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SCANNED ON 8/31/2007

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead Justice PART 35

Civil Service Technical Guild

-v-

City of New York

INDEX NO. 109626/07

MOTION DATE 8/29/07

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for Ans 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that petitioner's order to show cause for an order entering a Temporary Restraining Order and Preliminary Injunction, and maintaining or returning the parties to the *status quo* until a final decision is rendered in four related improper practice charges pending before the New York City Office of Collective Bargaining, Board of Collective Bargaining ("BCB") is denied; and it is further

ORDERED that the cross-motion to dismiss the petition in its entirety is granted.

The Clerk may enter judgment accordingly.

FILED

AUG 31 2007

NEW YORK COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 8/29/07

HON. CAROL EDMEAD J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

In the Matter of the Petition for Injunctive Relief and for a Judgment under Article 78 by

CIVIL SERVICE TECHNICAL GUILD, LOCAL 375, AFSCME,

Index No. 109626/07

Petitioner,

DECISION/ORDER

-against-

CITY OF NEW YORK, NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, BOARD OF COLLECTIVE BARGAINING and MARLENE GOLD, as Chair,

Defendants.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Civil Service Technical Guild, Local 375, AFSCME ("Local 375," the "Union" or "petitioner"), moves by order to show cause pursuant to Civil Service Law ("CSL") § 209(5), to have this court enter a Temporary Restraining Order and Preliminary Injunction, maintaining or returning the parties to the *status quo* until a final decision is rendered in four related improper practice charges pending before the New York City Office of Collective Bargaining, Board of Collective Bargaining ("BCB"). Specifically, petitioner moves for an order

> 1. restraining respondent City of New York ("respondent" or the "City") . . . from taking any action that would alter the *status quo* with respect to CityTime, or any data collection device or application used in conjunction with CityTime, including but not limited to implementing CityTime for Local 375-represented employees at any additional agencies or implementing any new CityTime hardware or application, the use of which is required for Local 375-represented employees;
>
> 2. restraining respondent City of New York . . . from taking any unilateral action relating to CityTime, or any data collection device or application used in

conjunction with CityTime, that affects any Local 375-represented employee without bargaining with Local 375;

3. directing respondent City of New York . . . to take any actions necessary to restore the *status quo ante* that existed prior to unilateral implementation of CityTime as to Local 375-represented employees, including but not limited to rescinding any requirement that Local 375-represented employees at any agency use biometric[1] hand-geometry scanners, the WebClock application, or any other data collection device or application developed to be used in conjunction with CityTime.

Petitioner also seeks an order pursuant to CPLR Article 78 annulling the determination dated June 28, 2007 by respondents BCB and Marlene Gold ("Gold), as Chair of the BCB.[2]

The Parties

Local 375 is the certified collective bargaining representative of employees in the engineering and scientific bargaining unit. Local 375 represents over 6500 New York City employees who work in titles such as Architect, Engineer, Construction Project Manager, City Planner and Urban Designer, at approximately 30 mayoral agencies, including the Department of Design & Construction ("DDC"), Department of City Planning ("DCP"), Department of Homeless Services ("DHS") and the New York City Fire Department ("FDNY"), as well as at public authorities such as New York City Transit, the Health and Hospitals Corporation and the School Construction Authority.

Respondent City, a municipal corporation, and the mayoral agencies employing members of the Local 375-represented bargaining unit, are subject to the provisions of the New York City

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[1] According to petitioner, "Biometrics" is the comparison of biological traits or physical characteristics against a template for the purpose of identification.

[2] After exhaustive oral argument, petitioner's request for an Interim Stay enjoining respondent City of New York from taking any action contrary to the relief sought by petitioner herein, pending the return date on the instant Order to Show Cause, was denied by this court.

Collective Bargaining Law, Administrative Code, §12-301 *et seq.* ("NYCCBL"). The Mayor's Office of Labor Relations ("OLR") is the City's collective bargaining representative.

Respondent BCB is the impartial tripartite agency empowered to determine improper practice charges under the NYCCBL. Members of the BCB consist of seven members: two "city" members appointed by the mayor, two "labor" members appointed by the municipal labor committee and three "impartial" members elected by the city and labor members.[3] Respondent Marlene A. Gold is sued herein in her capacity as Chair of BCB.

Background

By or about June of 2006, OLR notified Local 375 of its intent to implement the CityTime system and the biometric hand-geometry scanners at DDC. CityTime is an automated payroll and timekeeping system developed for the respondent by outside consultants and contractors. Prior to CityTime, no bargaining unit employee ever punched a time clock at DDC. Instead, all employees submitted paper time sheets on which they accounted for the hours worked that week, as well as requested annual leave, documented absence for illness or submitted overtime requests. Daily time recording was not monitored by timekeeping staff, who received only the formal time sheets for payroll purposes, and according to petitioner, their main concern was not the actual starting and ending times but whether employees put in a full seven-hour work day.

"Above salary cap" employees who account for their time on a weekly basis entered arrival, departure and meal times for all days worked when completing their time sheet at the end

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[3] *Shanker v. Helsby*, 676 F.2d 31 [2d Cir. 1982]; *Buffalo Teachers Federation, Inc. v. Helsby*, 515 F.Supp. 215 [DCNY 1981]).

of the week. However, the actual practice for "below salary cap" employees, who were required to account for their arrival and departure time on a daily basis, varied considerably from unit to unit, as to, *inter alia*, how closely, if at all, supervisors monitored compliance, and whether exact arrival and departure times were recorded or whether the document simply reflected the employee's normal schedule.

CityTime replaced paper time sheets with an electronic time sheet accessed on a desktop computer. Employees who are weekly time recorders must manually enter their morning arrival, evening departure and meal times for the entire week when they certify and submit their electronic time sheets, much as they did with the paper time sheets. Requests for annual leave, documentation of sick time and submission of overtime will ultimately appear on the electronic time sheet, but require employees to navigate a series of fields in the system to accomplish this.

However, upon implementation of CityTime, employees who were ostensibly using daily sign-in sheets were required to "punch in" (or more accurately, "palm in" and "palm out") at the beginning and end of the day by inserting their hand into a biometric hand-geometry scanner. These employees had to submit to having a template made of the shape and measurements of their hand. The employee's hand geometry was stored in the system so that each time a hand is placed into the scanner to register arrival or departure time, it is checked against the template.

Under CityTime, times captured by the scanners are transmitted and appear, after an interval of time, on the electronic time sheet; however, unlike the manual entries made by weekly time recorders, the scanned times are fixed and cannot be changed by the employee, even in the event of an error.

In response, Local 375 filed four successive Improper Practice Petitions which are

pending before BCB. The charges, as articulated by petitioner, all relate to respondent's implementation of CityTime, and of intrusive and onerous hardware and software otherwise unnecessary to the operation of CityTime, including biometric scanners and a tracking application known as "WebClock." WebClock is a web-based application in one's personal computer that monitors when employees log on and off a computer.

The initial case (the "Initial Charges") would resolve the underlying issue of whether respondent was obligated to bargain with the Union over the decision to implement a mechanical timekeeping system that is, according to the Union, more intrusive and requires more participation by employees and/or bargain over the impact of such implementation upon terms and conditions of employment, such as existing time and leave policies.

Petitioner's Contentions

The Union claims that respondent engaged in a series of calculated and continuous violations of the NYCCBL at DDC and DCP, including

> (1) refusing to negotiate mandatory subjects of bargaining, such as changes effected in time and leave policies by CityTime, the biometric scanners and/or WebClock;
>
> (2) unilaterally changing the aforementioned time and leave policies without bargaining with Local 375;
>
> (3) unilaterally installing and mandating use of intrusive technology, such as biometrics, without bargaining with Local 375 although obligated to do so under BCB precedent regarding automation of timekeeping functions;
>
> (4) unlawfully interfering with the exercise by employees of their rights under the NYCCBL, including misleading Union officers regarding possible settlement to delay adjudication of the initial case at BCB and undermining members' perception of the efficacy of their representative and its ability to obtain a remedy for repeated improper practices by the City; and

(5) refusing to negotiate the practical impact of the CityTime system and its hardware and applications, a *per se* violation of the NYCCBL.

Since the Initial Charge was filed with BCB, respondent unilaterally implemented CityTime at an additional eight mayoral agencies without bargaining with Local 375. Respondent also unilaterally introduced WebClock, the second ancillary technology for CityTime. Respondent has also informed the Union that it will continue to consider any new technology that develops, which could bring even further changes to the system.

Each instance of unilateral action by respondent presents new or different factual and legal issues and therefore turns the determination of the underlying issue of bargaining obligation into a "moving target," "capable of repetition yet evading review."

An injunction restoring the *status quo* would give BCB the opportunity to conclude its adjudication of this significant case, which is one of first impression in this jurisdiction and presents a labor issue of national import, the use of employee-tracking technology in the workplace. The biometric hand-geometry scanners represent an unprecedented level of intrusion which has greatly unsettled rank-and-file employees who are required to use them, and it is of critical importance to the Union and its members that such radical alteration of the way in which hard-working professionals account for their time be collectively bargained rather than imperiously foisted on them.

The biometric scanners have been a source of great distress to Union members, who find them invasive and demeaning and are anxiously awaiting a ruling from BCB. But the Union's seeming inability to stop respondent's ongoing unilateral actions has eroded members' confidence that Local 375 can aggressively protect their rights under the NYCCBL and that

BCB's processes can offer them true redress.

Employees who are required to scan their hands for arrival and departure times at the beginning and end of their work day use the CityTime system's electronic time sheet for all functions. They manually enter the times they depart for and return from the meal period, as well as submit leave and overtime requests, in the same fashion as non-scanners. There is no technical or operational reason why they could not manually enter arrival and departure times as well, and as the City has conceded, external devices or supplemental applications are not necessary to automate time and payroll functions with CityTime, which can operate by simply utilizing the electronic time sheet.

In unilaterally implementing CityTime at DDC, respondent abrogated BCB precedent that established an employer's obligation to bargain over implementation of a mechanical time-keeping system if the new system requires a "material change in the degree of employee participation" or is "more intrusive" than the prior one.

It is clear that the biometric hand-geometry scanners are demoralizing, and significantly more intrusive than sign-in sheets, which merely involves applying pen to paper, as opposed to inserting a body part into high-tech machinery. CityTime also involves more participation by employees. In the past, time entries and leave and overtime requests could all be done on the one paper time sheet; now all employees must navigate multiple computer fields to enter leave and overtime, and daily recorders have to toggle between two modalities, scanners for their arrival and departure times and the CityTime system on the computer for everything else. Employees are also required to participate in an additional step in the timekeeping procedure that was not previously required, the process by which a biometric template of the shape of their hands is

created and stored.

In addition to the obligation to bargain over automation of timekeeping, respondent was required to have bargained over alterations to existing time and leave policies at DDC, which is, by statute, a mandatory subject. Inclusive of the time and leave matters that should have been bargained include the following:

- There was a long-standing policy in many units at DDC whereby supervisors and employees by mutual agreement, had flexibility with respect to timekeeping. For example, an employee scheduled to work 9-5 who was delayed, could simply work 9:15 - 5:15. CityTime has eliminated that flexibility;

- With paper time sheets, time was calculated by minute. The CityTime system rounds the time captured by the biometric scanner to the nearest quarter-hour;

- Under CityTime, employees taking a partial day of leave who return to work are automatically docked for a meal period.

Even if *arguendo* BCB were to find that respondent was not obligated to bargain over the decision itself, NYCCBL § 12-307(b) dictates that it must bargain over the practical effects of implementation. CityTime and the scanners significantly impacted bargaining unit employees at DDC in a number of ways, including:

- Although time sheets cannot be certified until the employee has scanned out at the end of the last day of the week, it can take up to 20-40 minutes until the scan-out time registers on the electronic time sheet. In order to certify their time sheet in time to receive a direct deposit on payday, rather than a paper check, employees who will be absent at the beginning of the following week have had to wait on their own time on Friday afternoon for their scan-out time to register in the system;

- Under CityTime it was so difficult to take partial sick days that employees who would otherwise have returned to work after a doctor's appointment, or who would have come in even feeling ill to take care of an important task and then go home, simply took the entire day, causing the employee to lose more sick time from his or her bank than had previously been necessary;

- Employees continued to have concerns about sanitary conditions of the scanners;
- Employees who work in the field some or all of the time, or who work "non-standard" schedules, continue to have difficulties recording their time and being properly paid.

On February 2, 2007, OLR informed petitioner that it would no longer dictate policy regarding the biometric hand-geometry scanners on a citywide basis; instead each Commissioner could decide whether or not to mandate use of the scanners at his or her agency. This change was announced 11 days after a well-attended and highly publicized City Council hearing regarding CityTime and the biometric scanners, and 10 days after an article on the hearing and the biometrics issue appeared on the front page of the "Metro" Section of the New York Times.

On February 9, 2007, DDC Commissioner David Burney ("Burney") - exercising his new-found discretion - issued an e-mail announcing OLR's policy change regarding the scanners to DDC employees and informing them that "in the next few weeks" a software change would allow them to record their departure and arrival by computer. There was nothing in Burney's e-mail that indicated that the computer itself would be used as a time clock; the software change referred to could have been to allow for manual entry of daily arrival and departure times on the electronic time sheet. The Union therefore held off pressing BCB to schedule additional hearing dates in the hope that the pending improper practice charge could be resolved. However, DDC continued to require use of the scanners for the next several months, not weeks. Union representatives and members were taken by surprise when DDC announced the unilateral implementation of WebClock in June, 2007. WebClock was also unilaterally implemented at other agencies in addition to DDC, including DCP.

There is no question that Burney and/or OLR had to know that the continued presence of

the scanners months after Local 375 supposedly secured Burney's commitment to introduce a less objectionable method of recording time, and the sudden appearance of another onerous timekeeping method without bargaining with the Union, made members perceive Local 375 as ineffectual. What had appeared at the time to be a huge victory was now hollow. Union members were frustrated and disenchanted by the Union's seeming inability to stop mandatory use of what many DDC employees viewed as invasive "Big Brother" biometric scrutiny, or to stop management from making unilateral changes without bargaining with the Union.

Respondent City's Contentions

Respondent City of New York opposes injunctive relief and cross moves to dismiss the petition on the ground that petitioner failed to demonstrate that the BCB's decision that irreparable harm did not exist, was irrational, which is to say arbitrary, capricious or unlawful. Petitioner cannot demonstrate any irreparable harm, let alone irreparable harm which would render a later BCB decision ineffectual, and therefore the BCB's determination not to seek or authorize the Union to seek an injunction cannot be considered irrational and must be upheld. The BCB's finding was rationally based and well founded in precedent.

Moreover, petitioner cannot make the showing that absent the injunction irreparable harm will occur rendering and ultimate decision by the BCB "ineffectual." Under CSL § 209-a(5), petitioner must not only prove that the usual injunction standards are met, but it must also show that the alleged irreparable harm will render any decision by the BCB "ineffectual."

Here, there is no evidence that the new timekeeping system could not be removed if the BCB rules for petitioner. Petitioner's claim that unless a preliminary injunction is issued, the City will move forward with the new record keeping systems and then BCB will shirk its duty

and be less inclined to order removal of CityTime, is baseless. There is no evidence that BCB will fail to perform its function simply because the practice at issue has been ongoing for a time. Nor is there evidence that if the underlying matter ends in a BCB decision favorable to petitioner, the City would do anything less then comply with such lawful determinations. Indeed, nothing is contemplated, nor has anything been done, which could not be reversed. Thus, petitioner has not shown that absent injunctive relief a decision by the BCB would be "ineffectual."

Further, petitioner cannot establish that irreparable harm would result if implementation of the CityTime system is not halted. Petitioner's argument that expanded use of CityTime will necessitate the filing of more Improper Practice petitions, does not create irreparable harm. Also, petitioner's additional argument that if the current use and further implementation of CityTime continues the BCB will be less willing to order cessation of the program due to the expense of removing the system, is unsupported by any law or fact. Indeed, BCB has previously ordered remedial action despite the cost to the City.

In this case, the greatest harm petitioners alleged is that to be timely they may have to leave for work earlier and return from lunch earlier to clock in on time. Petitioners similarly assert that they may have their actual time rounded up or down. Such events, were they considered to be harms, could be remedied by an award of damages and thus cannot constitute an irreparable harm. And, to the extent petitioner argues that the Union would appear ineffective if it cannot halt implementation of a new time keeping system until the administrative process is completed, such an argument is both too speculative and too remote to establish irreparable harm.

Nor have the elements of injunctive relief ((1) a likelihood of success on the merits; (2)

irreparable injury; and (3) the balance of the equities tipping in petitioner's favor) been met.

Petitioner also has not demonstrated a likelihood of success on the merits. Petitioner's claim that City respondents violated the Collective Bargaining Law by not negotiating over the upgrade of the timekeeping system lacks merit. Under collective bargaining law, upgrading the time keeping system and installing time keeping equipment are managerial prerogatives and therefore do not need to be bargained over before implementation.

Moreover, the installation of time keeping equipment does not impact on a term and condition of employment since it is merely a change in method of recording hours worked. What had been a manual/paper procedure will now be a mechanical/automated procedure. The CityTime hand scanner and WebClock program simply automate, mechanize and computerize the City's time keeping process. It brings record keeping into the 21st century. It improves record keeping and reduces fraud. These devices qualify as equipment and the decision to install them clearly falls within the realm of management prerogative, and thus not subject to bargaining. In addition, it is well established that an employer has the absolute right to maintain administrative control of employees' attendance and has the right to record the attendance of its staff.

Nor does the fact that an employee now uses a hand scanner constitute a more intrusive method of time keeping. As an initial matter, it must be recalled that all City employees undergo a background check and fingerprinting. The hand scanner, which notes the employee's hand's "geometry,"and not the employee's fingerprint, is akin to a signature, and is less intrusive than fingerprinting. It enables the system to insure that the person "punching in" is the employee and not another person acting on the employee's behalf. Nor does it impact the terms and conditions

of employment. The frequency of the employee's participation in the process has not been altered and therefore it is not a departure from the agency's previously established requirement regarding recording time by employees.

Prior to the implementation of CityTime, and through the use of scanners and the WebClock, a work rule for employee participation in time keeping was already in effect. Prior to the implementation of CityTime when an employee got to work she was required to sign in on a time sheet by recording her exact time of arrival and by initialing the time sheet. When an employee completed her workday, she would sign out on the same time sheet and record her exact time of departure and then initial the time sheet. During the day, when the employee left for and returned from lunch, she would record her departure and return time on the same time sheet. The employee signatures have been replaced by a hand scan or a PIN entry.

Nor has petitioner demonstrated that the balance of the equities tips in its favor. The new time keeping system provides a more accurate method of recording when public employees come to work and leave work. It prevents other employees from clocking in for an absent or late colleague. It prevents fraud and waste of the public's money. It requires employees to show up on time and leave on time. The harm to respondents is less accurate record keeping and a greater chance of time and leave abuse. There is no hardship to petitioners other than having to show up on time and leave on time.

Respondent also highlights that although petitioner brought the first Improper Practice proceeding on August 14, 2006, petitioner did not ask the BCB to seek injunctive relief until June 15, 2007. Petitioner's delay in seeking injunctive relief belies its claim that immediate extraordinary equitable relief is necessary.

Petitioner's Opposition to Cross-Motion

In opposition to the respondent's cross-motion, the petitioner submits that it need not establish the common law elements related to preliminary injunctive relief, as such standards are preempted by the Civil Service Law §209(a). Further, CityTime and/or biometric scanners require a greater degree of employee participation in the timekeeping process and are more intrusive that the pre-CityTime system. Also, depending on the scope of the BCB's ultimate decision, the respondent could simply distinguish BCB's holding from the operation of CityTime at any other agency.

Furthermore, the delay in the progress of the underlying administrative proceedings was due in large part to circumstances not within the control of the petitioner, and to the respondent's unwillingness to cooperate with petitioner's attempts to proceed with the hearings. And, the situations which prompted the petitioner to seek injunctive relief all occurred subsequent to the filing of the improper practice petition, and the union's status and efficacy as bargaining agent was not yet being undermined at DDC.

Nor should the Court defer to BCB's arbitrary and capricious decision.

Analysis

I. *Injunction Pursuant to Civil Service Law 209-1(5)*

Civil Service Law 209-1(5) provides that

> Injunctive relief may be granted by the court, after hearing all parties, if it determines that there is reasonable cause to believe an improper practice has occurred and that it appears that immediate and irreparable injury, loss or damage will result thereby rendering a resulting judgment on the merits ineffectual necessitating maintenance of, or return to, the status quo to provide meaningful relief.

A. *Whether Reasonable Cause to Believe an Improper Practice Has Occurred*

1. Duty to Bargain Implementation of CityTime and WebClock.

NYCCBL §12-307 provides that public employers have a duty to bargain in good faith with the Union on "matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules."

A change or alteration of time-keeping procedures is a mandatory subject of bargaining where it (1) "materially changes the degree of employee participation established in the prior system" or (2) clearly and directly impacts on the terms and conditions of employment (*Communications Workers of America v City of New York*, Board of Collective Bargaining, Decision B-62-88). Thus, any failure to negotiate the implementation of such a change in time and leave procedures without first bargaining with the Union would constitute an improper practice (NYCCBL §12-306(a)(4)).[4] On the other hand, where there is an existing work-rule, policy or requirement that employees maintain a record of their times of arrival and departure, the manner of implementation would be a management prerogative permitting unilateral modification (*Hampton Bays School District v Hampton Bays Teachers Assn.*, 10-4596 [1977]).

For example, in *Communications Workers of America v City of New York* (Board of Collective Bargaining, Decision B-62-88), the Communication Workers of America union filed an improper practice petition, claiming that the City's unilateral installation of time clocks, after failing to reach an agreement of a new procedure during collective bargaining, evidenced the City's violation of the duty to bargain in good faith. Up to the time the City installed time

[4] NYCCBL §12-306(a)(4) declares that it shall be an improper practice for a public employer "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 . . . ."

clocks, employees had been using a manual sign-in/sign-out system to record their arrival and departure times. The City maintained that its decision to install time clocks was within its statutory managerial prerogative to "determine the methods, means and personnel by which governmental operations are to be conducted." The City also denied any duty to bargain over the implementation of the time clocks since they were not more extensive or intrusive that the prior procedures, and did not materially alter the degree of employee participation in the time-keeping system from that which was previously established. The BCB found that implementing the mechanical time-keeping system was not a mandatory subject of bargaining. Since the union failed to allege any facts indicating that the new system was a more intrusive time-keeping procedure that the former sign-in/sign-out method, the BCB found that the "time clocks in question [were] a mere substitution of one degree of employee participation for another," and that it did "not materially alter the [employees'] terms and conditions of employment."

In *City of New York v United Probation Officers Assn.* (Board of Collective Bargaining, Decision B-23-85), the City filed a petition seeking a determination that, *inter alia*, the Probation Officers' union's demand that there be "No time clocks for staff members with 10 years of service" was not a mandatory subject of bargaining. Relying on NYCCBL, Section 1173-4.3, the BCB found that such demand infringed upon the City's right to exercise administrative control of employee attendance and did not constitute a mandatory subject of bargaining. The BCB cited with approval the position taken by the New York Public Employment Relations Board ("PERB") made in *Island Trees Union Free School District* (10 PERB 54590 [1977]) that in "the absence of any proof that the City initiated a new attendance or disciplinary rule or varied the starting times or the length of the work day or altered its pay practices, there is no evidence . . . of

a change . . . in the terms and conditions of employment." According to the BCB, the Union's demand did not appear to deal with the unilateral institution of time clocks, which in the opinion of the BCB, "could amount to a mandatory subject of negotiation if a clear and direct impact on conditions of employment were to be shown." Instead, the demand sought to eliminate the time clock requirement for certain employees based on their years of service, and thus, infringed upon the City's administrative powers.

Caselaw supplied by the Union demonstrates instances where it was found that the implementation of new time and leave recording procedures was a mandatory subject of bargaining.

In *Buffalo Sewer Authority v Buffalo Sewer Authority Unit, Local 915* (18-4615 [1985]), the union claimed that the Buffalo Sewer Authority violated the Public Employees' Fair Employment Act, when the Authority unilaterally implemented a work rule requiring "administration section" employees at one of three of its plants, the Bird Island Treatment Plant, to sign in and out whenever they left and returned to their offices. Prior to this rule, the "administration section" employees were required to sign in and out at the entrance to the facility only when they left the Bird Island Treatment Plant grounds during the workday. In addition, such employees punched time cards at the beginning and end of the day. ALJ Zahm held that although an employer has the right to investigate and chronicle employee attendance, when the employer initiates a requirement that the employee participate in the recording process, it introduces a new term and condition of employment which becomes a mandatory subject of bargaining. Further, the new procedure was not merely a modification of an accepted past practice, since (1) the "administration section" employees never previously recorded their

attendance unless they left and returned to the plant grounds and (2) the administration section employees were separate from the other two departments which used sign-in/sign-out forms. Thus, expanding the sign-in/sign-out procedure to include other times when "administration section" employees left their immediate work area constituted a new work rule, subject to bargaining (*see also County of Nassau v Nassau Chapter of the Civil Service Employees Assn., Inc.*, 13-4612 [1980] [finding that by unilaterally, and for the first time, requiring employees to record their time of leaving for and returning from lunch without negotiating its implementation and impact, the County violated the Public Employees' Fair Employment Act]).

Again, in *Civil Service Employees Assn., Inc. v Newburgh Enlarged City School District* (1987 NYPER (LRP) LEXIS 2842 [1987]), the District unilaterally required employees at the District library to record on a time clock their arrival and departure times at the beginning and end of the workday, as well as their departure and arrival for lunch. Before this new rule, employees were only required to record their arrival at the beginning of the workday by signing or marking a sheet which bore their printed names. The part-time employees at the library had to record their attendance by noting on a "master sheet" the number of hours they worked each day, at the end of their workday. The Administrative Law Judge sustained the union's charge that the District violated the Public Employees' Fair Employment Act when it unilaterally required employees to use a time clock. The ALJ determined that although the mere substitution of the time clock for recording attendance was not a mandatory subject of bargaining, imposing additional recording requirements beyond those previously required constituted a negotiable change in terms and conditions of employment. On appeal, PERB agreed and rejected the District's argument that the employees increased participation in the recording process was

minimal, as it was undisputed that the District instituted a time clock, and that the extent of the employees' participation in the recording process increased. PERB found that the change was "from a once-a-day recording of attendance to the recording of arrival and departure and, for those employees affected, the recording of departure and arrival at lunch time. The primary impact of such change continues to be on conditions of employment."

In *Hampton Bays School District v Hampton Bays Teachers Assn.* (10-4596 [1977]), a two-year agreement between the teachers union and the School District fixed the hours of employment and the work years, but did not require the teachers to record their times of arrival, departure, by either sign-in sheets, time-clocks, or otherwise. Toward the end of the two-year period, the District sought to implement a "sign-in" book to record the time of arrival and departure of the employees. The Hearing Officer first noted the employer's absolute right to record the presence of its employees, and the maintenance of such records is beyond the scope of negotiation. However, where employees are required to participate in the recording process, they are essentially being required to assist in the implementation of a managerial decision as a function of their own duties. Thus, the new rule was considered a whole new workplace rule which had been introduced as a new term and condition of employment, and thus, could not be implemented unilaterally (*see also County of Nassau v Nassau Chapter of the Civil Service Employees Assn.*, Improper Practice Decisions, ¶13-4612 [initiating, for the first time, a requirement that employees record their time of leaving for and returning from lunch, and refusing to negotiate such decision or its impact constitutes a violation of a duty to negotiate good faith]).

Applying such principles to the circumstances herein, this Court determines that the

City's unilateral decision to initiate CityTime and WebClock without negotiating such decision did not constitute a violation of a duty to negotiate in good faith. Prior to the implementation of CityTime and WebClock, a work place rule had been in place, which required both above-salary cap and below-salary cap employees to record their time and leave hours on a systematic basis. Under the circumstances, respondent is not imposing additional recording requirements upon DDC bargaining unit employees through the use of CityTime. Instead, CityTime is a modification of the manner in which the same, previously required time and leave rules are recorded.[5]

Prior to CityTime, above-salary cap employees at DDC were required to record their hours worked by making entries, on a weekly basis, of their arrival and departure times for the beginning and end of their day, the arrival and departure times for their meal periods, and annual, sick, and overtime charges by making such entries on time sheets. The implementation of CityTime did not change these time and leave categories or the frequency with which such categories must be entered. Instead, the identical entries to be made would now be made, still on a weekly basis, but on a computer, as opposed to paper. Handwritten entries or typed written entries, are both entries, nonetheless, and under the circumstances herein, the latter constituted a mere substitution of one degree of employee participation for the former. Further, the navigation that these employees must carry out from one screen on the computer to the next to record annual, sick, and overtime charges is of no legally cognizable difference when compared with the navigation one must make when entering information in one column or row on a time sheet to

[5] Attached to this decision is an appendix detailing the time and leave requirements under the previous time sheet system and the CityTime and WebClock system.

the next column or row. Thus, it cannot be said that CityTime materially changed the degree of above salary cap employee participation established in the prior time sheet system, or changed or altered the terms and conditions of employment of above salary cap employees.

With respect to below-salary cap employees at DDC, these employees were also required, prior to CityTime, to record their hours worked by making entries on a time sheet of their arrival and departure times for the beginning and end of their day, the arrival and departure times for their meal periods, and annual, sick, and overtime charges, but on a daily basis. The implementation of CityTime, requires that this latter group of employees make, with the exception of arrival and departure times, the identical entries with the same frequency on their desk top computers. That CityTime requires that these latter employees record their arrival and departure times in method different from above the cap employees, by "palming in and out," does not alter the fact that this hand-scanning method constitutes a mere substitution of the method of employee participation. There is simply no increase in employee participation in recording arrival and departure times, since these employees were already required to record arrival and departure times on time sheets. Therefore, it cannot be said that CityTime materially changed the degree of below salary cap employee participation established in the prior time sheet system or changed or altered the terms and conditions of employment of below salary cap employees.[6]

2. Duty to Bargain over Practical Effects of Implementation

However, NYCCBL §12-307(b) also requires that respondent bargain over the practical effects of implementation. Section 1173-4.3(b) of the NYCCBL specifically grants employee representatives the right to bargain on "questions concerning the practical impact" on employees

[6] As to DCP employees, the record on the issues presented have not been fully presented to the Board.

of managerial decisions. A pre-condition to a claim of practical impact is the requirement that the Union specify the details of the impact, as mere conclusory allegations are not enough to support a claim of practical impact (*City of New York v United Probation Officers Assn.* (Board of Collective Bargaining, Decision B-23-85).

Here, the petitioner has detailed various examples of how CityTime has affected bargaining unit employees' terms and conditions of employment.

The Union's argument that above salary cap employees at DDC cannot "make up" for the period of lateness at the end of the day as they did under the time sheet system, is unpersuasive. The Union failed to cite to any portion of the collective bargaining agreement with the respondent which authorizes this practice. In the absence of any statutory or contractual provision, it appears to the Court that the ability to arrive to work late, and "make up" the time at the end of the work day was a courtesy given to the employees, and thus, any infringement on such a courtesy cannot be said to an issue subject to collective bargaining.

The same holds true for the purported loss of pay for one hour, when an employee begins the work day after 1:00 p.m. The Union argues that under the time sheet system, an employee who arrived at work after 1:00 p.m. was permitted to apply the hour lunch period to the period prior to the employee's arrival at work, thus permitting the employee to charge, and get paid, from 1:00 p.m. until 5:00 p.m. (four hours) for that particular day. However, the Union failed to identify any provision of the collective bargaining agreement that permits an employee to "self allocate" one's lunch period in such fashion. Thus, that CityTime now applies the hour lunch period to the period after the employee arrives to work does not constitute an infringement on the employee's time and leave work condition.

Nor is the argument that the employees suffer a purported loss of pay for up to 15 minutes when signing on to the computer adequately supported by the record. The Union failed to present any evidence in the form of an affidavit or otherwise from any bargaining unit employee establishing this allegation.

However, there appears to be a practical impact on the compensation received for the amount of actual hours worked with respect to reporting arrival and departure times at the beginning and end of the work day on either the computer or through the hand scanner. It is undisputed that the computer and hand scanner "rounds up" to the nearest quarter hour when an employee reports to work after the 8th minute, resulting in a loss of pay for seven minutes of actual work time. It also appears that the computer and hand scanner "rounds down" when an employee leaves work at the end of the work day after 5:00 p.m., again resulting in a loss of pay for actual work time. Such rounding procedures did not exist under the time sheet system, and impacts the five-minute grace period provided for in the parties' collective bargaining agreement.[7]

3. Interference with Bargaining Rights

Finally, NYCCBL 12-306(a)(1) declares it an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted in 12-305" to bargain through their representative." The Union argues that by committing to introducing a less objectionable method of recording time, and then implementing another onerous system without first bargaining with the Union, the City causes the Union members to

[7] The Court's determination on this issue is not binding on the BCB, and ultimate determination of whether the alleged practical impact of respondent's decision to implement CityTime rests with the BCB.

become disenchanted by the Union's seeming inability to stop the City from instituting the new system.

To the degree the Union's argument rests on the notion that the respondent imposed a more "onerous" system, such argument lacks merit. CityTime does not appear any more onerous that the reporting requirements mandated under the time sheet system. CityTime provides a different method of calculating and reporting the same time and leave periods previously recorded under the time sheet system. And, the Court does not agree that the decision to implement the CityTime system was subject to collective bargaining. Moreover, the Union failed to supply any facts in evidentiary form indicating that bargaining unit employees have lost confidence in the Union's ability to enforce their rights.

However, in light of this Court's conclusion that certain practical effects of respondent's decision to implement CityTime may be subject to collective bargaining, the alleged failure to bargain such effects support the Union's contention that respondent interfered with, restrained or coerced bargaining unit employees from exercising their rights granted to bargain through their representative.

B. *Whether Immediate and Irreparable Injury, Loss or Damage Will Result*

Notwithstanding the above however, petitioner failed to establish that irreparable injury will result absent an injunction, rendering the judgment on the merits ineffectual. Even assuming CityTime fails to account for the periods of actual time worked, such losses are fairly ascertainable and calculable. There is no indication that a decision by the BCB in favor of the Union would be rendered ineffectual. Monetary losses, if any, are compensable, and there is no indication that respondent will not abide by any decision by the BCB. Further, there is no factual

support in the record to indicate that the relationship between bargaining unit employees and their representatives has been undermined.

II. *Injunctive Relief Pursuant to CPLR Art. 78*

Assuming that the common law elements are not preempted by the statutory elements created in CSL § 209-a(5), petitioner's failure to demonstrate irreparable harm, as noted above, defeats injunctive relief pursuant to CPLR Art. 78.

III. *Annulment of Board's Decision*

Petitioner's request for an order annulling the Board's denial of petitioner's request for injunctive relief, is denied. New York City Administrative Code Section 12-309(a)(4) confers upon the BCB the duty and power "to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter." Thus, under CPLR Article 78, judicial review of an administrative determination, such as one by the BCB, "the neutral adjudicative agency statutorily authorized to make specified determinations" is limited to the evaluation of whether the determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of the agency's discretion (*see Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 230, 356 NYS2d 833, 313 NE2d 321 [1974]; *City of New York v District Council 37, AFSCME, AFL-CIO*, 12 Misc 3d 1162, 819 NYS2d 209 [2006] citing *New York City Dept. of Sanitation v MacDonald*, 87 NY2d 650, 656 [1996]). The law is clear that "an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight" (*Matter of Herzog v Joy*, 74 A.D.2d 372, 375 [1st Dept 1980], *affd* 53 N.Y.2d 821 [1981]). Further, "[w]hen an administrative agency is charged with implementing and

enforcing the provisions of a particular statute, the courts will generally defer to the agency's expertise and judgment regarding that statute" *(City of New York v District Council 37, AFSCME, AFL-CIO*, 12 Misc 3d 1162, *supra*; *District Council 37, American Federation of State, County and Mun. Employees, AFL-CIO v City of New York*, 22 AD3d 279, 284 [1st Dept 2005]). Accordingly, the courts defer to the BCB's expertise in applying and interpreting the provisions of the NYCCBL, so long as the BCB's determination is reasonable (*City of New York v District Council 37, AFSCME, AFL-CIO*, 12 Misc 3d 1162, *supra*). When an administrative agency is charged with implementing and enforcing the provisions of a particular statute, the courts will generally defer to the agency's expertise and judgment regarding that statute.

In light of the conclusions reached above, it cannot be said that the Board's determination to deny injunctive relief to the petitioner was unreasonable, arbitrary, or capricious.

Based on the foregoing, it is hereby

ORDERED that petitioner's order to show cause for an order entering a Temporary Restraining Order and Preliminary Injunction, and maintaining or returning the parties to the *status quo* until a final decision is rendered in four related improper practice charges pending before the New York City Office of Collective Bargaining, Board of Collective Bargaining ("BCB") is denied; and it is further

ORDERED that the cross-motion to dismiss the petition in its entirety is granted.

This constitutes the decision and order of the Court.

Dated: August 29, 2007

Hon. Carol Robinson Edmead, J.S.C.