UFADBA, 16 OCB2d 23 (BCB 2023)

(IP) (Docket No. BCB-4510-23)

Summary of Decision*:** The Union claimed that the FDNY violated NYCCBL § 12-306(a)(1) and (4) by discontinuing a practice of paying a time and a half rate to bargaining unit members engaged in mandatory trainings. The City argued that the FDNY's actions were within its management rights and that there was no such past practice. The Board found that paying bargaining unit members their standard wage while engaged in mandatory training during regular work hours was not a departure from existing policy or practice. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIRE ALARM DISPATCHERS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

THE FIRE DEPARTMENT OF THE CITY OF NEW YORK and **THE CITY OF NEW YORK,**

Respondents.

DECISION AND ORDER

On February 27, 2023, the Uniformed Fire Alarm Dispatchers Benevolent Association ("Union") filed a verified improper practice petition against the City of New York ("City") and the Fire Department of the City of New York ("FDNY"). The Union alleges that the FDNY violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by discontinuing a practice of paying a time and a half rate to bargaining unit members engaged in mandatory training. The City argues

that the FDNY's actions were within its management rights and that there was no change to past practice. The Board finds that paying bargaining unit members at their standard wage rate while engaged in mandatory training during regular work hours was not a change from an existing policy or practice. Accordingly, the petition is denied.

BACKGROUND

The Union is the certified bargaining representative for FDNY employees in the titles of Fire Alarm Dispatcher and Supervising Fire Alarm Dispatcher Levels I and II (collectively, "Dispatchers").

In June 2022, the FDNY implemented Mandatory Sexual Harassment Prevention Training for all its employees ("June training"). There is no dispute that Dispatchers who completed the June training were paid at the rate of time and a half while doing so. It is also not disputed that this training was required to be completed in a single two-hour period. The Union claims that the rate the FDNY paid employees to complete the June training was consistent with an ongoing practice of paying a time and a half rate to complete all mandatory training. Specifically, it alleges that these prior trainings were paid at time and a half rate: 2017 LGBTQ diversity training, 2017 COIB Chapter 68 Training, 2018 and 2019 Sexual Harassment training, and 2019 Corruption Prevention Awareness training.[1] The City denies that such a practice existed, and instead claims that a time and a half rate was paid only when overtime was pre-approved for a particular training, and employees completed the training outside of their regular work hours. The City claims that it approved overtime for the June training because Dispatchers were required to complete the virtual training module in a single two-hour block, which would be difficult to fit in with their regular

[1] The Union was given the opportunity to provide additional facts concerning whether Dispatchers were required to perform these specific trainings during their regular hours and declined to do so.

daily duties. The City submitted a list of 125 overtime requests from Dispatchers that it approved in June-July 2022 for the completion of the June training. (Ans., Ex. 3)

On November 4, 2022, the Department of Citywide Administrative Services ("DCAS") implemented three mandatory trainings for FDNY personnel, including Everybody Matters: EEO and Diversity & Inclusion Training for NYC Employees, Sexual Harassment Prevention Training, and Disability Awareness and Etiquette ("November trainings"). Unlike the June training, the November trainings were virtual modules and could be paused and resumed as needed. Dispatchers were required to complete the November trainings during their regular work hours and did not receive time and a half pay for the time spent completing those trainings.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4) by discontinuing their policy of paying Dispatchers a time and a half rate for hours spent on mandatory trainings. It claims that said practice was well established and implemented as usual in the June training. It alleges that for the November trainings, the time and a half rate was not paid.

The Union asserts that it is well-settled that issues of pay, including pay rates, are mandatory subjects of bargaining. It thus argues that the FDNY's unilateral discontinuance of a practice of paying a time and a half rate for time spent on mandatory trainings constitutes a violation of the duty to bargain in good faith.

The Union further claims that any justification based on budgetary issues that the City may offer for its refusal to pay for the November trainings at the time and a half rate is not a defense to the FDNY's duty to bargain over this issue. Instead, budgetary concerns are factors relevant to an

impasse proceeding, not to the determination of the duty to bargain.[2]

City's Position

The City concedes that it approved overtime for the June training and Dispatchers were paid a time and a half rate for completion of that training. Nevertheless, it argues that it does not have a general practice of paying a time and a half rate for all mandatory training. According to the City, overtime falls within its management right to "determine the methods, means and personnel by which government operations are to be conducted." NYCCBL § 12-307(b). Citing Board law, the City argues that it has the right to assign and/or eliminate overtime for business reasons in the absence of any contractual limitation. Accordingly, the City claims that because the time and a half rate paid for the June training was in the form of approved overtime, any alleged change to that practice is a change to a non-mandatory subject of bargaining.

Further, the City contends that there is no unequivocal past practice of paying employees such a rate to complete mandatory training during their regular tour. While the City does not dispute that pay rates are a mandatory subject of bargaining, it argues that there is no policy or past practice of paying bargaining unit members a time and a half rate for all time spent in mandatory training, only for those training programs that are conducted under approved overtime outside regular work hours. Since the Union cannot establish that the Dispatchers are entitled to a time and a half rate for training completed during their regular tours, the City argues that the claim must be dismissed.

Finally, the City argues that as the Union has not demonstrated a violation of NYCCBL § 12-306(a)(4), there can be no derivative violation of NYCCBL § 12-306(a)(1).

[2] The City did not assert a defense related to budgetary issues.

DISCUSSION

It is well established that "a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith." *UFA*, 10 OCB2d 5, at 13 (BCB 2017) (citations omitted), *affd.*, *City of New York v. Uniform Firefighters Assn., L. 94, IAFF, AFL-CIO,* Index No. 450703/2017 (Sup. Ct. N.Y. Co. Mar. 15, 2018) (Bluth, J.). To prove that a violation has occurred, a petitioner "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37, L. 436 & 768*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37, L. 376*, 79 OCB 20, at 9 (BCB 2007)).

Pursuant to NYCCBL § 12-307(a), wages, including merit or premium pay for certain duties, are mandatory subjects of bargaining.[3] *See PBA v. City & NYPD*, 63 OCB 4, at 10 (BCB 1999) ("It is well settled that issues regarding basic rates of pay, whether incentive/merit or premium are mandatory subjects of bargaining.") (citations omitted). Therefore, the rate of pay received by Dispatchers for work they perform, including mandated training, is a mandatory subject of bargaining.

We now turn to whether the failure to pay a time and a half rate to Dispatchers for the

[3] NYCCBL § 12-307(a) provides, in relevant part, as follows:

> Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public 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 and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law . . .

November trainings was a change to an existing policy. The duty to bargain in good faith includes an obligation to not make unilateral changes to past practices that involve mandatory subjects of bargaining. *See DC 37, L. 376*, 79 OCB 20, at 9 (BCB 2007); *ADW/DWA,* 7 OCB2d 26, at 18 (BCB 2014). In order to establish the existence of such a past practice, a petitioner must demonstrate that the practice "was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged." *DC 37, L. 983*, 15 OCB2d 42, at 17 (BCB 2022) (internal quotation marks omitted) (quoting *Local 621, SEIU*, 2 OCB2d 27, at 12 (BCB 2009)).

The Union has failed to allege facts that show an unequivocal and longstanding past practice by the FDNY of paying Dispatchers a time and a half rate for all mandatory training. While it is not disputed that Dispatchers were paid that rate for the June training, the record shows that overtime was authorized for the completion of that training, and it was conducted outside Dispatchers' regular work hours. The November trainings were not assigned outside the Dispatchers' regular work hours, but instead were completed without the need for overtime. Although the Union cites to other mandatory trainings prior to June 2022 for which it alleges Dispatchers were paid a time and a half rate, it declined to plead facts that would show that such trainings were performed during regular hours. Therefore, the Union has not pled sufficient facts to show a past practice that bargaining unit members received time and a half rate for time spent completing trainings during their regular work hours. Thus, we do not find that the failure to pay time and a half rate to complete the November trainings was a change from an existing policy.

Accordingly, we dismiss the Union's allegation that the City violated NYCCBL § 12-306(a)(1) and (4) by not paying a time and a half rate for time bargaining unit members spent completing the November trainings. The petition is denied in its entirety.

ORDER

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

ORDERED, that the verified improper practice petition filed by the Uniformed Fire Alarm Dispatchers Benevolent Association against the Fire Department of the City of New York and the City of New York, docketed as BCB-4510-23, is hereby dismissed in its entirety.

Dated: August 3, 2023

New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA SILVERBLATT
MEMBER

I Dissent. PETER PEPPER
MEMBER

I Dissent. CHARLES MOERDLER
MEMBER