SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

PART 5

Index Number : 451411/2013
CITY OF NEW YORK
vs
NEW YORK CITY BOARD OF
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 8/14/14
AUG 1 4 2014

HON. KATHRYN FREED, J.S.C.
JUSTICE OF SUPREME COURT

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

----------X

In the Matter of the Application of

THE CITY OF NEW YORK,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

THE NEW YORK CITY BOARD OF COLLECTIVE BARGAINING and UNITED FEDERATION OF TEACHERS, LOCAL 2, AFL-CIO,

Respondents.

----------X

Index No.: 451411/2013
Motion Seq. Nos.: 001, 002, 003

DECISION AND ORDER

Kathryn E. Freed, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND PETITION	..1-2..(Exs. 1-3)
BCB's MOTION TO DISMISS	.....3.....
UFT's MOTION TO DISMISS AND AFF IN SUPPORT	.....4,5.....
MEMORANDA OF LAW	.....6-9.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

The issue in this matter is whether petitioner The City of New York ("the City") improperly limited the ability of per session hearing officers ("HOs") to work an aggregate of 1,000 hours per year at multiple City agencies where it had previously applied the 1,000 hour maximum to work performed for a single agency. In sequence number 001, petitioner the City seeks an order and judgment, pursuant to CPLR Article 78, annulling, reversing, or modifying

determinations by respondent The New York City Board of Collective Bargaining ("the BCB"), dated January 5, 2011, July 10, 2012, and July 10, 2013, which held, inter alia, that the City violated sections 12-306(a)(1), 12-306(a)(4), and 12-306(a)(5) of the New York City Administrative Code. In sequence numbers 002 and 003, respectively, respondents BCB and United Federation of Teachers, Local 2, AFL-CIO ("the UFT") move, pursuant to CPLR 7804(f), to dismiss the City's petition. After oral argument of the applications and a review of the parties' papers and the applicable statutes and case law, the motions by the BCB and UFT are **granted**, the determinations are **confirmed**, the petition is **denied**, and the proceeding is **dismissed**.

FACTUAL BACKGROUND:

The title of hearing officer was created in 1971. Ex. 1, at 3.[1] HOs were part-time City employees, also called "per session" employees, who were assigned to the Environmental Control Board ("the ECB"), the Taxi and Limousine Commission ("the TLC"), and the Department of Health and Mental Hygiene ("the DOHMH") to preside over hearings. The most recent job specification for HOs was issued in 1998. That specification contained a "Note" which stated: "No incumbent shall work more than 17 hours per week in any two consecutive weeks, or more than 1,000 hours per year." Ex. 1, at 3.

In February of 2007, the UFT was certified as the exclusive representative of the HOs. Ex. 1, at 5. Since 2008, the UFT has been negotiating with the City on behalf of the HOs to reach a collective bargaining agreement. Ex. 1, at 5.

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[1] Unless otherwise noted, all references are to the exhibits annexed to the City's petition.

At a meeting on March 3, 2010, the City advised the UFT that it planned to enforce a 1,000 hour aggregate cap on total hours worked by HOs for more than one agency. Ex. 1, at 7. On March 26, 2010, the ECB, TLC and DOHMH issued a letter to the per session HOs stating:

> Unless you worked at least 50 hours for each of the two tribunals during the past 12 months, your employment as a judge/hearing officer at the [DOHMH], ECB, or TLC for the remainder of 2010 will be limited to the tribunal at which you were solely employed or primarily employed during the past year. Your employment as a judge/hearing officer at [DOHMH], ECB or TLC will be limited to 1,000 hours for the entire calendar year of 2010, including hours already worked this year.
>
> If you are currently on the judge/hearing officer rosters of two or more administrative tribunals and worked at least 50 hours for each of them during the past 12 months, you may continue to work at both tribunals during 2010. However, your total time at those two tribunals will be limited so that it does not exceed 1,000 hours over the year. Generally, that means you will be limited to working not more than 500 hours a year nor more than one day per week for each of the two tribunals. If you would like to work at two tribunals but would like to devote more of your time to one tribunal than the other, you may propose an unequal allocation of time, which the tribunals will consider. Alternatively, you may choose to work at only one of the tribunals. By April 2, you should inform the appropriate supervisor of each of the tribunals of your decision - whether you want to continue to split your time between two tribunals (on a 50/50 basis or some other basis) or to work only at one tribunal during the rest of 2010.

Ex. 1, at 7.[2]

On March 29, 2010, the UFT filed an improper practice petition against the City on behalf of the per session HOs. The UFT alleged that the City unilaterally imposed new limits on the number of hours worked by the HOs and engaged in direct dealing by directly notifying UFT members of the change and asking them to negotiate their hours at each agency with the City, and

[2]At or about the time the letters were sent, the ECB hired at least 50 new HOs, the TLC hired 45, and the DOHMH posted a job vacancy notice for 46 such positions. Ex. 1, at 8.

also that it imposed the policy in retaliation for engaging in protected activity, in violation of New York City Collective Bargaining Law ("NYCCBL") as set forth in the New York City Administrative Code, Title 12, Chapter 3 §§ 12-306(a)(1), (3), (4), and (5).

The BCB subsequently conducted a three-day hearing regarding the allegations by the UFT. At the hearing, Sherrie Schultz of the New York City Department of Citywide Administrative Services ("DCAS"), testified that the title of HO was not meant to be a full time position and that the 1998 job specification was created in order to allow agencies to hire HOs ad hoc and part time so that they would not be entitled to benefits. Ex. 1, at 3. She further stated that, regardless of whether a HO worked for one or more agencies, he or she was issued a single employee identification number and W-2 form by the City. Ex. 1, at 4.

David Goldin testified that he was appointed Administrative Justice Coordinator by the Mayor in 2006. Ex. 1, at 5. Soon after his appointment, Goldin spoke to representatives of the ECB, TLC, and DOHMH and learned that HOs were not to work more than 1,000 hours per year. Ex. 1, at 5-6. In early 2007, Goldin was advised by representatives of the Office of Labor Relations ("OLR"), the Office of Management and Budget, and the New York City Law Department that the 1,000 hour limit was intended to be applied in the aggregate to a HO's work in all tribunals. Ex. 1, at 6. At that time, however, the practices of the ECB, TLC, and DOHMH were not consistent with a 1,000 hour aggregate limit. Ex. 1, at 6. Goldin learned of the UFT's petition to represent hearing officers within days after it was filed on February 2, 2007. Ex. 1, at 6. Goldin testified that the unionization of the HOs in no way motivated him to send the March 26, 2010 letter. Ex. 1, at 6.

Richard Yates, the OLR's Deputy Commissioner, testified that the March 26, 2010 letters

restated the pre-existing limits on hours to ensure that HOs were aware that they were required to comply with the 1,000 hour limit. Ex. 1, at 8. He characterized the letter as a "reminder". Ex. 1, at 8. Yates, Goldin and Schultz opined that, since the 1,000 hour limit was included in the job description, the title itself limited the number of hours a HO could work in the aggregate, and not for separate agencies. Ex. 1, at 8.

Four HOs testified at the hearing, all of whom had served as HOs for at least seven years, worked consistently at two of the agencies, and regularly worked over 1,000 hours in total per year. Ex. 1, at 9. The HOs testified that, in some years, but not in others, individual agencies made efforts to limit a hearing officer's hours to 1,000 at that particular agency. Ex. 1, at 9. None of the hearing officers who testified was ever notified that a 1,000 hour aggregate maximum applied to their work across different agencies. Ex. 1, at 10.

BCB's Decision and Order Dated January 5, 2011

After the hearing, the BCB issued a decision and order dated January 5, 2011 determining that the City violated sections 12-306(a)(1), 12-306(a)(4), and 12-306(a)(5) of the NYCCBL. The BCB determined that the UFT established that the City violated NYCCBL § 12-306(a)(1), (4), and (5) by making a unilateral change in the hours worked by the HOs during negotiations for a collective bargaining agreement and by inviting bargaining unit members to negotiate directly with the City regarding the change. Ex 1, at 17-25. In reaching its decision, the BCB found, inter alia, that "the record contain[ed] no evidence of the existence of any requirement that there be a 500 hour split, or any other specified allocation, between two agencies prior to the March 26, 2010 letter." Ex. 1, at 7. It stated that, prior to March 26, 2010, there would have

been no reason why HOs "would have [had] any notice or expectation that they could not work 1,000 [hours] in the aggregate." Ex. 1, at 20. The BCB further stated that "over a prolonged period of time, [the City and UFT] treated the 1,000 hour cap as applying to a single agency, not [as an aggregate figure]." Ex. 1, at 20. Specifically, the BCB stated:

> While the City correctly points to the [BCB]'s recognition of the City's authority to unilaterally create job specifications, this right may not be used to shield the City from bargaining required under the NYCCBL. It is clear that the 1,000 hour cap's intended purpose is to permit the City to avoid providing certain benefits and incurring additional costs. Nevertheless, the cap's purpose and its effectiveness is not dispositive of the question of whether the subject of hours is mandatorily bargainable. While the record supports a finding that the 1,000 hour cap contained in the job specification was intended as a cap upon the total number of hours performed in the title regardless of whether at one agency or multiple agencies, in fact, it was never applied in this way. The City's failure to apply the job specification in line with its intended purpose was not a matter of isolated instances; in 2008, for example, approximately 20 percent of [all of the HOs] worked over 1,000 hours in the aggregate. In this regard, the evidence simply does not support the City's claim that it is now enforcing the 1,000 hour cap as long articulated in the [HO] job specification.

Ex. 1, at 19-20.

The BCB also found that the UFT did not establish that the city's actions were motivated by anti-union animus, and therefore denied the UFT's claim for relief pursuant to NYCCBL § 12-306(a)(3). Thus, the UFT's petition was granted in part and denied in part.

The BCB directed the City to rescind the March 26, 2010 letter and to bargain with the UFT regarding any changes to the 1,000 hour cap. Ex. 1, at 25. The BCB stated that, since it did not have sufficient information to determine a remedy, it would retain jurisdiction over the matter and obtain information regarding damages so that a remedy could be created. Ex. 1, at 24-25.

Interim Decision and Order Dated July 10, 2012

Because the initial record was insufficient to determine the relief to be granted to the HOs, the BCB directed the parties to submit records relating to the hours of the HOs during previous years. Ex. 2, at 2. Pursuant to the BCB's request, the City and the UFT submitted data concerning hours worked by HOs in all agencies during the years, 2007-2010. Ex. 2, at 3. The parties agreed upon the accuracy of the total hours worked by the HOs. Ex. 2, at 3. In addition to these submissions, the parties had the opportunity to orally argue their positions regarding a proper remedy. Ex. 2, at 2. The BCB considered the information submitted and developed a formula to reasonably approximate the number of hours a HO who lost wages as a result of the City's improper practice would have worked during 2010.

The BCB determined that the only HOs who were eligible for back pay were those who reasonably could have been expected to work more than 1,000 hours while still employed at more than one agency in 2010. Ex. 2, at 17. It further determined that the individuals "who would have worked additional hours in 2010 if not for the City's improper practice [were] those [HOs] employed during 2010 who [met] the following criteria:

> 1) worked over 1,000 hours at more than one agency in at least one of the preceding three years (i.e. 2007-2009),
>
> and
>
> 2) whose average annual work hours (at more than one agency) was more than 1,000 hours per year.

Ex. 2, at 17.

According to the BCB, 36 of the 338 HOs employed in 2010 met the foregoing criteria

and could be considered "an affected hearing officer" ("AHO").[3] Ex. 2, at 17. To calculate the approximate number of hours each AHO would have worked in 2010 had the City not committed an improper practice, the BCB took the average number of hours worked per year and reduced it by the greater of either:

> 1) the actual number of hours an {AHO] worked in 2010
>
> or
>
> 2) 1,000 hours (i.e, the amount they could have worked but for the 1,000 hour cap cap)

Ex. 2, at 18.

The BCB stated that:

> The resulting difference between the Average Number of Hours Worked and the greater of the [AHO's] 2010 hours or 1,000 hours is a reasonable approximation of the number of hours that the [AHO] was prevented from working in 2010 ("Estimated 2010 Hours"). This formula is set forth numerically below:
>
> (Average Number of Hours Worked in Previous Years) - [the greater of (2010 Hours Worked or 1,000 Hours)] = Estimated 2010 Hours

Ex. 2, at 18-19.

The BCB determined that the foregoing was a "fair and reasonable approximation of the amount of hours that each [AHO] would have worked in 2010 but for the City's unilateral implementation of the 1,000 hour cap on total hours worked." Ex. 2, at 19.[4] However, the BCB

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[3]The figure "36" appears to be a typographical error since, as noted below, the BCB determined that there were 34 AHOs.

[4]The UFT argued that if an AHO worked less than 1,000 hours in 2010, the actual hours worked should be subtracted from the average, not from 1,000 hours. Ex. 2, at 19. The BCB rejected this argument, reasoning that it was undercut by the fact that approximately 25 percent

declined to render a final determination of "appropriate make-whole relief for the [AHOs]", but rather ordered further proceedings to develop a record as to the question of mitigation and as to the availability of the individual AHO to work in 2010." Ex. 2, at 19.

Decision and Order Dated July 10, 2013

In a decision and order dated July 10, 2013, the BCB determined that, since the AHOs' hours were unlawfully reduced, they did not have a duty to mitigate their damages. Ex. 3, at 3, 15-16[5]. The BCB found that AHOs were not eligible for back pay for periods of time during 2010 when they were unavailable to work. Ex. 3, at 3, 12. If an AHO obtained new employment in 2010 as a result of the City's improper practice, gross back pay was reduced by gross income from the new employment. Ex. 3, at 3-4. Gross back pay was also reduced by any unemployment insurance paid to a hearing officer. Ex. 3, at 4. The BCB's decision and order examined the individual circumstances of each AHO and, applying the formula set forth in its decision and order of July 10, 2012, awarded each a remedy.

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of the AHOs worked at least 1,000 hours during 2010. Ex. 2, at 19.

[5]The BCB noted that its decision regarding mitigation affected only a small percentage of the AHOs. The City did not contest that 20 of the 34 AHOs made efforts to obtain additional employment. Ex. 3, at 16. It argued that the remaining 14 did not make sufficient efforts. Ex. 3, at 17. The BCB found that, if a duty to mitigate existed, seven of those individuals made sufficient efforts to mitigate. Ex. 3, at 17. Thus, only seven of the AHOs admittedly failed to look for other work. Ex. 3, at 3. The BCB reasoned that, since the longest any of those seven would have been unemployed was only 30 calendar days, there was no reason to impose upon them a duty to mitigate.

The City's Petition

On or about August 15, 2013, the City filed the instant notice of petition and petition seeking to annul, vacate, reverse, or modify the January 5, 2011, July 10, 2012, and July 10, 2013 determinations of the BCB. On January 6, 2014, the BCB and UFT moved to dismiss the petition and to confirm the determinations of the BCB.

THE PARTIES' POSITIONS:

In its petition, the City asserts that, since the HOs never had a collective bargaining agreement and the 1,000 hour cap was contained in a 1998 job specification, as well as in every posting for HO job vacancies, its letter of March 26, 2010 did not unilaterally change the maximum number of hours the HOs were permitted to work.

As its first cause of action, the City maintains that BCB acted illegally, irrationally, arbitrarily, and capriciously in determining that it unilaterally changed the maximum number of hours which per session HOs were allowed to work. It also asserts that the remedy imposed by the BCB was speculative and against public policy and resulted in compensating HOs not only for hours that they did not work, but for hours that were reassigned to, and worked by, other [HOs]." Petition, at par. 10.

By finding as it did, urges the City, the BCB acted in excess of its authority and "unilaterally amended the job specification to strike the 1,000 hour cap..." Petition, at par. 49.

The City also argued that the "split of hours between agencies" was not a mandatory subject of collective bargaining but rather a "scheduling and assignment" issue "within its "exclusive managerial purview." Petition, at par. 73.

As its second cause of action, the City asserts that the formula used by BCB to fashion a remedy for AHOs was, inter alia, speculative and violative of public policy. It further claims that the BCB "failed to account for the increase in the number of [HOs] to take available hours" and that "[t]herefore, there were less hours available to each [HO] to work during 2010." Petition, at par. 82. The City urges that the "BCB is irrationally requiring the City to pay [HO] hourly wages for hours that were never worked, and, in fact, were worked by other [HOs]." Petition, at par. 83. Additionally, the City argues that the BCB's finding that [AHOs] had no duty to mitigate their damages was irrational, arbitrary and capricious, an abuse of discretion, and contrary to New York case law requiring recipients of back pay to mitigate their damages.

In support of its motion to strike the petition, the BCB submits a memorandum of law in which it argues that the City's challenge to the January 5, 2011 order and decision is untimely since the City failed to challenge it within 30 days as required by NYCCBL § 12-308(a)(1).[6] The BCB further asserts that its decision was neither arbitrary nor capricious, contrary to law, or an abuse of discretion and that, in any event, its rulings are entitled to deference given its expertise in applying and interpreting the NYCCBL. Specifically, the BCB asserts that it properly determined that the March 26, 2010 letter constituted a change to a mandatory subject of bargaining. It further maintains that it established in its July 10, 2012 interim decision and order a reasonable methodology to determine back pay to be awarded. Finally, the BCB argues that it properly determined that the AHOs did not have an obligation to mitigate their damages.

In a memorandum of law in opposition to the motions by the BCB and the UFT, the City

[6]In an affirmation in support of its motion to dismiss the petition, the UFT incorporates by reference the facts and arguments set forth in the BCB's memorandum of law.

argues that its petition is timely because the January 5, 2011 decision and order was not a final determination given that the BCB stated therein that it would retain jurisdiction of the matter for the purpose of calculating damages. The City further asserts that the "split of hours between agencies" is not a "mandatory subject of collective bargaining", but rather "a scheduling and assignment issue within the exclusive managerial purview of the City." City's Memo. of Law in Opp., at 14. Additionally, asserts the City, since HOs have never had a collective bargaining agreement and the 1,000 hour cap was set forth in a 1998 job specification, "it is undisputed that there was no change in actual practice." (*emphasis provided*) City's Memo. of Law in Opp., at 2. Thus, urges the City, the petition states a cause of action and the BCB's orders must be annulled.

In a reply memorandum of law in further support of its motion to dismiss the petition, the BCB reiterates its contention that the City's petition is untimely. It also reiterates its argument that it rationally determined that the City unilaterally changed the hours of HOs to prevent them from accruing a total of more than 1,000 hours per year while working for more than one agency. Further, the BCB asserts that, since the City's memorandum of law only raised arguments regarding the BCB's January 5, 2011 decision and order, it has failed to challenge the interim decision and order of July 10, 2012 and the decision and order of July 10, 2013.

LEGAL CONCLUSIONS:

The Timeliness of the Petition

The argument by the BCB and the UFT that the petition is untimely because it was filed more than 30 days after the BCB's January 5, 2011 decision and order is without merit. Administrative Code of the City of New York § 12-308(a) provides, inter alia, that "[a]ny order of the [BCB] * * * shall be reviewable under [CPLR Article 78] upon petition filed by an

aggrieved party within thirty days after service by registered mail or certified mail of a copy of such order upon such party . . ." Despite their argument that the City failed to file its petition within 30 days after it was served with the January 5, 2011 order and decision, the BCB and the UFT fail to annex any proof of service to their papers. Since they have failed to establish when the City was served with that decision and order, they cannot argue that the City failed to file a petition challenging that order within the time required by § 12-308(a).

In any event, as the City asserts, the January 5, 2011 decision and order was not a final determination from which Article 78 relief could be sought (*see* CPLR 7801[1]). Since the BCB expressly stated that it was retaining jurisdiction so that it could obtain information regarding damages from the parties in order to formulate a remedy (Ex. 1, at 24-25), any injury allegedly caused to the City by that decision and order may have been "prevented or significantly ameliorated by further administrative action." *Matter of Essex County v Zagata*, 91 NY2d 447, 453 (1998). Thus, the petition was not untimely.

The Merit of the Petition

Judicial review of an Article 78 proceeding is limited to whether an administrative determination was "affected by an error of law or was arbitrary and capricious, or an abuse of discretion." CPLR 7803(3); *Pell v Board of Education of Union Free School District*, 34 NY2d 222, 230-31 (1974). A decision is arbitrary and capricious if it is "without sound basis in reason and is generally taken without regard to the facts." *Pell*, 34 NY2d *supra*, at 231.

In its decision and order dated January 5, 2011, the BCB found that the City violated NYCCBL §§ 12-306(a)(1), (4), and (5). These sections state as follows:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain, or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization...

This court finds that, based on the evidence presented at the hearing, the BCB did not act in an illegal, irrational, arbitrary, or capricious manner, and did not abuse its discretion, in finding violations of the foregoing provisions. The BCB, citing its own prior decisions as precedent, found that, although "the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times * * * the total number of hours employees work must be bargained." Ex. 1, at 18.

Although the City maintains that it did not change any policy, but merely sought to enforce a preexisting policy, this is belied by the testimony of witnesses who testified at the hearing, Goldin, who testified on the City's behalf, conceded that, as of 2007, the practices of the ECB, TLC, and DOHMH were not consistent with a 1,000 hour aggregate limit. Ex. 1, at 6. Additionally, none of the four HOs who testified was ever notified that a 1,000 hour aggregate maximum applied to their work across different agencies. Ex. 1, at 10. Thus, the BCB's finding that the March 26, 2010 letter "unilaterally changed a mandatory subject of bargaining" (Ex. 1, at 21) was supported by substantial evidence. *See 300 Gramatan Ave. Assoc. v State Div. of Human*

Rights, 45 NY2d 176 (1978); *Pell*, 34 NY2d, *supra* at 231.

Courts generally defer to the expertise of the administrative body charged with enforcing particular statutes. *See District Council 37 v City of New York*, 22 AD3d 279 (1st Dept 2005). A court "may not substitute its judgment for that of" the administrative body where, as here, that determination is reasonable. *Pell*, 34 NY2d *supra*, at 232 (*citations omitted*). Indeed, in *District Council 37 v City of New York, supra*, the Appellate Division, First Department noted that deference was typically accorded to the BCB in matters, such as this, involving the interpretation of the NYCCBL. *Id.*, at 284.

Based on the evidence submitted at the hearing, the BCB reasonably concluded that the HOs were entitled to be represented by the UFT in connection with a mandatory subject of bargaining and that, by failing to negotiate with the UFT, the City "interfere[d] with" the rights of the HOs, and thereby violated NYCCBL § 12-306(a)(1). Similarly, by refusing to bargain with the UFT regarding a mandatory subject of bargaining, the City violated § 12-306(a)(4). Further, the City violated § 12-306(a)(5) since it sought to unilaterally impose the 1,000 hour aggregate cap during a period of contract negotiations.[7]

It is telling that, in its memorandum of law in opposition to the pending motions, the City cites only one case unrelated to its argument regarding the timeliness of the petition: *Pell, supra.* However, as noted above, *Pell* does not warrant the granting of the City's petition given the soundness of the BCB's decision. The City's position is further undermined by the fact that it makes absolutely no effort to distinguish the numerous administrative and judicial decisions cited

[7]As noted previously, since 2008 the UFT has been negotiating with the City on behalf of the HOs to reach a collective bargaining agreement. Ex. 1, at 5.

by the BCB which warrant the confirmation of its determinations.

The City's opposition to the motions to dismiss addresses only the statutory violations found by the BCB. Therefore, the City has waived its arguments regarding the methodology and implementation of the remedy prescribed by the BCB by failing to raise them in opposition to the motions. *See RSB Bedford Assocs., LLC v Ricky's Williamsburg, Inc.*, 91 AD3d 16, 23 n.1 (1st Dept 2011) (defendants waived argument by failing to raise it in opposition to plaintiff's motion for summary judgment).

In any event, this Court finds no grounds upon which to disturb the BCB's remedy. Pursuant to NYCCBL § 12-309(a)(4), the BCB has the authority to issue a proper remedy for an improper employment practice. Civil Service Law § 205(5)(d) provides that remedies in improper practice cases may include "make whole" relief, including, inter alia, an award of backpay.

A backpay award is only an approximation of what is owed and a formula calculating the same does not have to achieve perfection but must only be nonarbitrary. *See Intermountain Rural Elec. Ass'n. v N.L.R.B.*, 317 NLRB 588, 591 (1995), *enfd. mem.* 83 F3d 432 (10th Cir 1996). Therefore, "[a] formula which closely approximates what the [HOs] would have earned had they not been [injured by an unfair labor practice] is acceptable if it is not unreasonable or arbitrary under the circumstances." *Center Constr. Co., Inc.*, 355 NLRB 1218, 1219 (2010).

Here, the BCB, acknowledging that "no methodology would result in a perfect remedy" (Ex. 2, at 4), painstakingly considered numerous factors in creating a formula designed to "result in a fair and reasonable approximation of the amount of hours that each [AHO] would have worked in 2010 but for the City's unilateral implementation of the 1,000 hour cap on total hours

worked." (Ex. 2, at 19). The BCB

> ultimately concluded that a methodology that considers hours worked in the three years preceding the improper practice better takes into account the variations in hours worked from year to year. Thus, [it] deemed the three preceding years to be a "representative period" upon which to estimate which [HOs] would have worked more than 1,000 hours in more than one agency in 2010. *Intermountain Rural Elec. Ass'n.*, 317 NLRB 588 [*supra*] at 591.

Ex. 2, at 16.

Finally, since the City did not raise in its opposition to the motions to dismiss the argument that the BCB improperly determined that the AHOs had no duty to mitigate their damages, it waived that contention. *See RSB Bedford Assocs., LLC, supra.* In any event, the BCB's finding that no such duty existed was neither arbitrary, capricious, illegal , nor irrational given its reliance on *Deming Hosp. Corp v NLRB*, 665 F3d 196 (DC Cir 2011) and *88 Transit Lines, Inc.*, 314 NLRB 324, 325 (1994), *enfd. mem.* 55 F3d 823 (3d Cir 1995), which held that victims of unfair labor practices who have not lost their jobs have no duty to mitigate their damages.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motions by respondents The New York City Board of Collective Bargaining and United Federation of Teachers, Local 2, AFL-CIO to dismiss the petition are granted; and it is further,

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further,

ORDERED and ADJUDGED that the determinations of defendant The New York City Board of Collective Bargaining dated January 5, 2011, July 10, 2012, and July 10, 2013 are confirmed; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: August 14, 2014

ENTER

KATHRYN E. FREED,
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT