

UFT, 11 OCB2d 11 (BCB 2018)

(IP) (Docket No. BCB-2878-10)

Summary of Decision: In *UFT, 7 OCB2d 12 (BCB 2014)*, the Board found that the City's implementation of a weekly cap on Hearing Officers' work hours violated NYCCBL § 12-306(a)(1), (4), and (5). In this interim order, the Board adopted eligibility criteria to determine which Hearing Officers suffered a loss as a result of the improper practice and a backpay formula to reasonably approximate the hours they would have worked but for the violation of the NYCCBL. The Board also ordered further proceedings to allow the parties to present additional evidence regarding potential exceptions to the eligibility criteria and the calculation of net backpay. (***Official decision follows.***)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

INTERIM DECISION AND ORDER

In a prior decision, the Board found that the City of New York ("City") violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by restricting the number of hours that employees in the title Hearing Officer (Per Session) ("Hearing Officers") can work to 17 hours per week in any two consecutive weeks ("Weekly Cap"). See *UFT, 7 OCB2d 12 (BCB 2014)*, *affd*, *Matter of City of New York v. NYC Bd. of Collective Bargaining & United Fedn. of Teachers*, 2015

NY Slip Op 31383(U) (Sup Ct, New York County 2015) (“*Prior Decision*”). Upon finding that the record was insufficient to determine an appropriate remedy, the Board ordered the parties to provide information regarding damages and retained jurisdiction to determine an appropriate remedy. *See Id.* at 25. After reviewing the payroll data and soliciting input from the parties regarding an appropriate remedy, the Board now adopts eligibility criteria to determine which Hearing Officers suffered a loss as a result of the improper practice and a backpay formula to reasonably approximate the hours they would have worked but for the violation of the NYCCBL. The Board also orders further proceedings to allow the parties to present additional evidence regarding potential exceptions to the eligibility criteria and the calculation of net backpay.

BACKGROUND

Hearing Officers are represented by the United Federation of Teachers, Local 2, AFT, AFL-CIO (“Union”) and employed by the Office of Administrative Trials and Hearings, which administers the tribunals of the Environmental Control Board, the Taxi & Limousine Commission, and the Department of Health and Mental Hygiene. On March 26, 2010, the City issued a letter announcing the enforcement of the Weekly Cap.¹ Prior to March 26, 2010, Hearing Officers were not limited to 17 hours per week in any two consecutive weeks. *See Id.* at 19. Further, it is undisputed that separate from the Weekly Cap, Hearing Officers have been consistently limited to 1,000 hours per year per tribunal (“Annual Cap Per Tribunal”).

In order to develop a backpay formula and remedy that best approximates the number of

¹ The March 26, 2010 letter also announced a 1,000-hour annual cap for Hearing Officers. In a related case, this Board found that the City violated § 12-306(a)(1), (4), and (5) of the NYCCBL by applying the Annual Cap to Hearing Officers working at more than one tribunal. *See UFT*, 4 OCB2d 4 (BCB 2011), *affd*, *Matter of City of New York v. NYC Bd. of Collective Bargaining*, Index No. 451411/2013 (Sup Ct, New York County Aug. 14, 2014) (Freed, J.).

bi-weekly hours a Hearing Officer would have worked but for the City's violation of the NYCCBL, the Board requested that the City provide bi-weekly payroll data for hours worked by Hearing Officers from January 1, 2009, to December 31, 2014. For the purposes of determining a backpay formula, the parties agreed in their March 2017 submissions to define the Weekly Cap as a 35-hour restriction per bi-weekly pay period per tribunal.² *See* March 17, 2017 Union and City Briefs. The parties also agreed in their March 2017 submissions that April 30, 2010, through April 11, 2014, the four-year period between the City's announcement of the Weekly Cap and the Board's Order to rescind the Weekly Cap, constitutes the "Backpay Period" for purposes of a remedy. *Id.*

The payroll records indicate that 412 Hearing Officers worked during the Backpay Period. Hearing Officers have flexible hours and some discretion in determining their schedules.³ In addition, we noted in our *Prior Decision* that "it was not clear from the limited number of payroll records in evidence, whether the Weekly Cap was consistently and continuously implemented after March 2010" and that a determination of which Hearing Officers suffered a loss would be made in fashioning a remedy. *UFT*, 7 OCB2d 12 at 22, n. 32. Therefore, a detailed review of the payroll records was necessary to ascertain which Hearing Officers suffered a loss in pay due to the Weekly Cap. To determine the eligibility for backpay of the 412 Hearing Officers, we first reviewed their

² A City pay period consists of two weeks. The parties' agreement is consistent with Hearing Officer testimony that, because of the Weekly Cap, their schedule per bi-weekly pay period was limited to three days (21 hours) in one week and two days (14 hours) in the other. *See UFT*, 7 OCB2d 12 at 9, n. 15.

³ We take administrative notice of the extensive evidence presented to the Board in five prior cases regarding the fact that there is flexibility in hours and schedules worked by Hearing Officers. *See UFT*, 6 OCB2d 19 (BCB 2013); *UFT*, 5 OCB2d 26 (BCB 2012), *affd*, *Matter of the City of New York v. NYC Bd. Of Collective Bargaining*, Index No. 451411/2013, at 16 (Sup Ct NY Co Aug. 14, 2014); *UFT*, 4 OCB2d 54 (BCB 2011); *UFT*, 4 OCB2d 4; *UFT*, 3 OCB2d 44 (BCB 2010); *see also Local 237, IBT*, 64 OCB 1 (BOC 1999).

payroll records from calendar year 2009, the year immediately preceding the implementation of the Weekly Cap (“Representative Period”).⁴ We did so to identify which Hearing Officers regularly worked more than 35 bi-weekly hours when they had the opportunity to do so. We then compared the Representative Period payroll data to the Backpay Period payroll data to ascertain which Hearing Officers worked fewer hours. Our analysis of the payroll data, which follows, was used to establish the eligibility criteria, approximate the hours Hearing Officers would have worked but for the Weekly Cap, and determine a backpay formula and remedy.

Analysis of Representative Period Payroll Data

The payroll records from the Representative Period show variations in bi-weekly hours and number of pay periods worked by Hearing Officers:⁵

CHART 1

Distribution of Bi-Weekly Hours and Pay Periods Worked in the Representative Period

	<u># of Hearing Officers Who Worked Less Than 50% of Pay Periods</u>	<u># of Hearing Officers Who Worked 50% or More Pay Periods</u>	<u>Total</u>
≤ 35 Bi-Weekly Hours:	23	208	231
> 35 Bi-Weekly Hours:	4 ⁶	85	89

⁴ Forty-two of the 412 Hearing Officers worked at two tribunals during the Backpay Period. Since the Weekly Cap was applied per tribunal, we evaluated the hours of each Hearing Officer by tribunal.

⁵ Of the Hearing Officers who worked in the Backpay Period, 134 did not work in the Representative Period. Only the payroll data of 320 Hearing Officers who worked in the Representative Period and the Backpay Period are described here.

⁶ Of the four Hearing Officers who worked more than 35 bi-weekly hours in less than 50% of the Representative Period, one worked 12 pay periods, and three worked eight pay periods.

Of the 320 Hearing Officers who worked during the Representative Period, only 85 Hearing Officers averaged more than 35 bi-weekly hours and worked at least 50% of the pay periods (“85 Hearing Officers”).⁷ A closer look at the 85 Hearing Officers revealed that, on average, they worked 40.6 bi-weekly hours in the Representative Period. As explained further below, these 85 Hearing Officers regularly worked more than the Weekly Cap when they had the opportunity to do so. Therefore, the remainder of the summarized data here is limited to those 85 Hearing Officers.

Analysis of Backpay Period Payroll Data

The payroll records show that the bi-weekly hours of the 85 Hearing Officers decreased during the Backpay Period. The data indicates that the 85 Hearing Officers averaged between 34.5 and 38.8 bi-weekly hours during the Backpay Period, as compared to 40.5 bi-weekly hours in the Representative Period:

CHART 2

Average Bi-Weekly Hours Worked by the 85 Hearing Officers

<u>Year</u>	<u># of the 85 Hearing Officers Who Worked</u>	<u>Average Bi-Weekly Hours Worked</u>
2009	85	40.6
2010	79	34.5
2011	76	35.8
2012	64	35.4
2013	57	37.6
2014	51	39.2

Similar to the Representative period, the payroll records show variations in the number of pay periods and bi-weekly hours worked by the 85 Hearing Officers in the Backpay Period. The

⁷ The 85 Hearing Officers includes two who worked at more than one tribunal and are, therefore, counted twice.

data also shows that some of the 85 Hearing Officers who worked more than 35 average bi-weekly hours in the Representative Period worked less than 35 average bi-weekly hours per calendar year and/or worked less than 50% of the calendar year pay periods during the Backpay Period:

CHART 3

Pay Periods Worked by the 85 Hearing Officers

	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>
# of Hearing Officers Who Worked < 50% of Pay Periods	0	18	15	27	33	37
# of Hearing Officers Who Worked ≥ 50% of Pay Periods:	85	67	70	58	52	48

CHART 4

Distribution of Average Bi-Weekly Hours of the 85 Hearing Officers
Who Worked ≥ 50% of Backpay Period

	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>
Less than 28 Hours:	0	8	9	11	7	6
Between 28 and 35 Hours:	0	23	18	20	13	13
Between 35.1 and 38.5 Hours:	38	22	30	17	21	9
More than 38.5 Hours:	47	14	13	10	11	20
Total > 35:	85	35	43	27	32	29

The variations in bi-weekly hours and pay periods worked by the 85 Hearing Officers during the Representative and Backpay Periods described above corroborate our findings in the *Prior Decision* that Hearing Officers have flexible hours and do not work regular schedules. Similarly, these variations confirm that the Weekly Cap was not consistently enforced. *See UFT*, 7 OCB2d 12 at 20 n. 28.⁸ Nevertheless, the payroll data reflects that some of the 85 Hearing

⁸ Hearing Officer Piken testified that the Weekly Cap was not enforced until July 2011; and

Officers suffered a loss of bi-weekly hours after the announcement of the Weekly Cap. A comparison of the Representative and Backpay Periods clearly shows a reduction in the 85 Hearing Officers' average bi-weekly hours worked. As shown in Chart 2, the average bi-weekly hours worked by the 85 Hearing Officers in the Representative Period decreased between 1.4 and 6.1 hours in the Backpay Period.

Further, Chart 4 shows that the number of the 85 Hearing Officers working above the Weekly Cap decreased significantly in the Backpay Period. While the 85 Hearing Officers worked more than 35 bi-weekly hours in the Representative Period, only between 27 and 43 of them averaged more than 35 bi-weekly hours in at least 50% the Backpay Period.⁹ Moreover, as shown in Chart 4, in the Representative Period there were more Hearing Officers working more than 38.5 bi-weekly hours than working between 35.1 and 38.5 bi-weekly hours. However, in four out of five years of the Backpay Period, more Hearing Officers worked 35 to 38.5 bi-weekly hours, than worked more than 38.5 bi-weekly hours. In other words, a large portion of the 85 Hearing Officers shifted to working less hours in the Backpay Period.

Parties' Participation in Remedy Formulation

In addition to analyzing the payroll data,¹⁰ the Trial Examiner met with the parties three times, held two conference calls, and exchanged numerous emails with the parties to discuss the

Hearing Officer Keefe testified that the Weekly Cap was implemented around April 2010. Similarly, enforcement of the Weekly Cap ended earlier for some Hearing Officers. By example, Hearing Officer Kegelman testified that his hours were only capped in May and June 2011. *See UFT*, 7 OCB2d 12 at 6-9.

⁹ This amounts to a 59% reduction in 2010, a 49% reduction in 2011, a 68% reduction in 2012, a 62% reduction in 2013, and a 66% reduction in 2014.

¹⁰ The Trial Examiner consolidated and organized the payroll data in a spreadsheet and provided it to the parties on February 3, 2017.

payroll data and to solicit their input for establishing eligibility criteria and a backpay formula to determine a reasonable approximation of the hours Hearing Officers would have worked but for the Weekly Cap.

After considering the parties' input, the Trial Examiner presented the parties with Proposed Eligibility Criteria and a Proposed Backpay Formula and afforded them an opportunity to submit their positions on each.

The Proposed Eligibility Criteria required satisfying four eligibility criteria:

1. Average more than 35 bi-weekly hours over at least 13 pay periods in the Representative Period (calendar year 2009); and
2. Average between 28 and 38.5 bi-weekly hours per calendar year during the Backpay Period; and
3. Work at least 50% of the pay periods per calendar year during the Backpay Period; and
4. The difference between the average bi-weekly hours per calendar year in the Representative Period and the average bi-weekly hours per calendar year in the Backpay Period must be one hour or more.

The Proposed Eligibility Criteria contain elements to which the parties had previously agreed.¹¹ In their March 2017 submissions, the parties agreed that Hearing Officers would be eligible for backpay if they averaged more than 35 bi-weekly hours in at least 50% of pay periods preceding the Weekly Cap.¹² The parties also agreed that a Hearing Officer's average bi-weekly hours in

¹¹ The parties' agreement was conditioned on being afforded an opportunity to make offers of proof as to Hearing Officers for whom application of these elements would yield an inequitable result.

¹² Proposed Eligibility Criterion #1 did not incorporate the parties' agreement to use the 20 pay periods following the Backpay Period. In addition, it used the 2009 calendar year instead of the 26 pay periods immediately prior to the Weekly Cap as the Representative Period.

the Backpay Period must fall within a specific range of bi-weekly hours (Proposed Eligibility Criterion #2).¹³ Finally, the parties agreed that a Hearing Officer would be eligible if they worked at least 50% of the Backpay Period (Proposed Eligibility Criterion #3).¹⁴

The Proposed Backpay Formula includes four steps:

Step 1: Subtract the greater of 35 or the average bi-weekly hours worked in the Backpay Period from the average bi-weekly hours the Hearing Officer worked in the Representative Period.

Step 2: Multiply the result in Step 1 by the number of pay periods worked in the year.

Step 3: Add the result of Step 2 to the actual hours worked by the Hearing Officer in the calendar year. If the result exceeds 1,000 hours, then, subtract the hours in excess of 1,000 from the result of Step 2.¹⁵

Step 4: Multiply the result in Step 2 by the hourly rate, or if there is a deduction in Step 3, multiply the result in Step 3 by the hourly rate.

On November 1, 2017, the parties submitted their positions, which contained objections to portions of the Proposed Eligibility Criteria and Proposed Backpay Formula and included arguments for alternate eligibility criteria.

POSITIONS OF THE PARTIES

City's Position

The City argues that the unique nature of hours and schedules worked by Hearing Officers

¹³ Proposed Eligibility Criterion #2 modifies the range of average bi-weekly hours worked in the Backpay Period from those originally agreed to by the parties, which was 20 to 35 bi-weekly hours.

¹⁴ While the parties agreed in March 2017 that an eligible Hearing Officer must have worked at least 52 of the 104 pay periods in the Backpay Period, Proposed Eligibility Criterion #3 is applied by calendar year.

¹⁵ Consequently, Hearing Officers who worked a total of 1,000 or more hours per tribunal per calendar year are not owed backpay.

in conjunction with the number of Weekly Cap restrictions during the Backpay Period renders the formulation of a remedy “unduly speculative.”¹⁶ (Nov. 2017 City Br. at 2) Nevertheless, to the extent the Board finds backpay is owed, the City agrees to Proposed Eligibility Criteria #1, #2, and #3 and acknowledges that these eligibility criteria “reflect the flexible nature of [Hearing Officer’s hours and work schedules] and establish reasonable ranges within which to capture affected” Hearing Officers. (*Id.* at 3) The City also reiterates that its position is contingent on being afforded the opportunity to make offers of proof as to Hearing Officers for whom application of the Proposed Eligibility Criteria would yield an inequitable outcome.

With respect to Proposed Eligibility Criterion #1, the City argues that a minimum of 13 pay periods worked in the Representative Period is a rational threshold for determining Hearing Officer eligibility for a remedy. It also argues that Hearing Officers who worked less than 13 pay periods in the Representative Period, including those who did not work at all, should not be eligible for a backpay award. The City asserts that Hearing Officers hired after the implementation of the Weekly Cap were not subject to a unilateral change and, therefore, did not suffer a measurable loss. According to the City, these Hearing Officers accepted work with the understanding that the Weekly Cap was a term and condition of their employment. Further, as to Hearing Officers who worked between one and 12 pay periods in the Representative Period, the City argues that utilizing less than 13 pay periods or utilizing bi-weekly hours following the Backpay Period as representative of what they would have worked but for the Weekly Cap is too speculative and inconsistent with Board precedent finding that a look-forward methodology is not a reasonable predictor of hours for purposes of formulating a remedy. The City also maintains that the Union

¹⁶ The City asserts that unlike the Annual Cap Case, which had a single 1,000-hour annual limit, the instant matter involved up to 104 bi-weekly restrictions.

has not offered an acceptable alternative to estimating the hours Hearing Officers would have worked without the Weekly Cap.

With regard to Proposed Eligibility Criterion #4, the City argues that a difference of one average bi-weekly hour between the Representative and Backpay Periods per calendar year is not a significant deviation that can be attributed to the effect of the Weekly Cap. Instead, it contends that a minimum difference of four average bi-weekly hours should be required to be eligible for backpay. It asserts that requiring a difference of four hours “more accurately” identifies Hearing Officers affected by the Weekly Cap. (*Id.* at 3)

The City also asserts that two additional factors should be applied to determine a Hearing Officers eligibility for backpay. First, the City argues that Hearing Officers be required to meet the Proposed Eligibility Criteria in 2010 and in two additional calendar years between 2011 and 2014. It reasons that ineligibility in calendar year 2010, the year it asserts that the Weekly Cap was implemented, suggests that any decrease in Hearing Officers’ work hours in any subsequent calendar year, was not due to the Weekly Cap. Further, the City asserts that limiting the remedy to Hearing Officers found eligible in three years “increases the likelihood that the difference in scheduled hours [between the Representative and Backpay Periods] in a given year is not due to anomalous factor[s] unique to the individual employee.” (*Id.* at 4)

Second, the City seeks to exclude from eligibility Hearing Officers employed at multiple tribunals because, it argues, that it is not possible to determine whether to attribute the reduction in bi-weekly hours during the Backpay Period to the 1,000 Hour Annual Cap or the Weekly Cap. Further, it maintains that Hearing Officers who received a remedy in *UFT*, 6 OCB2d 19 (BCB 2013), the Annual Cap remedy case, are ineligible in this case because “it would very likely be duplicative and represent a windfall.” (Nov. 2017 City Br. at 5)

The City did not raise any objections to the Proposed Backpay Formula.

Union's Position

The Union challenges the accuracy of the payroll data based on discrepancies between the payroll data the City produced in this case and what it produced in *UFT*, 5 OCB2d 26 (BCB 2012) for Hearing Officers Arthur Kegelman and Diane Rivers. It asserts that the work hours reported by the City for Hearing Officer Kegelman are substantially less than were reported for the *UFT*, 5 OCB2d 26 and that the data excludes hours Hearing Officer Diane Rivers worked.

The Union agrees to Proposed Eligibility Criteria #3 and #4. In regard to Proposed Eligibility Criterion #1, the Union disagrees with requiring a minimum number of pay periods worked during the Representative Period. It argues that the Board's finding of an unfair practice is "presumptive proof" that back pay is owed to all Hearing Officers who worked in the Backpay Period, including those who did not work or worked less than 13 pay periods in the Representative Period. (July 2017 Union Br. at 2) The Union also asserts that the Board should consider post-violation hours as representative of what these Hearing Officers would have worked in the Backpay Period but for the Weekly Cap. In the alternative, the Union asserts that the Board should not disqualify Hearing Officers who worked less than 13 pay periods per year as a result of extenuating circumstances, such as leaves of absence. Further, the Union maintains that it should be afforded the opportunity to establish the eligibility of any such Hearing Officer through "other evidence that demonstrates that [they] were prevented from working [] hours during the [B]ackpay [P]eriod" because of the Weekly Cap. (Nov. 2017 Union Br. at 4)

In addition, the Union proposes to change Proposed Eligibility Criterion #1's method of calculating the average hours worked in the Representative Period. The Union argues that the lowest two to four pay periods for any Hearing Officer that works 22 or more pay periods in the

Representative Period should be excluded when calculating that Hearing Officer's average bi-weekly hours. It asserts that the lowest pay periods in calendar year 2009 are due to Hearing Officers taking unpaid time off and that such unpaid time should not skew the average work hours during the Representative Period.

With regard to Proposed Eligibility Criterion #2, the Union objects to limiting the range of hours in the Backpay Period to 28 to 38.5 bi-weekly hours. It argues that the lower end of this range for eligibility should be expanded to 23.5 average bi-weekly hours. The Union maintains that this adjustment is necessary to account for a reduction in hours resulting from hearings running shorter than expected and to maintain a 15-hour eligibility range, consistent with the 20 to 35 range originally agreed to by the parties. In the event that the Board does not accept the Union's proposal for a 23.5 to 38.5 range, the Union indicates a preference for the proposed 28 to 38.5 range over the originally agreed to 20 to 35 range. *See* November 8, 2017 Union Email.

Regarding the Proposed Backpay Formula, the Union argues that the Board should subtract average bi-weekly hours worked in the Backpay Period from the average bi-weekly hours in the Representative Period, instead of subtracting a minimum of 35 hours to determine the hours owed. The Union asserts that subtracting 35 hours penalizes Hearing Officers because it "artificially" assumes that Hearing Officers were scheduled for 35 bi-weekly hours when, in fact, the City may not have scheduled them for all the hours that they were available and willing to work. (July 7, 2017 Union Br. at 5)

DISCUSSION

NYCCBL § 12-309(a)(4) empowers the Board to determine and issue remedial orders for improper practices.¹⁷ The New York State Supreme Court has affirmed the Board’s authority to issue a backpay remedy for an improper practice relating to a unilateral implementation of a restriction on working hours. *See Matter of City of New York v. NYC Bd. of Collective Bargaining*, Index No. 451411/2013, at 16 (Sup Ct NY Co Aug. 14, 2014) (Freed, J.) (affirming *UFT*, 5 OCB2d 26); *see also UFT*, 6 OCB2d 19, at 11 (BCB 2013) (“[I]t is well settled that the finding of an improper practice is presumptive proof that some backpay is owed.”) (citing *Regional Import and Export Trucking Co., Inc.*, 318 NLRB 816, 818 (1995)). In reviewing the Board’s determination of a backpay remedy, the Court reasoned that CSL § 205(5)(d) expressly provides “make whole” relief, including but not limited to, an award of backpay. *Id.*

In exercising our remedial authority, this Board is “guided by [its] understanding of the realities of relations between the parties and workplace variations, which is why ‘[r]emedies for improper employer practices are peculiarly within [its] administrative competence.’” *UFT*, 5 OCB2d 26, at 10-11 (citing *Matter of Buffalo Police Benevolent Assn. v. NYS Pub. Empl. Relations Bd.*, 8 AD3d 958, 959 (4th Dept 2004)); *see also Matter of Civ. Serv. Empl. Union v.*

¹⁷ NYCCBL § 12-309(a) states in pertinent part:

The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty: . . .

(4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders.

Pub. Empl. Relations Bd., 180 Misc2d 869, 871 (Sup Ct Albany County 1999) (same); *Matter of Civ. Serv. Empl. Union v. NY State Pub. Empl. Relations Bd.*, 2 AD3d 1197, 1199 (3rd Dept 2003). As “an adjudicative body, this Board ‘has considerable discretion in selecting a method reasonably designed to approximate the amount of pay [to which] a wrong[ed] employee’ is entitled.” *UFT*, 5 OCB2d 26, at 11 (citing *Natl. Labor Relations Bd. v. Velocity Exp., Inc.*, 434 F.3d 1198, at 1202 (10th Cir. 2006)). The Board’s role in establishing eligibility criteria and a backpay formula is to develop a remedy that “reasonabl[y] approximat[es the] damages resulting from the City’s improper practice.” *Id.* at 16 (finding a remedy formula need not be perfect as it “is only an approximation of what is owed [and] . . . does not have to achieve perfection; it need only be non-arbitrary”) (citing *Intermountain Rural Elec. Assn. v. Natl. Labor Relations Bd.*, 317 NLRB 588, 591 (1995), *enforced mem.* 83 F3d 432 (10th Cir 1996)).

As a preliminary matter, we find no evidence to support the Union’s assertion that the payroll records provided by the City do not accurately reflect the bi-weekly hours worked by Hearing Officers from 2009 to 2014. The alleged discrepancies in Hearing Officers Arthur Kegelman and Diane Rivers’ payroll data are readily explained. Since Hearing Officer Kegelman testified in the *Prior Decision* that his hours were only capped in May and June 2011, the Trial Examiner included only the data from May and June 2011 in summations provided to the parties. Further, while some of Hearing Officer Rivers’ hours were inadvertently excluded from the Trial Examiner’s September 6, 2017 summation to the parties, this error was corrected. Further, the complete payroll records that were provided to the Union included all of Hearing Officers Kegelman and Rivers’ hours.

As noted earlier, the payroll records show the variability of Hearing Officers’ hours. They do not have a defined work schedule and, therefore, do not work the same number of hours or

days in each bi-weekly pay period. As a result, to determine which Hearing Officers were affected by the Weekly Cap, we analyzed the payroll records on a bi-weekly basis to determine factors that showed: (1) continuity in employment, (2) a regular pattern of working more than the equivalent of the Weekly Cap, and (3) a decrease in hours after imposition of the Weekly Cap. Based on the parties' input, there was agreement on several Proposed Eligibility Criteria. We now adopt the Proposed Eligibility Criteria (hereafter "Eligibility Criteria) and find that they are narrowly tailored to identify Hearing Officers who would have worked more than the Weekly Cap during the Backpay Period.

Eligibility Criteria

A Hearing Officer must meet the following four criteria to receive backpay:

1. Average more than 35 bi-weekly hours over at least 13 pay periods in the Representative Period (calendar year 2009); and
2. Average between 28 and 38.5 bi-weekly hours per calendar year during the Backpay Period; and
3. Work at least 50% of the pay periods per calendar year during the Backpay Period;¹⁸ and
4. The difference between the average bi-weekly hours per calendar year in the Representative Period and the average bi-weekly hours per calendar year in the Backpay Period must be one hour or more.

Based on our analysis of the payroll data, we determine that the Eligibility Criteria should be applied by calendar year. A calendar year application of the Eligibility Criteria is necessary to account for the 1,000 Annual Cap Per Tribunal, which was also applied by calendar year. The

¹⁸ Because the Backpay Period does not cover the entire calendar year in 2010 or 2014, the minimum number of pay periods during the Backpay Period that a Hearing Officer needed to work to be eligible for a backpay award for 2010 was 10, and for 2014 was 3. The minimum number of pay periods needed was 13 in calendar years 2011, 2012, or 2013.

parties both agreed in their November 2017 submissions to the application of the criteria by calendar year. We address each criterion separately below.

Eligibility Criterion #1: Average more than 35 bi-weekly hours over at least 13 pay periods in the Representative Period (calendar year 2009)

Eligibility Criterion #1 is used to identify the Hearing Officers who regularly worked more than 35 bi-weekly hours prior to the Weekly Cap. We find that Hearing Officers that meet this criterion are likely to have worked more hours than the Weekly Cap during the Backpay Period.

We find that the one-year Representative Period is an adequate period to approximate the hours worked without the Weekly Cap. The 2009 calendar year is closest to the announcement of the Weekly Cap, and there is no dispute that one year is sufficient in length to show how Hearing Officers worked without the Weekly Cap.

We also find, and the City agrees, that requiring Hearing Officers to have worked 50% of the Representative Period is an adequate sample of pay periods to determine average bi-weekly hours. Applying this criterion showed that only 85 of the 320 Hearing Officers employed in 2009 regularly exceeded 35 average bi-weekly hours. Further, the data demonstrated that employees meeting this criterion regularly worked 40.6 average bi-weekly hours. As a result, we find that application of Eligibility Criterion #1 identifies the Hearing Officers who are likely to have worked more than 35 bi-weekly hours in the Backpay Period without a Weekly Cap.

Further, due to the variations in their work schedules, we find that Hearing Officers who worked less than 50% of the Representative Period are not eligible for backpay. Without an adequate sample of data that precedes the violation, we cannot reasonably determine that they would have worked more than 35 hours without the Weekly Cap or that any reduction in their work hours during the Backpay Period was caused by the Weekly Cap. As such, we find that it is too speculative to conclude that Hearing Officers who worked less than 13 pay periods in the Representative Period

would have worked more than the Weekly Cap in the Backpay Period.

In this regard, we also decline to use post-violation work hours as a basis to conclude that Hearing Officers would have worked more than the Weekly Cap. We are not convinced by the Union's assertion that *Safeway Steel Scaffolds Co. of Georgia*, 153 NLRB 417 (1965) supports the utilization of post-violation hours here. The employees in *Safeway Steel Scaffolds Co.* worked a fixed schedule both before and after the violation such that evaluating individual employee's hours was not necessary to determine a backpay remedy. By contrast, the instant matter involves employees who work variable hours and work schedules that necessitate analyzing their work patterns prior to the improper practice to determine if and how they were impacted by the violation.¹⁹ Without a sufficient data sample of prior work history upon which to gauge their availability and willingness to work, we cannot reasonably predict that Hearing Officers would have worked more hours during the Backpay Period. *See UFT*, 5 OCB2d 26, at 20 (finding that post-violation hours are not a reasonable predictor for hours worked during a violation period). Therefore, we find that Hearing Officers who worked less than 13 pay periods in 2009, including those who did not work at all in 2009, are not eligible for a remedy.

Moreover, in calculating the average number of bi-weekly hours worked during the Representative Period, we decline to exclude the two to four pay periods with the lowest hours, as suggested by the Union. First, using the same methodology in both the Representative and Backpay Periods provides a more accurate comparison of average bi-weekly hours. Excluding the lowest

¹⁹ For this reason, we similarly reject the Union's assertion that this Board's finding of an improper practice presumes the eligibility of Hearing Officers who worked less than 13 pay periods, or not at all, in the Representative Period. To make this presumption, the Board would have to disregard the evidence that the Weekly Cap was not consistently enforced. Moreover, unlike *Beverly California Corp.*, 329 NLRB 977 (1999), on which the Union relies, the Hearing Officers do not work a fixed schedule.

pay periods from only the Representative Period would artificially increase the average hours worked in that period. Second, to the extent that all the pay periods worked include time off taken by a Hearing Officer, this reflects their regular work pattern and provides a more reasonable estimate of their hours in pay periods they chose to work.

As noted earlier, when Eligibility Criterion #1 is applied, we find that 85 Hearing Officers averaged more than 35 bi-weekly hours over at least 13 pay periods in the Representative Period. Accordingly, we exclude from eligibility the remaining 235 Hearing Officers. These Hearing Officers did not regularly work more than the equivalent of the Weekly Cap during the Representative Period and, therefore, we cannot find that that they were harmed by imposition of the Weekly Cap.

Eligibility Criterion #2: Average between 28 and 38.5 bi-weekly hours per calendar year during the Backpay Period

Eligibility Criterion #2 is intended to identify Hearing Officers whose work during the Backpay Period showed that they continued to regularly work up to the maximum hours permitted by the Weekly Cap and therefore were likely to work more than 35 average bi-weekly hours in the absence of the Weekly Cap. Because Hearing Officers have the ability to control the number of days and hours they work, we conclude that a reduction in hours below 28 bi-weekly hours, which is approximately four days per pay period, might not be attributed to the Weekly Cap. A minimum of 28 bi-weekly hours in Eligibility Criterion #2 is reasonable because it reflects that a Hearing Officer worked enough hours to show that they were maximizing the permissible hours available under the Weekly Cap, while average bi-weekly hours less than 28 does not. For this reason, we reject the Union's request to reduce the minimum average weekly hours worked in the Backpay Period to 23.5.

We also find, and the parties agreed in their November 2017 submissions, that Eligibility

Criterion #2's maximum of 38.5 bi-weekly hours worked in the Backpay Period reasonably excludes those Hearing Officers who were not impacted by the Weekly Cap. We set the limit at 38.5, instead of 35, because the difference of 3.5 hours is a relatively minor deviation from the Weekly Cap over a two-week period.²⁰ Further, 38.5 bi-weekly hours is the maximum a Hearing Officer who works 26 pay periods can work per year per tribunal under the Annual Cap Per Tribunal. Accordingly, Eligibility Criterion #2 limits a remedy to those Hearing Officers who averaged between 28 and 38.5 bi-weekly hours during the Backpay Period. Application of this criteria reveals Hearing Officers who maximized their allowable work hours and were, more likely than not, restricted by the Weekly Cap.

Eligibility Criterion #3: Work at least 50% of the pay periods in a calendar year during the Backpay Period to be eligible for backpay for that year

Eligibility Criterion #3 is also intended to identify Hearing Officers who worked consistently during the Backpay Period and were negatively impacted by the Weekly Cap. For the same reasons that form the basis for Eligibility Criterion #1, we find, and the parties agreed in their November 2017 submissions, that 50% of the pay periods in a calendar year during the Backpay Period is the minimum amount of time a Hearing Officer had to work to demonstrate that their hours were reduced by the Weekly Cap in that year. If a Hearing Officer worked less than 50% of the pay periods in a calendar year of the Backpay Period, this shows a level of irregularity in their work such that it is too speculative to conclude that they suffered a loss in pay as a result of the Weekly Cap. Accordingly, we find that Hearing Officers who did not meet Eligibility Criterion #3 did not work enough pay periods during the Backpay Period to demonstrate that they were restricted by the Weekly Cap.

²⁰ We note that the data indicates that there were also minor deviations in the Annual Cap Per Tribunal. *See also UFT*, 5 OCB2d 26, at 19.

Eligibility Criterion #4: The difference between the average bi-weekly hours in the Representative Period and the average bi-weekly hours in a calendar year during the Backpay Period must be one hour or more to be eligible for backpay for that year.

Eligibility Criterion #4 is intended to identify Hearing Officers whose average bi-weekly hours decreased as a result of the Weekly Cap. We find, and the Union agrees, that a decrease in average bi-weekly hours of less than one hour is a minor fluctuation that is insufficient to demonstrate that a change occurred. We decline, however, to require a decrease of at least four hours, as asserted by the City. Application of both the 1,000 hour Annual Cap Per Tribunal and the Weekly Cap on Hearing Officers who regularly worked most of the year would restrict them to 3.5 bi-weekly hours. Therefore, if a minimum Weekly Cap restriction of 4 bi-weekly hours were required by Eligibility Criterion #4, Hearing Officers who were impacted by the Weekly Cap would be excluded from eligibility.

Similarly, we reject the City's request to limit eligibility to those who satisfy all the Eligibility Criteria in 2010 and in at least two other years in the Backpay Period. Our analysis of the payroll data confirmed that the Weekly Cap was not "consistently and/or continuously uniformly applied." *UFT*, 7 OCB2d 12 at 20. Indeed, the testimony in the underlying case indicated that implementation of the Weekly Cap began at various times up to July 2011 and endured for varying time periods, including periods as short as two months. *Id.* at 6-7. The City's proposed criteria would unnecessarily exclude affected Hearing Officers for whom the Weekly Cap was not enforced until 2011 and those who were impacted by the Weekly Cap in only one or two years of the Backpay Period.

Finally, we decline to exclude from eligibility all Hearing Officers employed by multiple tribunals.²¹ First, this exclusion is too broad because the backpay period in *UFT*, 5 OCB2d 26 covered a different period of time and overlaps with the Backpay Period in this case during only one year, 2010. There is no risk of a duplicate remedy for the four other years in the Backpay Period (2011-2014) or for those Hearing Officers who are not eligible for a remedy for 2010 in *UFT*, 6 OCB2d 19. Further, the potential for a duplicative remedy is not determinative of a Hearing Officer's eligibility for a remedy. The impact of the remedy in the *UFT*, 6 OCB2d 19, is addressed in the calculation of net back pay, which is discussed below.

Applying all four Eligibility Criteria, we find that 57 Hearing Officers ("Affected Hearing Officers") are eligible for a backpay remedy in at least one calendar year of the Backpay Period.²²

Exceptions to Eligibility Criteria

In order to address the parties' concerns regarding the application of the Eligibility Criteria in certain anomalous situations, we will afford the parties the opportunity to present offers of proof relevant to exceptions to the Eligibility Criteria. To the extent a party believes that a Hearing Officer who does not meet the Eligibility Criteria should be found eligible for a backpay remedy or that a Hearing Officer who meets the Eligibility Criteria should be found ineligible, such party will be afforded an opportunity to make an offer of proof in support of an exception to the Eligibility Criteria and, if necessary, be given the opportunity to present additional evidence to

²¹ Only two of the 85 Hearing Officers fall within this category.

²² Application of Eligibility Criteria by Year:

	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>
Satisfied Criterion #1:	85	85	85	85	85
And Satisfied Criterion #2:	49	51	38	34	22
And Satisfied Criterion #3:	45	48	37	34	22
And Satisfied Criterion #4:	41	40	31	29	17

support these proffers.

In sum, based on our review of the payroll data, discussions with the parties, and their written submissions, we conclude that the Eligibility Criteria coupled with the opportunity to present offers of proof as to eligibility exceptions adequately account for the flexible nature of the Hearing Officer position and variations in the application of the Weekly Cap. We find that application of these Eligibility Criteria identifies Hearing Officers who regularly worked more than the equivalent of the Weekly Cap during the Representative Period and were limited by the Weekly Cap during the Backpay Period.

Gross Backpay Formula

Next, we must calculate the number of hours Affected Hearing Officers lost because of the Weekly Cap in each calendar year in which they are eligible and the amount of backpay due. We recognize that even a sound and reasonable formula may not yield a perfect result. Nevertheless, we reject the City's assertion that a formulation of remedy here is "unduly speculative." Hearing Officers are not precluded from the NYCCBL's protection based on the flexibility of their working hours. Nor may "[t]he City . . . preclude a remedy for an improper practice by claiming one would be too difficult to ascertain." *UFT*, 5 OCB2d 26 at 13-14. After reviewing the payroll records and considering the parties' input, the parties agreed with most of the Proposed Backpay Formula (hereafter "Backpay Formula"). We find that the Backpay Formula determines a proper remedy for Affected Hearing Officers and will reasonably approximate the damages resulting from the City's unilateral implementation of the Weekly Cap. *See UFT*, 5 OCB2d 26 at 16 (finding a remedy formula "does not have to achieve perfection").

To reasonably approximate the lost hours and backpay due, we adopt the Backpay Formula to be applied to Affected Hearing Officers by calendar year:

Step 1: Subtract the greater of 35 or the average bi-weekly hours worked in the Backpay Period from the average bi-weekly hours the Affected Hearing Officer worked in the Representative Period.

Step 2: Multiply the result in Step 1 by the number of pay periods worked in the year.

Step 3: Add the result of Step 2 to the actual hours worked by the Affected Hearing Officer in the calendar year. If the result exceeds 1,000 hours, then, subtract the hours in excess of 1,000 from the result of Step 2.

Step 4: Multiply the result in Step 2 by the hourly rate, or if there is a deduction in Step 3, multiply the result in Step 3 by the hourly rate.

We find that calculating the backpay due per tribunal by calendar year is consistent with the application of the Eligibility Criteria and serves to provide a reasonable approximation of the hours lost because of the Weekly Cap.

In Step 1, we subtract 35 or the Affected Hearing Officer's average bi-weekly hours in the Backpay Period, whichever is higher, from their average bi-weekly hours in the Representative Period. *See UFT*, 5 OCB2d 26 at 18 (similarly subtracting actual hours or the amount of the cap, whichever is higher, from the average annual hours prior to the cap). We find that the resulting difference is a reasonable approximation of the bi-weekly hours an Affected Hearing Officer lost in a pay period because of the Weekly Cap. We decline to subtract only the Affected Hearing Officer's average bi-weekly hours in the Backpay Period in Step 1, as requested by the Union. The data does not support the Union's assertion that employees were prevented from working an average of 35 bi-weekly hours, the agreed-upon definition of the Weekly Cap. Indeed, approximately 58% of the 57 Affected Hearing Officers worked an average of at least 35 bi-weekly hours in at least one calendar year of the Backpay Period. Therefore, we cannot attribute average hours worked less than 35 bi-weekly hours to the Weekly Cap restriction. *Id.* at 19.

Step 2 of the Backpay Formula calculates the total hours lost by an Affected Hearing Officer per tribunal per calendar year during the Backpay Period resulting from the Weekly Cap. We find, and the parties do not object, that to obtain an approximation of the hours that a Hearing Officer would have worked had the Weekly Cap not been implemented, we multiply the result in Step 1 by the number of pay periods in the Backpay Period in which the Hearing Officer worked.

Since the parties do not dispute the enforcement of the Annual Cap Per Tribunal, Step 3 ensures that no Hearing Officer is awarded a remedy that exceeds 1,000 hours worked per tribunal per year. Therefore, we find that when determining an Affected Hearing Officer's remedy, if the sum of the total hours worked by tribunal per calendar year and the result of Step 2 exceed 1,000 hours, the number of hours resulting from Step 2 will be reduced by the number of hours that exceed 1,000.

Step 4 of the Backpay Formula is the calculation of gross backpay. The amount of gross backpay is determined by multiplying the hours lost in each calendar year by the hourly rate of pay.

Net Backpay Calculation

As discussed in detail in *UFT*, 6 OCB 19, at 11, this Board has found that gross backpay for Affected Hearing Officers may be reduced by: (1) the periods of time an employee is unavailable to work; (2) some interim earnings from outside employment; (3) net interim earnings from self-employment; and (4) unemployment insurance compensation. As such, the record in this matter will also remain open to allow the parties to submit evidence regarding offsets to backpay. In addition, for Affected Hearing Officers who received a remedy in *UFT*, 6 OCB2d 19, we will consider reducing their gross backpay in 2010 by the backpay they received in *UFT*, 6 OCB2d 19.

Accordingly, we direct the Trial Examiner to take reasonable steps to compile an evidentiary record with respect to the remaining issues and calculate the net backpay due to Affected Hearing Officers.

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 Union and the City will present their offers of proof regarding potential exceptions to the eligibility criteria and the calculation of net backpay to the Trial Examiner; and it is further

ORDERED, that the City will submit its request for information regarding backpay offsets to the Union and Trial Examiner; and it is further

ORDERED, that the Union and the City participate in further proceedings as directed by the Trial Examiner to compile a record about offers of proof on eligibility and offsets to backpay.

Dated: April 16, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent (see attached opinion)

M. DAVID ZURNDORFER
MEMBER

I concur in the dissent (see attached opinion)

CAROLE O'BLENES
MEMBER

PETER PEPPER
MEMBER

**DISSENT OF M. DAVID ZURNDORFER IN BCB-2878-10 IN WHICH CAROLE
O'BLINES CONCURS**

I dissent for the reasons set forth in my dissents in *UFT*, 5 OCB2d 26 (BCB 2012) and *UFT*, 6 OCB2d 19 (BCB 2013). The backpay formula adopted by the Board will result in the award of many thousands of dollars in damages that are entirely speculative.