MLC, 15 OCB2d 34 (BCB 2022)

(Docket No. BCB-4458-21)

Summary of Decision: Petitioners claimed that the City violated § 12-306(a)(4) and § 12-307 of the NYCCBL by failing to bargain over policies the City unilaterally adopted as a result of the Mayor's order that all City employees be vaccinated by October 29, 2021. Petitioners argued that the City failed to provide sufficient time to negotiate issues relating to implementation of the Vaccine Mandate set forth in these policies, prior to arbitrary deadlines, in violation of the duty to bargain in good faith. The City argued that it had no obligation to bargain over the implementation of the Vaccine Mandate due to the public health emergency caused by the COVID-19 pandemic. It further argued that it had engaged in good faith impact bargaining and that there is no legal requirement that impact be bargained before the implementation of a policy. The Board finds that the City had a duty to bargain over mandatory subjects contained in its policies to implement the Vaccine Mandate and that it failed to do so. Accordingly, the petition was granted. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

THE NEW YORK CITY MUNICIPAL LABOR COMMITTEE, et al.,

***Petitioners*,**

-and-

THE CITY OF NEW YORK, and THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE,[1]

***Respondents*.**

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[1] The petition named Dr. David Chokshi, Commissioner of the Department of Mental Health and Hygiene, as a respondent. As individuals are not proper respondents under the NYCCBL, we amend the caption *nunc pro tunc* to substitute the Department of Health and Mental Hygiene, for Chokshi. *See DC 37*, 6 OCB2d 14 at 2, n. 1 (BCB 2013) (citing NYCCBL §§ 12-303(g) (defining public employer for the purposes of the NYCCBL) and 12-304 (scope of the NYCCBL)).

DECISION AND ORDER

On October 25, 2021, a verified improper practice petition was filed alleging that the City of New York ("City") and the Department of Health and Mental Hygiene ("DOHMH") violated § 12-306(a)(4) and § 12-307 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to bargain over the unilaterally adopted policies the City issued as a result of the Mayor's order that all City employees be vaccinated by October 29, 2021 ("Vaccine Mandate").[2] The petitioners are the New York City Municipal Labor Committee, United Fire Officers Association, Local 845; Captains Endowment Association; Lieutenants Benevolent Association; Uniformed Firefighters Association, Local 94, I.A.F.F., AFL-CIO; Sergeants Benevolent Association; Detectives' Endowment Association (collectively, "Petitioners").

Petitioners argue that the City set unilateral and arbitrary deadlines on terms relating to implementation of the Vaccine Mandate that failed to provide sufficient time to negotiate. Those implementation terms affect mandatory subjects of bargaining, and their unilateral implementation was in violation of the duty to bargain in good faith. The City argues that it had no obligation to bargain over the implementation of the Vaccine Mandate due to the public health emergency caused by the COVID-19 pandemic. It further argues that it engaged in good faith impact bargaining, and there is no legal requirement that impact be bargained before the implementation of a policy. The Board finds the City has a duty to bargain over mandatory subjects contained in

[2] On that same date, a petition seeking injunctive relief for the claims was filed. On November 9, 2021, the Board denied the petition because it did not appear that immediate and irreparable injury would result from the City's actions. On November 24, 2021, an amended petition was filed, adding an additional 12 unions as petitioners. As of January 10, 2022, 18 unions had reached settlements with the City and withdrawn from the petition.

the City's policies to implement the Vaccine Mandate and that it failed to do so. Accordingly, the petition is granted.

BACKGROUND

On August 31, 2021, the Mayor issued Executive Order ("EO") No. 78, mandating that as of September 13, 2021, City employees and covered employees of City contractors be vaccinated against COVID-19 or submit to a weekly PCR test. Thereafter, on October 20, 2021, the Mayor issued EO No. 83, and announced that these employees would no longer have the option of weekly testing and would instead be required to be fully vaccinated. Specifically, employees would be required to have their first dose of a vaccine by October 29, 2021. Additionally, the Mayor announced that a $500 bonus would be paid to those currently unvaccinated employees who received their first dose by that date. On the same day EO No. 83 was announced, the City's Commissioner of Health and Mental Hygiene ("Health Commissioner") issued an order similarly requiring all City employees to be vaccinated and providing further details, including that any employee who had not provided proof of having received a first dose of a vaccine by 5:00 p.m. on October 29, 2021 would be "excluded from the premises at which they work beginning on November 1, 2021."[3] (Pet., Ex. 1 ¶ 3)

Also on October 20, 2021, the Department of Citywide Administrative Services ("DCAS") issued a revised version of its "Managing the Office in the Age of COVID-19" policy to all agencies, which included a section generally describing the Vaccine Mandate and listing resources

[3] This order also provided that due to staffing shortages the Vaccine Mandate would not become effective until December 1, 2021, for uniformed Department of Correction employees who are not assigned to work in health care settings.

on how and where to obtain the vaccine. (Pet., Ex. 4) On October 22, the City issued a "FAQ on New York City Employees Vaccine Mandate" ("FAQ" or "fact sheet"). (Pet., Ex. 3) This fact sheet is a detailed description of which employees must be vaccinated, how to get vaccinated, what counts as proof of vaccination, and provides information on paid leave time and other incentives for vaccination. It also provides that, as a "penalty," employees who fail to comply with the Vaccine Mandate will be placed on Leave Without Pay ("LWOP") and "will be terminated in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreements."[4] (*Id*. at ¶ 51) In addition to describing the Vaccine Mandate, the FAQ also detailed the process for an employee to request a reasonable accommodation exemption to the Vaccine Mandate for medical or religious reasons and stated that any such request must be made by October 27, 2021. The FAQ states that while the request for a reasonable accommodation is being evaluated, the employee will have to submit to weekly testing. Any employee who applies for a reasonable accommodation after October 27 will be placed on LWOP while their accommodation is considered. Additionally, the FAQ stated that the only reasonable accommodation available is that the employee submits a weekly negative test result. If an employee's request for a reasonable accommodation is denied, he or she may submit an appeal via an "online review request portal" within three business days. (*Id*. at ¶ 27)

Petitioners claim that the City did not provide it with any information concerning who would decide the appeal or what standard would be used. The City, however, claims that it provided the unions with information on the panel that would hear the accommodation denial

[4] The FAQ further states that "Absent any collective bargaining agreement providing for other procedures, employees should be placed on LWOP effective November 1 and may be subject to discipline or other adverse employment action. Further guidance will be forthcoming." (Pet., Ex 3 at ¶ 52)

appeals. Additionally, although the FAQ states that additional information may be requested from the employee in order for a decision to be made on the appeal, Petitioners aver that the employee would not have the right to provide any additional information. The FAQ states that the review of all appeals would be completed before November 25, 2021. If an appeal was denied, the employee had to submit proof of a first dose of vaccination within three business days. If the employee did not do so, he or she was to be placed on LWOP.

The City did not bargain with any unions prior to announcing the Vaccine Mandate or issuing its policies concerning implementation thereof. On October 20, 2021, the same day the Vaccine Mandate was announced, OLR Commissioner Renee Campion sent letters to all affected unions stating that, although the City believed the implementation of the Vaccine Mandate was a managerial prerogative, she was available to meet to bargain the impacts of the Vaccine Mandate. Also on that date, the Chair of the Municipal Labor Committee ("MLC") sent a letter to Campion "on behalf of the MLC and its member unions" requesting that the City cease and desist from implementing the Vaccine Mandate and bargain with the MLC over the decision to order the Vaccine Mandate as well as the implementation of that decision. (Pet., Ex. 5) Campion responded that same day, stating that she did not agree that the Vaccine Mandate was a mandatory subject of bargaining, but that "[i]f the MLC wishes to bargain as a coalition of its member unions, we are available to engage in impact bargaining." (Pet., Ex. 6)

Beginning on October 25, 2021, the City met with numerous unions to discuss implementation, including a coalition of unions. There is no dispute that as of October 29, 2021, no agreements had been made, and the Vaccine Mandate went into effect. However, commencing on November 4, 2021, and continuing through November 24, 2021, the City signed agreements with numerous unions on a variety of implementation issues including the reasonable

accommodation request and appeal process, LWOP terms, and separation benefits such as continuation of health benefits up to June 30, 2022, for employees who refused to vaccinate and opted to leave City employment.[5] The current Petitioners did not reach agreement with the City on implementation terms.

POSITIONS OF THE PARTIES

Petitioners' Position

Petitioners assert that the City violated its duty to negotiate in good faith under NYCCBL § 12-306(a)(4) when it unilaterally adopted policies relating to the implementation of the Vaccine Mandate before it gave affected unions a meaningful opportunity to negotiate. Petitioners are not seeking to bargain over the Vaccine Mandate itself, nor do they challenge the Health Commissioner's power to issue the Vaccine Mandate. Rather, they seek to bargain "the City's unilateral and discretionary implementation of policies affecting employee reasonable accommodation applications, placement on LWOP, and appeals by an arbitrary date certain . . . which refused Petitioners the time necessary to negotiate in good faith or reach impasse over those policies *prior to these specific deadlines*." (Rep. ¶ 25) (emphasis in original). Petitioners argue

[5] The following unions withdrew from the improper practice in accordance with those agreements: District Council 37; Uniformed Sanitationmen's Association, Local 831; International Brotherhood of Teamsters, Local 237; Service Employees' International Union, Local 246; Communication Workers of America, Locals 1180, 1181, and 1182; International Union of Operating Engineers, Local 15C; International Union of Operating Engineers, Local 30; United Probation Officers Association; International Brotherhood of Electrical Workers, Local 3; Organization of Staff Analysts; Service Employees' International Union, Local 300; United Fire Alarm Dispatchers Benevolent Association; International Organization of Masters, Mates, and Pilots, AFL-CIO; District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Uniformed Sanitation Chiefs Association; Sanitation Officers Association, Local 444; Service Employees' International Union, Local 621; International Boilermakers, Local 5.

that none of these "decrees" were made pursuant to the Vaccine Mandate itself but were instead subject to the City's discretion. While the Vaccine Mandate bars unvaccinated employees from the physical workplace, it is silent with respect to leave policies, employee pay, and reasonable accommodation appeals processes. As such, Petitioners contend that the City's bargaining obligation under the NYCCBL is not preempted by the "powers of DOHMH, nor the prohibitions of any statute, regulation, ordinance, or order . . . ." (Rep. ¶ 41)

Petitioners argue that the policies the City unilaterally adopted to implement the Vaccine Mandate involve employees' terms and conditions of employment. Employees who fail to vaccinate will be placed on LWOP which, Petitioners argue, impacts their pay, differentials, benefits, pension accruals, and the fundamental right to their employment and a fair disciplinary process. Additionally, the implementation included reasonable accommodation procedures and disciplinary outcomes for employees who choose not to comply, which require bargaining. Furthermore, Petitioners aver that the City's unilateral policies also effectuated a change in job qualifications for incumbent employees, which is a mandatory subject of bargaining.

Petitioners contend that they are not seeking to bargain a practical impact resulting from the Vaccine Mandate. Instead, Petitioners seek to bargain directly over the mandatory subjects of bargaining set forth in the procedures the City unilaterally adopted in order to implement the Vaccine Mandate. Specifically, they seek to negotiate certain terms and conditions of employment relating to those employees who did not comply with the mandate. Those terms are not set forth in the Vaccine Mandate but are contained in the policies and procedures adopted by the City, such as those set forth in the FAQ.

Petitioners contend that the City failed to provide sufficient time to negotiate the implementation of policies concerning mandatory subjects of bargaining prior to the arbitrary

deadlines it set. Petitioners note that it is well-settled that the duty to bargain requires meeting at reasonable times and conferring in good faith. Here, the City began bargaining with the first few unions on October 25—two days before the reasonable accommodation application deadline the City unilaterally set, and nine days before unvaccinated employees faced being placed on LWOP. Petitioners assert that the City's unreasonable and unnecessary time pressure for implementation of the Vaccine Mandate evidences a failure to negotiate in good faith.

As a remedy, Petitioners ask the Board to issue an order declaring that the City violated its obligation to negotiate in good faith; order the City to bargain in good faith over implementation of policies related to the Vaccine Mandate; and any other and further relief as the Board deems appropriate.

City's Position

The City asserts that it has no obligation to bargain over the implementation of the Vaccine Mandate due to the public health emergency caused by the COVID-19 pandemic.[6] In support of this assertion, the City maintains that the Vaccine Mandate falls within the City's managerial prerogative under NYCCBL § 12-307. In addition, it contends that the Health Commissioner has the statutory authority to require the vaccination of City workers.[7] As a result, the City maintains that the Board has consistently held that the duty to bargain over a practical impact does not arise until the Board finds a practical impact and determines whether the employer has taken adequate

[6] The City also argued that the MLC lacks standing as a petitioner in this matter because it is not a certified bargaining representative of any City employee and does not have the authority to bargain terms and conditions of employment, except for health benefits. We do not address this issue because its resolution has no substantive impact on the outcome in matter.

[7] Petitioners do not contest the City's decision to require vaccination, only that implementation of the Vaccine Mandate is a mandatory subject of bargaining. Therefore, the City's arguments on this point are not fully summarized here.

steps to alleviate the impact. Therefore, the City argues that any duty to bargain over the impact of the Vaccine Mandate does not arise until the Board has made a determination that a bargainable impact exists. Moreover, even when the Board has found a practical impact, the remedy has been to order bargaining to alleviate the impact—not recission or delay in implementation until an agreement or impasse is reached. Here, the City commenced bargaining over the impact of the Vaccine Mandate on October 25, 2021, with all affected unions. Indeed, the City successfully bargained these issues to conclusion with 18 different unions. Thus, the City contends that it very clearly has not refused to bargain over the Vaccine Mandate's impact.

Further, the City maintains that Petitioners' assertions that nine days' notice is an insufficient period to negotiate impact is legally and factually incorrect. As noted above, the City argues that the appropriate remedy for a finding of practical impact is an order to bargain, "while the challenged policy remains in place." (Ans. ¶ 144) It asserts that it is within the authority of the City to act in this emergency and that the reasonable nature of the Vaccine Mandate does not present a basis upon which the Vaccine Mandate should be lifted while bargaining is in process. It claims that Petitioners have shown nothing to support the assertion that nine days is insufficient for collective bargaining. To the contrary, it asserts that nine unions were able to bargain to completion just seven days after bargaining commenced, and multiple others reached agreement with the City thereafter. The City therefore contends that Petitioners' argument fails because it demonstrated good faith in offering to bargain impact, and there is no legal requirement that impact be bargained before the implementation of a challenged policy.

DISCUSSION

Petitioners assert that the City has violated NYCCBL § 12-306(a)(4) by failing to bargain over unilaterally adopted policies it issued in order to implement the Vaccine Mandate. NYCCBL § 12-307(a) provides that parties "shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), [and] working conditions." Thus, NYCCBL § 12-306(c) requires that public employers and employee organizations "bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009) (citations omitted). The Board has long held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012) (citation omitted). In order to establish that a unilateral change has occurred in violation of the NYCCBL, the Union "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37, L. 436 & 768*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)).

Petitioners do not argue that the Vaccine Mandate itself is a mandatory subject of bargaining. Rather, Petitioners challenge the policies and procedures that the City unilaterally promulgated to implement the Vaccine Mandate, which they argue are mandatory subjects in and of themselves. This Board has previously stated that "[w]hile the City has the right to make and implement decisions concerning its management prerogatives without bargaining, the procedures for implementing decisions that affect terms and conditions of employment . . . are mandatorily

negotiable." *DC 37, L. 3631*, 4 OCB2d 34, at 12 (BCB 2011) (citing *DC 37*, 75 OCB 13, at 11 (BCB 2005)) (finding a change in frequency of performance evaluations was a mandatory subject of bargaining). *See also Doctors Council*, 69 OCB 31 (BCB 2002) (procedures for implementation of requirements of the Conflicts of Interest Law must be bargained); *DC 37*, 77 OCB 8 (BCB 2006) (procedures for road workers' use of cell phones concerned mandatory subjects of bargaining); *DC 37*, 75 OCB 14 (BCB 2005) (procedures for notification and verification of residency were mandatorily bargainable); *DC 37*, 67 OCB 25 (BCB 2001) (procedures for drug testing policy were mandatory subjects); *City of Utica*, 32 PERB ¶ 3056 (1999) (procedures for required physical examinations must be bargained).

In a case with similar facts, PERB held that while the bargainability of a mandate from the Albany County Health Department that firefighters be tested for tuberculosis was not at issue, the procedures for testing the employees were negotiable. The ALJ found that the procedures the employer unilaterally adopted affected firefighters' "work schedules, leave time, compensation, privacy, discipline and choice of health care worker to perform the tuberculosis test," all of which were mandatory subjects of bargaining. *City of Cohoes*, 25 PERB ¶ 4506, at 4514 (ALJ 1992), *affd.*, 25 PERB ¶ 3042 (1992). Here, Petitioners argue that the City's unilaterally established policies concerning implementation of the Vaccine Mandate concern multiple mandatory subjects of bargaining, including pay and leave policies, procedures for reasonable accommodation policies, and disciplinary procedures for employees who do not comply.

First, it is undisputed that under the policies the City adopted to implement the Vaccine Mandate, employees who did not comply were placed on LWOP, and paid leave was not an option. This Board has repeatedly found that "[u]nilateral changes regarding the use of leave time are a violation of an employer's bargaining obligation." *DC 37*, 6 OCB2d 14, at 16 (BCB 2013) (new

policy for Citywide emergencies that no longer allowed for excused absences and could require employees to take LWOP constituted a unilateral change to a mandatory subject of bargaining) (citing *UFOA, L. 854 & UFA*, 67 OCB 17 (BCB 2001); *DC 37, L. 436 & 768*, 4 OCB2d 31, at 14). Moreover, LWOP affects wages, which is expressly delineated as a mandatory subject under NYCCBL § 12-307(a). Accordingly, we find that the use of paid leave for those who failed to comply is a mandatory subject of bargaining.

In addition, the record does not reflect, at the time the Vaccine Mandate was implemented, exactly how the City intended to treat those employees who failed to comply. The Vaccine Mandate required that employees be vaccinated by a certain date or not be allowed to work on City premises. However, it did not specifically require that employees who do not comply will be placed on LWOP or terminated and removed from payroll on a date certain. Thus, the City had some discretion in how it would implement this requirement of the Vaccine Mandate.

The Petitioners' assertion that there were aspects of the City's implementation that were disciplinary in nature and required bargaining was based on the statement in the FAQ that discipline may result from non-compliance. As noted earlier, the City's FAQ explicitly states that LWOP is the "penalty" for not complying with the Vaccine Mandate and that employees placed on LWOP "may be subject to discipline or other adverse employment action." (Pet., Ex. 3 at ¶¶ 51, 52) It also states that an employee who is placed on LWOP "will be terminated in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreements." (Pet., Ex. 3 at ¶ 51) However, we take judicial notice of the fact that after the petition

was filed the City asserted that the Vaccine Mandate was a qualification of employment and it has maintained that position since.[8]

Petitioners are correct that this Board has found that while the decision of whether to discipline an employee is a non-mandatory subject of bargaining, "the procedures necessary for the administration of discipline are mandatorily negotiable." *DC 37*, 79 OCB 37, at 10 (BCB 2007). Thus, the "methods, means, and procedures which may be used in effectuating disciplinary action are subject to mandatory bargaining." *COBA*, 12 OCB2d 3, at 12 (BCB 2019) (quoting *DC 37*, 65 OCB 36, at 9-10 (BCB 2000)) (internal quotation marks omitted). Disciplinary penalties may also be mandatorily negotiable. *See COBA*, 12 OCB2d 3, at 12; *see also DC 37*, 15 OCB2d 11, at 22 (BCB 2022) (finding that newly-imposed disciplinary infractions for driving penalties were a mandatory subject of bargaining)*; NYC Transit Auth.*, 20 PERB ¶ 3037 (1987), *affd.*, 147 A.D.2d 574 (2d Dept. 1989), *order modified*, 156 A.D.2d 689 (2d Dept. 1989) (finding that employer could not unilaterally eliminate a comprehensive schedule of penalty guidelines in favor of a policy by which disciplinary penalties were assigned on a case-by-case basis). Therefore, procedures and penalties relating to discipline against unvaccinated employees may be subject to bargaining. However, in the absence of evidence that the City initiated disciplinary proceedings against employees who chose not to vaccinate, we do not find that the City violated its duty to bargain in good faith. *See UFA, Local 94,* 15 OCB2d 33 (BCB 2022) (rejecting union's assertion

[8] We note that in proceedings filed in various courts, the Vaccine Mandate itself, as opposed to the implementation policies at issue here, has been found to be a lawful qualification or condition of employment that does not implicate disciplinary procedures. *See Garland v. New York City Fire Dept.*, 574 F. Supp. 3d 120, 129 (E.D.N.Y. 2021) (citing *We The Patriots USA, Inc. v. Hochul,* 17 F.4th 266, 293-94 (2d Cir. 2021)); *Marciano v. DiBlasio*, 2022 WL 678779, at *10 (S.D.N.Y. Mar. 8, 2022); *New York City Mun. Labor Comm. v. City of New York*, 75 Misc. 3d 411, 415 (Sup. Ct. N.Y. Co. Apr. 21, 2022).

that placing unvaccinated employees on LWOP was subject to contractual disciplinary procedures).

Petitioners also sought to bargain over the procedures under which requests for a reasonable accommodation to the Vaccine Mandate are processed and appealed. In previous cases concerning the processing of requests for a reasonable accommodation for a disability, this Board found that while "management has the right to establish [a reasonable accommodation policy], in compliance with applicable law," as well as make initial determinations of eligibility without bargaining, "the procedures implementing the policy constitute a mandatory subject of bargaining." *DC 37, L. 2507 & 3621*, 73 OCB 7, at 17-18 (BCB 2004) (citing *Matter of City of Watertown v. State of New York Public Employment Relations Board*, 95 N.Y.2d 73 (2000)); *see also EMS Superior Officers Assoc*., 75 OCB 15, at 11 (BCB 2005). Thus, procedures such as filing and appeal requirements have been found to be mandatorily bargainable. *See DC 37, L. 2507 & 3621*, 73 OCB 7, at 17. Petitioners have not asserted that they sought to bargain over the criteria under which a reasonable accommodation would be granted. Rather, they sought to bargain over the deadlines and appeals process for those employees whose requests for a reasonable accommodation are denied, which we find constitute mandatory subjects of bargaining.

The City's assertion that it did not violate NYCCBL § 12-306(a)(4) because it engaged in good faith impact bargaining is not dispositive. The issue in this matter is not whether the City was required to bargain over a practical impact that naturally resulted from the Vaccine Mandate. As PERB has explained, "[i]n an impact bargaining situation, the effects which are sought to be bargained simply flow from the exercise of managerial prerogative without benefit of or need for any separate decisional implementation." *County of Nassau*, 27 PERB ¶ 3054, at 3120-3121 (1994). Where the employer adopts separate policies or procedures in order to implement the

managerial prerogative, those policies or procedures are bargainable to the extent they concern mandatory subjects of bargaining. *See id*. (County's decision to drug test employees was a managerial prerogative, but procedures adopted to implement that decision were mandatorily negotiable). Where, as here, the issue is a unilateral change to mandatory subjects of bargaining, "discussions which do not result in either an agreement or impasse proceedings resolving the parties' inability to reach agreement do not constitute bargaining sufficient to legitimize a unilateral change to a mandatory subject of bargaining." *DC 37*, 4 OCB2d 19, at 35 (BCB 2011), *affd.*, *Matter of Roberts, et al. v. New York City Office of Collective Bargaining, et al.*, Index No. 106268/2011 (Sup. Ct. N.Y. Co. Apr. 30, 2012) (Torres, J.), *affd.*, 113 A.D.3d 97 (1st Dept. 2013) (citing *UFA*, 77 OCB 39, at 13-14 (BCB 2006); *DC 37, L. 1457*, 77 OCB 26, at 19-20 (BCB 2006)). No impasse or agreement has been reached between the City and Petitioners in this matter, "thus [the City's] contention that the discussions in which it participated somehow discharges its duty to bargain is groundless." *DC 37*, 4 OCB2d 19, at 35. Accordingly, we find that, under the circumstances here, the City breached its duty to bargain in violation of NYCCBL § 12-306(a)(4). When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1).[9]

With respect to remedy, while the City has not provided a specific justification for the short span of time between the announcement of the Vaccine Mandate and the implementation of its unilaterally adopted policies, we note that in the context of the COVID-19 public health emergency, time was clearly of the essence. The public health threat posed by the COVID-19

[9] During these proceedings Petitioners emphasized that the nine days between the City's announcement and implementation of the Vaccine Mandate was too short to accommodate bargaining. The Board acknowledges Petitioners' frustration and notes that the short notice of implementation also constrained the Board's ability to rule on Petitioners' application for injunctive relief prior to implementation.

virus since early 2020 is well-documented. Over two years later, highly contagious mutations of the virus continue to challenge public health and health care resources worldwide. In the Health Commissioner's October 2021 order, he noted that the US Centers for Disease Control and Prevention and other health policy studies have shown that, "vaccination is an effective tool to prevent the spread of COVID-19 and the development of new variants, and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated." (Pet., Ex. 1) Further, he explained that the Vaccine Mandate was a reasonable measure to reduce the transmission of COVID-19 in the workplace and when providing City services and "will potentially save lives, protect public health, and promote public safety." (*Id*.) Over eleven months have passed since the Vaccine Mandate was issued, and the deadlines to be vaccinated as well as the need to address reasonable accommodation requests have come and gone. Given these rare and unique circumstances, we do not order the City to restore the *status quo ante*.[10] Nevertheless, to the extent issues concerning terms and conditions of employment remain in implementation of the Vaccine Mandate, we order the City to bargain with Petitioners to either agreement or impasse.

[10] This conclusion is consistent with the remedy requested by Petitioners that was limited to a declaration that the City violated its obligation to negotiate in good faith and an order that the City bargain in good faith over implementation of policies related to the Vaccine Mandate.

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-4458-21, filed by Petitioners against the City of New York and the Department of Health and Mental Hygiene, is hereby granted; and it is further

ORDERED, that the City of New York bargain in good faith over any remaining issues concerning terms and conditions of employment in implementation of the Vaccine Mandate, and it is hereby

ORDERED, that the City of New York 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: September 28, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent (see attached opinion)
M. DAVID ZURNDORFER
MEMBER

I dissent (see attached opinion)
CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

MLC, 15 OCB2d 34 (BCB 2022)

(IP) (Docket No. BCB-4458-21)

Dissent of Carole O'Blenes and David Zurndorfer

This case arose out of the unprecedented and well documented public health emergency created by the devastating impact of COVID-19. In light of the medical and scientific data establishing that "vaccination is an effective tool to prevent the spread of COVID-19" (Pet. Ex. 1), and in furtherance of his mandate to safeguard the public health and safety, the City's Commissioner of Health and Mental Hygiene established a new condition of employment for City employees in October 2021 — issuing an order that required all City employees to be vaccinated against COVID-19. The order provided that employees who had not submitted proof of having received a first dose of the vaccine by 5:00 pm on October 29, 2021 would be "excluded from the premises at which they work beginning on November 1, 2021." (Pet. Ex. 1, ¶3)

In order to prevent the spread of disease among City employees and the public they serve, the City implemented that order with the dispatch required by the emergency conditions and, in large measure, with the cooperation of the City unions. Indeed, the City has successfully concluded agreements with 28 of its unions regarding the effects of the Vaccine Mandate. The six remaining unions that have initiated this proceeding "do not contest the City's decision to require vaccination" (Maj. Op. at 8 fn. 7); nor do they "argue that the Vaccine Mandate itself is a mandatory subject of bargaining." (*Id*. at 10) Nonetheless, they filed this improper practice petition, claiming that the City violated Sections 12-306(a)(4) and 12-307 by failing to bargain over various aspects of the implementation of the Vaccine Mandate — such as ceasing to pay employees who were "excluded from the premises at which they work" by virtue of their refusal to comply with the Mandate. The Majority, disregarding the natural consequences of the Mandate and ignoring compelling authority, has agreed.

On one point, and one point alone, we agree with the Majority Opinion. Its decision does not require the City "to restore the status quo ante" with respect to the six petitioner bargaining units. (Maj. Op. at 17) Over eleven months have passed since the Commissioner's order was issued. Agreements have been reached with the vast majority of City unions. The Vaccine Mandate has been implemented with remarkable success. And employee understandings and expectations with respect to the Mandate — as well as all the procedures flowing from it — are well settled. In these circumstances, it would make no sense whatsoever to undo or require changes for these six units in any of the existing policies or procedures that have been established, with tremendous effort by the City and unions alike, as the parties have navigated the unchartered waters of this pandemic. And we agree that no such changes are required by the order.

Unfortunately, the balance of the Majority Opinion is not so attentive to realities. Perhaps most obviously flawed is its conclusion that the City was required to engage in pre-implementation bargaining before ceasing to pay employees who refused to comply with the Vaccine Mandate and

placing them on leave without pay (LWOP) before terminating them. This is wrong-headed for several reasons.

First, purely as a practical matter, how could the City have implemented the Vaccine Mandate if it were required to continue paying employees who were not working because they refused to be vaccinated? Indeed, it takes no great imagination to contemplate the additional numbers of employees who would have refused to comply with the Mandate if they had known that, by doing so, they could simply stay home indefinitely and continue to be paid. In other words, putting non-complying employees on LWOP was a necessary part of implementing the Mandate.

Second, not paying a person who fails or refuses to comply with a condition of employment is not "discipline." Failure or refusal to comply with a lawful condition of employment — such as a residency requirement — "renders an individual ineligible for continued municipal employment"; it does not invoke disciplinary procedures. *In re Felix v. N.Y.C. Dep't of Citywide Admin. Servs.*, 3 N.Y.3d 498, 505 (2004); *see also In re Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 558-59 (2013); *In re O'Connor v. Bd. of Educ. of City Sch. Dist. of City of Niagara Falls*, 48 A.D.3d 1254, 1255 (4th Dept. 2008), *appeal denied*, 10 N.Y.3d 928 (2008) ("the residency policy … is a qualification of employment").

Nor can there be any argument that a different rule should apply in the context of the Vaccine Mandate. In recent months, every court that has considered the question — both State and Federal — has found that the Vaccine Mandate is a lawful condition of employment and has concluded that disciplinary procedures do not apply to terminations or placement on leave without pay for failure to comply with that condition: "The acts of not permitting petitioners to enter the building, preventing them from performing their jobs, and withholding pay are not disciplinary actions; they are designed to prevent COVID-19 exposure . . . . " *Maniscalco v. Bd. of Educ. of the City Sch. Dist. of N.Y.*, No. 160725/2021, 2022 N.Y. Misc. LEXIS 1367, *at 7 (Sup. Ct. N.Y. Cnty. Mar. 15, 2022). *See Garland v. N.Y.C. Fire Dep't*, 574 F. Supp. 3d 120, 127 (E.D.N.Y. 2021) (termination of a public employee based on the employee's failure to satisfy a qualification of employment unrelated to job performance, misconduct, or competency does not implicate disciplinary procedures); *O'Reilly v. Bd. of Educ. of City Sch. Dist. of City of N.Y.*, No. 161040/2021, 2022 WL 180957, at *2 (Sup. Ct. N.Y. Co. Jan. 20, 2022) (placing teacher who did not comply with the Vaccine Mandate on leave without pay "was not discipline under the Education Law and instead was merely a response to [the teacher's] refusal to comply with a condition of employment"); *Broecker v. N.Y.C. Dep't of Educ.*, No. 21-cv-6387 (KAM) (LRM), 2022 WL 426113, at *10 (E.D.N.Y. Feb. 11, 2022) (same); *N.Y.C. Mun. Lab. Comm. v. City of N.Y.*, 167 N.Y.S.3d 374 (Sup. Ct. N.Y. Co. Apr. 21, 2022) (accord); *Ansbro v. Nigro*, No. 531749/2021 (Sup. Ct. Kings Co. Sept. 21, 2022); *Marciano v. de Blasio*, No. 21-cv-10752 (JSR), 2022 WL 678779, at *10-11 (S.D.N.Y. Mar. 8, 2022).

Third, as evidenced by the agreements that the City reached with all but a handful of the City unions, there is no violation of Sections 12-306(a)(4) or 12-307 here because the City engaged in good faith impact bargaining. The Majority acknowledges that only impact bargaining is required when the effects sought to be bargained "simply flow" from the exercise of a managerial prerogative. (Maj. Op. at 15) As discussed above, ceasing to pay or employ a worker who does

not and cannot work because he has refused to comply with a condition of employment is a natural consequence of — or "simply flows" from — the Vaccine Mandate.

It also bears emphasis that the Majority cites *County of Nassau*, 27 PERB ¶ 3054, at 3120 (1994), which expressly recognizes that only impact bargaining is required over actions that "are so inextricably intertwined with [a managerial decision] as to make bargaining concerning implementation impracticable." Plainly, as explained above, the ability to put employees who refused to be vaccinated on leave without pay before terminating them for failure to meet a condition of employment was "inextricably intertwined" with the Mandate itself and necessary to its implementation. Any requirement of pre-implementation bargaining to impasse would have been impracticable at best.

Finally, the flaws in the Majority's decision are compounded by the inappropriate wording of the bargaining order. The Majority finds a violation of the duty to bargain only with respect to two issues: 1) paid leave for those who refused to comply with the Vaccine Mandate; and 2) the deadlines and appeals process for denials of requests for reasonable accommodation exemptions from the Vaccine Mandate. Accordingly, the bargaining order should be – and is properly read as – limited to those two issues. There is no need or justification for the Majority's vague and extraneous reference to "any remaining issues concerning terms and conditions of employment in implementation of the Vaccine Mandate," which risks creating confusion between the parties that would impede the bargaining process.

For all these reasons, we dissent.

October 6, 2022

CAROLE O'BLENES
MEMBER

M. DAVID M. ZURNDORFER
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 15 OCB2d 34 (BCB 2022), determining an improper practice petition between the New York City Municipal Labor Committee; United Fire Officers Association, Local 845; Captains Endowment Association; Lieutenants Benevolent Association; Uniformed Firefighters Association, Local 94, I.A.F.F., AFL-CIO; Sergeants Benevolent Association; Detectives' Endowment Association and the City of New York, and the Department of Health and Mental Hygiene

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-4458-21, be, and the same hereby is, granted; and it is further

ORDERED, that the City of New York bargain in good faith over any remaining issues concerning terms and conditions of employment in implementation of the Vaccine Mandate; and it is further

ORDERED, that the City of New York 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 City of New York
(Department)

Dated: _____(Posted By)
(Title)