employment or for improvement in pay or work assignments."). To the extent any of our cases similarly misrepresent that there are exceptions to the rule that the decision to train or the quantity or quality of training is a mandatory subject of bargaining, we clarify that the Board has not found any exceptions to that holding.

Moreover, to the extent the Union is claiming that OATH "interfered with the established past practice allowing for [multiple, unscheduled breaks]," we do not find that there was a change that required bargaining. (Union Br., at 37) While the change in how hearings were assigned might have meant that HOPS had less flexibility and control over when they took breaks, the evidence establishes that they were still able to take breaks.[45]

However, the record demonstrates that post-March 2020, HOPS in the Bronx and Queens were no longer allowed to take an hour for lunch and instead were limited to 30 minutes.[46] The Board has found the duration of a meal break to be a mandatory subject of bargaining. *See Local 858, IBT*, 49 OCB 38, at 9, 12 (BCB 1992), *affd., Matter of New York City Off-Track Betting Corp. v. Bd. Of Collective Bargaining*, Index No. 45321/1992 (Sup. Ct. N.Y. Co. Sept. 26, 1993) (Shainswit, J.). (citing *Addison Cent. Sch. Dist.*, 13 PERB ¶ 3060 (1980), *Hammondsport Cent. Sch. Dist.*, 18 PERB ¶ 4647 (ALJ 1985)). Accordingly, we find that OATH made a unilateral change to the duration of the lunch break for HOPS in the Bronx and Queens offices without bargaining, in violation of NYCCBL 12-306(a)(1) and (4).

Work Schedules

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)) (stating that "management has the unilateral right to assign work in the way that it deems necessary to

[45] While there was evidence that the new process may have resulted in respondents having to wait on hold longer if HOPS took a break, there was no evidence that they were prohibited from doing so.

[46] We find no change in the duration of the lunch break for HOPS in the Manhattan office, who were always limited to 30 minutes. Additionally, there is insufficient evidence in the record to determine whether there was a change to the duration of the lunch break in the Brooklyn office.

maintain the efficiency of governmental operations"); *UFT*, 3 OCB2d 44, at 8 (BCB 2010) (finding that a requirement that employees work within certain hours of the day is a matter of scheduling, which is not a mandatory subject of bargaining); *LEEBA*, 3 OCB2d 29, at 45-46; *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). Likewise, it is the City's managerial right to determine staffing levels. *See LEEBA*, 3 OCB2d 29, at 45-46; *CIR*, 27 OCB 10, at 23 (BCB 1981). Therefore, the City may take unilateral action in these areas unless the parties themselves have limited that right in their collective bargaining agreement. *See UFA*, 77 OCB 39, at 14-15 (BCB 2006); *SSEU, L. 721*, 43 OCB 59, at 22 (BCB 1989). Here, HOPS have never been guaranteed hours of work or particular schedules. To the contrary, the Agreement provides that "the Agency has the discretion to schedule [HOPS] based on the needs of the Agency." (Pet., Ex. A)

It is undisputed that, shortly after OATH offices closed in March 2020, OATH suspended its process of having HOPS submit their availability to their supervisor for the upcoming month. Scheduling of HOPS resumed approximately three months later, in the summer of 2020.[47] After the monthly scheduling requests resumed, a few HOPS that regularly requested hours did not receive any hours for a period of several months and, in one case, the HOPS had not received any hours as of the close of the record.

To the extent Petitioner asserts that the City violated NYCCBL § 12-306(a)(4) by unilaterally changing staffing levels and work schedules, we dismiss such claims. Since HOPS did not work set schedules or hours pre-March 2020 and the Agreement acknowledges the

[47] We note that, at least in the first few months after March 2020, there was a significant decrease in the number of cases so there was less work to assign. The City asserts that it chose to assign the few cases it had to a combination of managing attorneys, fulltime staff attorneys, and a few HOPS who agreed to test the remote hearing system.

agency's discretion in scheduling HOPS, we find that OATH's actions with respect to the post-March 2020 scheduling of HOPS were not subject to bargaining.[48] Additionally, the evidence establishes that post-March 2020, OATH eliminated some of the flexibility that HOPS enjoyed in scheduling hours of work by requiring them to start their work day at specified times. We have held that the employer can determine the start time as long as it does not change the total number of hours employees work. *See UFOA*, 1 OCB2d 17, at 10 (BCB 2008) (while "the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total numbers of hours employees work per day or per week"); *see also UFT*, 3 OCB2d 44, at 8. Therefore, we do not find that OATH's decision to require HOPS to start their workdays at 8:00 a.m. or 8:30 a.m. violated its duty to bargain in good faith.

Work Hours

As a general matter, unlike schedules, work hours are a mandatory subject of bargaining. In *UFOA*, 1 OCB2d 17, we found that an alleged change to "the number of hours [employees] will be required to work in each day and week . . . and the number of appearances per week that will now be required" is a mandatory subject of bargaining. *Id*. at 10 In *UFT*, 3 OCB2d 44, we found "that the changes requiring that HOPs work at least five hours per day and at least twice per week

[48] The Union also argues that the scheduling changes resulted in a practical impact of *de facto* laying off HOPS. Specifically, it notes that several HOPS including Potasznik, Cohen, and Winter were without work for protracted periods even when the summonses increased, that for a period of time, supervisors were assigned a larger percentage of the work formerly split amongst supervisors, full-time staff attorneys, and HOPS and that new HOPS were hired while existing HOPS were not getting hours. However, it is undisputed that HOPS are hourly employees, and have no guaranteed work hours or regular work schedules. Thus, we cannot construe these circumstances to be a layoff. Moreover, there is no evidence that conducting the hearings was work exclusive to HOPS. *See DC 37, L. 983*, 15 OCB2d 42 (BCB 2022); *CWA, L. 1180*, 1 OCB2d 2 (BCB 2008); *IUOE, L. 15 & 14*, 77 OCB 2 (BCB 2006).

in any week worked relate to hours and therefore must be bargained." *Id*. at 9 (finding that the Environmental Control Board violated NYCCBL § 12-306(a)(4)).

Here, Queens Managing Attorney Anik's November 2020 and March 2021 emails provided that HOPS must work a minimum of two days per week for every week scheduled. Assistant Commissioner Schwecke and Queens HOPS Etengoff testified that, pre-March 2020, HOPS were not required to work a minimum of two days per week for every week they were scheduled, although Schwecke noted that most HOPS did work at least two days per week. Therefore, we find that OATH violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the number of days per week that HOPS in Queens must work in any week that they work.

However, with respect to whether HOPS were allowed to work half-days pre-March 2020, there is insufficient evidence to support a finding that there was a change. The record reflects that there was no change for HOPS in the Manhattan Appeals division who worked half-days pre-March 2020 and continued to do so after. As to HOPS who were assigned to the Bronx and Queens offices, the record does not establish that half-days were permitted pre-March 2020. We credit Assistant Commissioner Schwecke's testimony that, pre-March 2020, HOPS in the Bronx and Queens were not permitted to work half-days. HOPS Goichman, assigned to the Bronx and Queens, and HOPS Etengoff, assigned to Queens, stated that they generally understood that pre-March 2020 half-days were allowed at those locations, but they did not work half-days pre-March 2020. There was no direct evidence that other HOPS assigned at those two locations worked half-days.[49] Accordingly, there is insufficient evidence to conclude that post-March 2020 emails eliminated half-days for HOPS previously assigned in the Bronx and Queens.

[49] Potasznick testified that pre-March 2020 she usually worked two half-days a week in Manhattan. However, she did not testify that she was not permitted to work half-days in Manhattan post-March 2020, only that her schedule consisted of full days thereafter.

Workload and Other Practical Impact

To the extent that OATH's post-March 2020 changes to HOPS' terms and conditions of employment fall within its rights under NYCCBL § 12-307(b), the Union maintains that such changes had a practical impact on their workload which require bargaining. A duty to bargain arises when "the exercise of a management right is shown to create an unreasonably excessive or unduly burdensome workload as a regular condition of employment." *SSEU, L. 371*, 15 OCB2d 18, at 11 (BCB 2022) (internal quotations omitted) (*quoting Local 1549*, 69 OCB 37, at 9 (BCB 2002)). For the Board to find a practical impact on workload, a petitioner must allege specific details of that impact. *SSEU, L. 371*, 15 OCB2d 18, at 11; *see also Local 1549*, 69 OCB 37 at 9. "Merely alleging more difficult duties or higher-level work is insufficient to establish unreasonably excessive or unduly burdensome workload." *SSEU, L. 371*, 15 OCB2d 18, at 11; *see also UFA*, 73 OCB 2 at 8 (BCB 2004) (denying petition alleging workload impact where there was no specific evidence that job duties were more difficult to perform, such as evidence of forced overtime or a related penalty); *ADW/DWA*, 69 OCB 16, at 8 (BCB 2002) (union failed to demonstrate an unduly burdensome workload where it did not provide evidence that the assignment of new duties resulted in, among other consequences, any forced overtime or a failure to meet deadlines). Additionally, a "petitioner does not demonstrate a practical impact on workload merely by enumerating additional duties assigned to employees or by noting a new assignment of duties covered in the job specifications." *COBA*, 10 OCB2d 21 at 14 (BCB 2017) (internal quotation marks and citations omitted); *see also UFA*, 71 OCB 19, at 8-13; *SBA*, 41 OCB 56, at 17 (BCB 1988). Thus, a "claim of increased workload during the workday does not amount to a workload impact absent a showing that employees were subject to working more time than

scheduled or overtime to complete their work." *Local 333*, 5 OCB2d 15, at 15 (*citing UFA*, 77 OCB 39 at 15-17).

The Board has repeatedly noted that a factor to be considered when determining if there is a workload impact that requires bargaining is whether employees are "subject to working more time than scheduled or overtime to complete their work." *Local 333, UMD*, 5 OCB2d 15, at 15-16 (*citing UFA*, 77 OCB 39 at 15-17); *see also UFA*, 73 OCB 2, at 7-8; *ADW/DWA*, 69 OCB 16, at 8; *PPOA, L. 599, SEIU*, 17 OCB 2 (BCB 1976). In *DC 37, L. 3621 & 2507*, 11 OCB2d 10 (BCB 2018), the Board found that the Union had established a workload impact based upon a pilot program that regularly required employees to work overtime to complete their job duties and ordered impact bargaining. Here, we find that the instruction to HOPS that they must complete their decisions on the same workday as the hearing falls within management's right to "determine the methods, means and personnel by which government operations are to be conducted." NYCCBL 12-307(b). Nevertheless, the evidence shows that this decision along with the decision to schedule hearings later in the day had an impact on the hours worked by HOPS.[50]

[50] An increase in responsibilities alone does not "constitute[s] an unreasonably excessive or unduly burdensome workload as a regular condition of employment," even where it means employees are working to their full capacity. *ADW/DWA*, 69 OCB 16, at 7 (citing *PPOA, L. 599, SEIU*, 17 OCB 2, at 15). However, there may be a workload impact if an increase in volume of work subjects employees to discipline for failing to perform duties in a timely manner. *See PPOA, L. 599, SEIU*, 17 OCB 2, at 15. Some HOPS testified that they would not be scheduled for cases, and in effect disciplined, if they did not finish their decisions the same day as the hearing. Nevertheless, there was no evidence that any HOPS was not scheduled or disciplined for failing to perform their duties in a timely manner. Therefore, any increase in the average number of cases heard by a HOPS or the amount of work HOPS are required to perform during their normal working hours did not establish a practical impact on the workload.

The record reflects that, pre-March 2020, HOPS generally had time to write their decisions on the day of the hearing or were allotted time on another scheduled workday to do so.[51] Indeed, some HOPS testified that they regularly had scheduled days that were completely dedicated to writing decisions. In addition, some HOPS would occasionally continue working to 6:00 p.m. or 7:00 p.m. on hearing days and/or ask permission to come in and write on a day they were not originally scheduled to work.

Post-March 2020, emails were sent instructing HOPS to write up all cases on the day they heard them. However, based on case assignment changes, this was simply not always possible. HOPS generally heard more cases per day and did not finish hearing cases until later in the day. Assistant Commissioner Schwecke's testimony and Managing Attorney Anik's March 8, 2021, email providing that HOPS "may not refuse to accept an assigned case and must continue to adjudicate cases until instructed otherwise" and that HOPS "may not request time to write up their cases," emphasized that hearings must be completed before writing. (Union Ex. M) As a result, despite the instruction to HOPS to write up cases on the day they heard them, their ability to complete all their decisions during scheduled work hours was significantly impaired, and in order to complete the decisions, some HOPS had to work more unscheduled hours. Indeed, there was testimony that the requirement to write decisions the same day as the hearing was not uniformly enforced. Some supervisors and HOPS appeared to interpret the instruction as requiring completion of the decision prior to the next scheduled workday rather than the day of the hearing. Further, there was testimony that the requirement was relaxed over time, as was the higher caseload. Regardless of the level or duration of enforcement, the witness testimony consistently

[51] Only one HOPS assigned to Brooklyn testified that they were generally expected to complete decisions on the day of the hearing pre-March 2020.

reflects that when cases resumed being heard post-March 2020, the changes in case assignments caused an increase in the frequency that HOPS had to work after their regularly scheduled work hours or on days they were not originally scheduled to work to complete decisions.

Moreover, the Union alleged that HOPS worked additional unscheduled time setting up their computer equipment and learning the new systems prior to their first scheduled day of hearing post-March 2020. It is clear that the shift to remote work and the changes OATH made to the case assignment process eliminated HOPS' ability to complete any such administrative tasks prior to hearing their first case when hearings resumed in June 2020. For example, reviewing ATAS PowerPoints, setting up computers, and downloading software had to be conducted prior to the start of their first workday. These hours may have been limited in duration but were nevertheless preparation required outside of HOPS regularly scheduled workday in order for them to perform hearings.[52] Accordingly, we find a workload impact on HOPS' hours since they had to write decisions and perform other duties outside their regularly scheduled workdays.

In reaching this conclusion, we note that the record is insufficient for us to quantify the number of hours HOPS spent performing these types of duties, determine whether all HOPS performed these duties on their own time, or whether this impact continues.[53] However, these specific variables are not necessary to our determination that the changes made to the case assignment process resulted in more unscheduled hours worked. We have held that demands for payment for time worked beyond regularly scheduled work hours are mandatory subjects of

[52] Some HOPS testified that they performed these tasks on their own time. However, there was no direct evidence that any HOPS were expressly instructed to perform these tasks without pay or requested pay and were denied payment.

[53] For example, to the extent the number of cases assigned each day has decreased since the start of remote work, this may have increased HOPS ability to perform these tasks during and/or at the end of their regularly scheduled workdays.

bargaining. *See UFA*, 43 OCB 4 at 274 (demand to increase the amount of compensated wash-up/clean up time required bargaining). Accordingly, OATH must bargain over this workload impact.

In sum, we find that the decision to assign HOPS to work remotely and changes to the scheduling of cases resulted in a workload impact by increasing their unscheduled work hours before and after their regularly scheduled workdays.[54]

Information Request

The Union contends that OATH violated NYCCBL § 12-306(c)(4) when it refused to furnish requested information, set forth in its August 18, 2020 correspondence, that is relevant and within the scope of bargaining.[55] This Board has held that "a failure to supply information in violation of NYCCBL § 12-306(c)(4) necessarily constitutes a violation of the duty to bargain in good faith pursuant to NYCCBL § 12-306(a)(4)." *NYSNA*, 4 OCB2d 42, at 11 (BCB 2011) (citations omitted), *affd.*, *City of New York v. New York State Nurses Assn.*, 130 A.D.3d 28 (2015), *affd*., 29 N.Y.3d 546 (2017). Further, "since the denial of information to which the Union is entitled renders the Union less able effectively to represent the interests of the employees in the unit, the employer's failure to supply the information also interferes with the statutory right of employees to be represented, in violation of NYCCBL § 12-306(a)(1)." *Id.* (quotation marks and citation omitted). "Thus, a violation of the duty to provide information relevant to and reasonably

[54] To the extent the Union is arguing that the City and OATH refused to bargain with the Union over health and safety issues associated with HOPS returning to the office, we need not reach this issue as there is no evidence that the City or OATH ever formally decided to return HOPS to the office, nor is there any evidence that OATH intends to do so in the foreseeable future.

[55] NYCCBL § 12-306(c)(4) provides that the duty to bargain in good faith requires the obligation "to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining."

necessary to contract administration violates NYCCBL § 12-306(c)(4), as well as NYCCBL § 12-306(a)(1) and (4)." *See NYSNA*, 4 OCB2d 42, at 11.

We have held that the union's burden "require[s] only a showing of probability that the desired information is relevant and that it would be of use to the union in carrying out its statutory duties and responsibilities." *NYSNA*, 3 OCB2d 36, at 13 (BCB 2010) (citation omitted). In accordance with this broad standard, we have stated that the duty to disclose documents "extends to information which is relevant to and reasonably necessary for purposes of collective negotiations or contract administration." *Id.* (internal quotation and editing marks and citations omitted). Thus, information relevant to and reasonably necessary for consideration of a potential grievance or to determine whether an improper practice occurred, "falls within the ambit of contract administration, and such information must be produced upon request." *NYSNA*, 4 OCB2d 42, at 12; *see also NYSNA*, 4 OCB2d 20, at 10 (BCB 2011), *affd., City of New York, et al. v. NYSNA, et al.*, Index No. 401425/2011 (Sup. Ct. N.Y. Co. Feb. 11, 2013) (Huff, J.); *revd.,* 130 A.D.3d 28 (1st Dept. 2015), *affd.*, 29 N.Y.3d 546 (2017). The scope of this duty encompasses "reasonable requests for information from which a certified representative can assess whether a management action or decision will result in a practical impact within the meaning of the law." *NYSNA*, 4 OCB2d 42, at 12. (citation omitted). However, the right to obtain information is not unlimited, and "[r]equests that seek documents that are irrelevant, burdensome to provide, available elsewhere, confidential, or do not exist, are deemed to fall outside the scope of the duty by the public employer to disclose." *DC 37*, 6 OCB2d 2, at 13 (BCB 2013).

The parties dispute whether the City produced any information responsive to the Union's August 18, 2020 information request. The City represented that it produced much of the information following the parties' July 2, 2020 labor-management meeting but did not specify

what information was produced. In contrast, the Union maintains that no documents were produced at the July 2, 2020 meeting and stated in a September 21, 2020 letter to OATH that the "substantial majority" of documents requested had not been provided.[56] (Union Ex. I) The City did not produce evidence to rebut the Union's September 2020 assertion that the majority of requested documents had not been produced.

Initially, we do not find that OATH's failure to provide seven of the 12 requests, Nos. 3, 6, 7, 8, 9, 10, and 11, violated its duty to provide information set forth in NYCCBL § 12-306(c)(4). These requests encompass information related to how OATH scheduled HOPS and scheduling communications, written instructions on remote work, equipment and training during the COVID-19 pandemic, including its methodology for selecting HOPS to perform remote work and the hours worked and number of cases heard by HOPS.[57] These requests also include information pertaining to the electronic platform that OATH selected for remote hearings and the equipment necessary to utilize the platform.[58] The requests further seek a list of HOPS deemed to be "essential employees." (Union Ex. G) The Union has failed to explain how any of this requested information is relevant to and reasonably necessary for purposes of collective negotiations or contract

[56] In the letter, Weinerman noted that the documents not provided include but are not limited to: "schedules submitted for work, hours worked by each assigned Hearing Officer from May 2020 … to the present, basic reopening plans, a copy of the survey issued agency wide soliciting input, concerns and questions. . . ." (Union Ex. I)

[57] We note, however, that to the extent the Union seeks information "related to the platform to be used for remote hearings" in Request No. 6, the City provided responsive information as part of its pleadings. (City Ex. 2, 8C)

[58] To the extent the Union seeks information related to "reimbursement for equipment and supplies" purchased or utilized by HOPS for remote work, we note that it was undisputed that OATH did not reimburse any HOPS for equipment and supplies, so there is no information that was responsive to this request. (Union Ex. G) Nevertheless, as addressed earlier, the issue of reimbursement for required personal equipment is a mandatory subject of bargaining.

administration. *See NYSNA*, 4 OCB2d 42, at 11. Generally, the requested documents relate to operational determinations by OATH or why they engaged in a particular operational change. In the absence of a clear relevance to issues for collective negotiations or contract administration, we do not find that OATH's failure to respond to the information requested in Nos. 3, 6, 7, 8, 9, 10, and 11 violated NYCCBL § 12-306(c)(4). *See generally* NYCCBL § 12-307(b); *DC 37, L. 1508*, 77 OCB 23 (BCB 2006) (noting that whether an issue is a mandatory subject of bargaining may be dispositive of its relevance to collective negotiations); *NYSNA*, 3 OCB2d 36, at 14 (finding that public employers have no duty to respond to requests to provide specific reasons that they engaged in a particular action because such requests do not seek information that will enable the union to negotiate more effectively).

The remaining requests, Nos. 1, 2, 4, 5, and 12, generally seek documents pertaining to the implementation or consideration of in-office health and safety measures in preparation for a possible return to the office as well as general information related to the reopening of the offices that falls within the scope of collective bargaining. We find that when the Union requested this information in August 2020, the information was relevant to and reasonably necessary for the Union's consideration of a potential negotiation or contract administration.[59] *See NYSNA*, 4 OCB2d 20, at 10. We take administrative notice that the Mayor announced that all City employees would return to the office in September 2020. Ultimately HOPS were not reassigned to office locations; however, at the time the health and safety information was requested, OATH had not advised HOPS or the Union that these employees would remain working remotely. Therefore, the

[59] We note that the Union has now received some of requested information. Several exhibits the parties exchanged during the course of this proceeding contained information requested. Specifically, we find that City Exhibit Nos. 4 and 5 are responsive to Request No. 4, and City Exhibit No. 7 is responsive to Request No. 12. We further find that Exhibit No. VVVV is responsive to Request Nos. 1, 2 and 5.

information responsive to requests 1, 2, 4, 5 and 12 was relevant at the time it was requested and on these facts OATH's refusal to provide it violated NYCCBL § 12-306(c)(4).[60]

We reject the City's assertion that Request Nos. 1, 2, 4, and 12 are moot. *See COBA*, 11 OCB2d 9, at 14 (BCB 2018) ("It has long been established that an improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open for consideration.") (internal quotation marks and citations omitted) *appeal dismissed*. *Matter of Correction Officers' Benevolent Association v. New York City Board of Collective Bargaining, City of New York, and the New York City Department of Correction*, Index No.154546/2018, 2019 WL 468315 (Sup. Ct. N.Y. Co. Feb. 1, 2019) (James, J.). Here, the Union sought information relating to HOPS' health and safety in response to what appeared to be an imminent return to the OATH offices during the COVID-19 pandemic. The fact that HOPS have subsequently not been scheduled to return to the office does not eliminate the prior violation. Nevertheless, this fact does influence the appropriate remedy.

We cannot conclude that the information that the Union seeks pertaining to health and safety measures related to HOPS' return to the OATH offices remains relevant. HOPS have not been directed to return to the office, and there is no evidence that OATH intends to recall HOPS back to the office in the foreseeable future. Therefore, while the failure to provide the health and safety information in August 2020 violated the NYCCBL, we decline to order OATH to produce this information.

[60] The City neither offered responsive documents nor raised a defense to its refusal to respond to Request No. 5. For the reasons discussed in the next paragraph, we also find that Request No. 5 is not moot.

As described in detail above, the City and OATH failed to bargain in good faith on issues of payment and reimbursement for equipment required to work remotely, changes to lunch breaks and the number of days per week a HOPS must work, and a workload impact. In addition, it found that the City and OATH failed to provide information the Union requested relating to workplace health and safety. In all other respects, the Board found that the City and OATH did not violate NYCCBL § 12-306(a)(1) and (4). Thus, we grant the petition in part and dismiss in part.

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-4408-20, filed by the United Federation of Teachers, Local 2, AFL-CIO, against the City of New York and the Office of Administrative Trials and Hearings, is hereby granted in part; and it is further

ORDERED, that the City of New York and the Office of Administrative Trials and Hearings bargain in good faith with the United Federation of Teachers, Local 2, AFL-CIO over issues of payment and reimbursement for equipment required to work remotely and changes to lunch breaks and the number of days per week a HOPS must work; and it is further

ORDERED, that the City of New York and the Office of Administrative Trials and Hearings bargain upon demand with the United Federation of Teachers, Local 2, AFL-CIO over the alleviation of the workload impact of increasing the HOPS' unscheduled work hours before and after their regularly scheduled workdays; and it is further

ORDERED, that the City of New York and the Office of Administrative Trials and Hearings 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: April 4, 2023
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

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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 16 OCB2d 14 (BCB 2023), determining an improper practice petition between the United Federation of Teachers, Local 2, AFL-CIO, and the City of New York and the Office of Administrative Trials and Hearings.

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-4408-20, is hereby granted in part; and it is further

ORDERED, that the City of New York and the Office of Administrative Trials and Hearings bargain in good faith with the United Federation of Teachers, Local 2, AFL-CIO over issues of payment and reimbursement for equipment required to work remotely and changes to lunch breaks and the number of days per week a HOPS must work; and it is further

ORDERED, that the City of New York and the Office of Administrative Trials and Hearings bargain upon demand with the United Federation of Teachers, Local 2, AFL-CIO over the alleviation of the workload impact of increasing the HOPS' unscheduled work hours before and after their regularly scheduled workdays; and it is further

ORDERED, that the City of New York and the Office of Administrative Trials and Hearings 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 Office of Administrative Trials and Hearings
(Department)

Dated: _____ **(Posted By)**
(Title)