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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON JOAN A. MADDEN **PART** 11
Justice

Index Number : 451081/2013
CITY OF NEW YORK
vs.
NEW YORK CITY BOARD OF
SEQUENCE NUMBER : 001
ARTICLE 78

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

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 the annexed Memorandum, Decision, Order and Judgment ~~Motion and Order~~ ~~SUBMIT~~

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

Dated: October 28, 2014

_____, J.S.C.
HON. JOAN A. MADDEN
~~J.S.C.~~

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: IAS PART 11

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In the Matter of the Application of
THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF CITYWIDE ADMINISTRATIVE SERVICES,

Index No. 451081/13

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

-against-

THE NEW YORK CITY BOARD OF COLLECTIVE BARGAINING and DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondents.

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JOAN A. MADDEN, J.:

The City of New York and the New York City Department of Citywide Administrative Services (DCAS; together, the City) bring this petition (motion seq. no. 001) to annul, reverse, vacate or modify the determination of the New York City Board of Collective Bargaining (the Board), 6 OCB2d 14 (BCB 2013), docket number BCB 3014-12, dated May 29, 2013, which held that the City violated section 12-306 (a) (1) and (4) of the New York City Collective Bargaining Law (CBL), on the ground that the Board's determination was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious, irrational, or was an abuse of discretion.

The Board and District Council 37, AFSCME, AFL-CIO (District Council 37) move to dismiss the petition (motion seq. nos. 002

and 003 respectively).[1]

BACKGROUND

The City brings this petition to challenge the decision of the Board, which held that the City violated section 12-306 (a) (1) and (4) of the CBL when DCAS issued "Personnel Service Bulletin 440-14" (PSB 440-14), on March 5, 2012. The Board held that PSB 440-14 unilaterally altered the City's time and leave policies during citywide emergencies, without negotiating those policies with District Council 37, as required by contract.

In 1995, the City and District Council 37 negotiated a collective bargaining agreement for New York City employees who are members of the local unions that comprise District Council 37. That agreement is entitled "1995-2001 Citywide Agreement" (Citywide Agreement). The Citywide Agreement remains in force pursuant to the status quo provision contained in CBL § 12-311 (d). CBL § 12-307 provides that wages and hours, including time and leave benefits, are mandatory subjects of bargaining between a public employer and a recognized union.

The Citywide Agreement provides that "[e]very employee is obligated to report for work as scheduled." Citywide Agreement (exhibit 2 to petition), article V, section 16 (a). Section 16 (h) provides: "Lateness caused by a verified major failure of

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[1]Motion sequence numbers 001, 002 and 003 are consolidated for disposition.

public transportation, such as a widespread or total power failure of significant duration or other catastrophe of similar severity, shall be excused." The agreement also contains the following section regarding disabled employees:

> "Each agency will prepare contingency plans for operation during a major failure of public transportation which would cause disabled employees, as defined in the Americans with Disabilities Act, great difficulty in reaching their regular work location. Such plans will include, where practicable and productive, provisions assigning disabled employees to report to agency locations closer to their homes. Such plans shall also include provisions for excusal by the agency head of absences on an individual basis for disabled employees. Decisions of the agency head with respect to absences under such plans shall not be subject to the grievance procedure."

Citywide Agreement, article V, section 16 (I). The Citywide Agreement does not provide for any absence of nondisabled employees to be excused during a citywide emergency.

Historically, various "Personnel Policy and Procedures" notices (PPPs), "Personal Service Bulletins" (PSBs) and other memoranda have been promulgated by DCAS regarding the City's time and leave policies when a specific emergency situation such as a weather related event, transit strike or power emergency, arose that caused major disruptions to public transportation. The PPPs, PSBs, and memoranda addressed various emergencies on a case-by-case basis. However, all of them provided for lateness to be excused without charge up to at least 11:00 a.m. when public transportation was severely compromised by the emergency.

On March 5, 2012, Edna Wells Handy, the commissioner of DCAS, issued PSB 440-14, titled "Time and Leave Policy In the Event of Citywide Emergency," which provide a written time and leave policy for a broad range of City-Wide emergencies.[2] Unlike prior PSBs, PPPs, and memoranda which were issued in connection with a specific emergency that had occurred or were anticipated, PSB 440-14 was intended to apply to a wide-range of emergencies that could arise in the future.

Among other provisions, PSB 440-14 provides that "employees who do not report to work during the City-wide emergency must use their annual leave, compensatory time, or be advanced annual leave. Such usage is subject to agency head approval." Petition, exhibit 20, I (A). With respect to lateness, to be eligible for excusal of the lateness, the agency would "determine whether the lateness was caused by unforeseen circumstances which arise after an employee leaves for work, which cannot be anticipated and are beyond the ability of the tardy employee to control." *Id.*, I (B). It also provides that "pursuant to an employee's agency's Continuity of Operation Plan ("COOP") an employee may be directed to report to alternative work sites, or flexible or staggered work hours." *Id.*, II (A, B).

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[2]PSB 440-14 provides that "a City-wide emergency includes, but is not limited to, weather-related events such as storms, floods, and tornados, transit strikes; and impact area-specific events such as infra-structure incidents."

District Council 37 filed an improper practice petition against the City on May 15, 2012, alleging that the City violated CBL § 12-306 (a) (1) and (4) by issuing PSB 440-14, in that the City unilaterally changed the time and leave policies regarding citywide emergencies.

After a four-day hearing and the parties' submission of briefs, the Board determined that the PSB 440-14's provisions as to alternative work locations and alternative work schedules were properly promulgated as they constitute matters that are part of managerial prerogative that the City can exercise during emergencies. However, the Board concluded that PSB 440-14 unilaterally altered time and leave policies that are the subject of mandatory collective bargaining. Specifically, based on the record before it, the Board found that PSB 440-14 was a "new and comprehensive written time and leave policy applicable to all City-wide emergencies," since prior written policies on these issues were issued on "an emergency-by-emergency basis after the emergency occurred or in anticipation of a specific event." Petition exhibit 1 (Determination) at 3.

The Board also found that "agency heads previously had discretion regarding absences" and that PSB 440-14 changes that discretion in two ways. Id at 18. First, by "provid[ing] a single way for an employee to be paid in the event of absence caused by a City-wide emergency-the use of accrued or advanced

leave," and also by "vest[ing] agency heads with discretion to approve or deny the use of annual leave or compensatory time." *Id* at 18, 19. With regard to the second aspect, the Board wrote "not only could an agency head decide not to excuse an absence due to a City-wide emergency, that employee could be required to take leave without pay. The prior event-specific memoranda either automatically allowed employees to use accrued or advance leave time or stated specific conditions under which they would be allowed to do so." *Id* at 19.

The Board further found that PSB 440-14 changed time and leave policies regarding lateness by excusing lateness only if the event causing the lateness arose after the employee left for work. *Id.* The Board ordered the City to rescind all actions taken under PSB 440-14 regarding absences and lateness, and to cease and desist from implementing those sections of the PSB until it bargains with the union over those issues.

The City argues that Board's determination that PSB 440-14 reflected a new comprehensive policy that unilaterally altered time and leave policies is irrational. The City maintains that it has negotiated these long-standing time and leave policies with its employees, and asserts that the provisions of PSB 440-14 are in keeping with the language of section 16 (h) of the Citywide Agreement. Thus, the City contends that PSB 440-14 is merely a general restatement and clarification of long-standing

City policies that were established through collective bargaining. The City also asserts that the sole difference is that PSB 440-14 is a general statement rather than the event-specific statements that were previously provided.

The City further argues that the policies contained in PSB 440-14 involve its right under CBL § 12-307(b),[3] as a public employer, to "take all necessary actions to carry out its mission in emergencies," and therefore such policies do not fall within the scope of collective bargaining. In this connection, the City asserts that Board attempted to evade CBL § 12-307(b) by finding that only PSB 440-14's policies on alternative work locations and scheduling, and not those concerning time and leave, fell within

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[3] CBL § 12-307(b) provides that:

> It is the right of the city, or any other public employer, 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; take disciplinary action; 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; determine the content of job classifications; 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.

the City's management rights under the provision.[4]

DISCUSSION

In order to vacate the Determination of the Board, the City must demonstrate that the Determination was arbitrary and capricious, irrational, in violation of lawful procedure or effected by an error of law. CPLR 7803 (3). A court cannot substitute its own judgment for that of the board it reviews unless the decision under review is arbitrary and unreasonable, or an abuse of discretion. *Matter of Medical Malpractice Ins. Assn. v Superintendent of Ins. of State of N.Y.*, 72 NY2d 753, 763 (1988), *cert. denied* 490 US 1080 (1989).

Pursuant to CBL § 12-306 (a) (4), the City must engage in collective bargaining "in good faith on matters within the scope of collective bargaining . . . " The scope of collective bargaining includes wages and hours, including time and leave benefits. CBL § 12-307 (a). Paid leave and other financial benefits are presumptively terms and conditions of employment

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[4]The City also argued before the Board that District Council 37's claims were barred by res judicata based on determination after an arbitration brought by the Union asserting that the City or the Health and Hospitals Corporation violated Section 16(h) of the Citywide agreement when it issued a December 17, 2010 memorandum which gave employees a choice of using annual or compensatory leave as the only mechanism to excuse and compensate employees who were absent from work during a snowstorm. The Board rejected this argument on various grounds, including that the matter before the Board involving an allegation of the refusal to bargain was outside of the arbitrator's jurisdiction. The City does not raise this issue in its petition, which, in any event, does not provide a basis for annulling the Board's determination since the requirements for res judicata were not met.

subject to collective bargaining. *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v New York State Pub. Empl. Relations Bd.*, 6 NY3d 563, 572 (2006); *Matter of State of N.Y., Governor's Off. of Empl. Relations v Public Empl. Relations Bd.*, 116 AD2d 827, 830 (3d Dept 1986). A unilateral change in leave policy is an improper practice. *Matter of State of N.Y., Governor's Off. of Empl. Relations v Public Empl. Relations Bd.*, 116 AD2d at 829-830.

Under these standards, the Board lawfully found that the policies contained in PSB 440-14 with respect to time and leave during emergencies are subject to collective bargaining as they affect whether an employee will be paid for absences and/or lateness. Moreover, although CBL § 12-307(b) states that the City may "take all necessary actions to carry out its missions in emergencies," this provision does not does not preclude collective bargaining with regard to time and wage issues since payment issues do not directly impact on the City's ability to take action during emergencies. *See generally Matter of Watertown v. State of N.Y. Public Relations Bd.*, 95 NY2d 73 (2000)(noting that "absent clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining")[5].

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[5]In this connection, the City's reliance on *New York Transit Authority v. New York State Public Employment Relations Bd.*, 19 NY3d 876 [2012], is misplaced. While the Court of Appeals in that case noted that "certain decisions of an employer, though not without impact upon its employees, may not be deemed

Next, the Board's finding that PSB 440-14 constituted an improper and unilateral change in time and leave policies regarding absences during an emergency was not arbitrary, capricious or irrational. Notably, at the hearing held before the Board, documents were introduced showing that on at least on seven prior occasions, the City issued event specific written notices in the form of PPP's PSB's and memoranda, excusing employee absences without charge to leave balances. In addition, there was testimony at the hearing to the effect that agency heads had the authority to excuse employee absences, without charging either annual leave or compensatory time balances. In contrast, PSB 440-14 not only precludes excused absences without charging leave balances, but also gives the agency head discretion to refuse permission to charge these balances and to require the employee to take leave without pay.

With regard to lateness, the City does not address the far more limited language that is contained in PSB 440-14 when compared with § 16 (h) of the Citywide Agreement and various prior written notices issued in connection with various citywide

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mandatorily negotiable terms and conditions of employment ... because they are inherently and fundamentally policy decisions relating to the primary mission of the public employer," it found that the record was insufficient to support petitioner New York City Transit Authority's argument the its implementation of stricter standards for certain employees with "safety sensitive titles" was related to its "core mission to provide a safe transit system" such that these standards were not subject to collective bargaining. *Id* at 879-880 (internal citations and quotations omitted).

emergencies. Specifically, unlike PH-440-14, section 16 (h) and the prior notices do not require that in order to be excused for lateness the cause of the employee being late must arise after the employee leaves for work. Therefore the Board's finding that the altered language constitutes a change in policy cannot be said to be irrational, arbitrary or capricious.

Finally, contrary to the City's position, the Board lawfully found that only PSB 440-14's policies on alternative work locations and scheduling, which do not affect time and leave, are within the City's management rights under CBL § 12-307(b).

Thus, as the City has failed to demonstrate that the Board's determination was unlawful, irrational and/or arbitrary and capricious, the petition must be denied and dismissed.

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition is denied; and it is further

ORDERED that the motions of The New York City Board of Collective Bargaining (motion seq. no. 002) and District Council 37, AFSCME, AFL-CIO (motion seq. no. 003) to dismiss the petition are granted, and the petition is dismissed.

Dated: October 28 2014

J.S.C.
HON. JOAN A. MADDEN
J.S.C.