ARBITRATOR'S BILL

This bill is submitted on behalf of the Arbitrator

Ralph S. Berger, Esq.
60 Remsen Street, #7C
Brooklyn, NY 11201

CASE NO: 13 390 02352 08
GRIEVANCE: UI – Parking Permits

TO BE COMPLETED BY THE ARBITRATOR

PARTIES

Council of Supervisors & Administrators
and
The Board of Education/City of New York

TO BE COMPLETED BY THE ARBITRATOR

ARBITRATOR COMPENSATION

Number of hearing days 1 @ $1,800.00 = $1,800.00

Hearing dates 4/28/09

Study and preparation days 4 @ $1,800.00 = $7,200.00

Study/Preparation dates
7/21/09, 7/22/09, 7/30/09, 8/4/09

Other (Specify) _____ _____ @ $_____ = $_____

FEE $9,000.00

ARBITRATOR EXPENSES

Transportation	$_____		
Hotel	$_____		
Meals	$_____		
Other (specify)	$_____	EXPENSES	$_____
		TOTAL	$9,000.00

PAYABLE BY UNION: $4,500.00

PAYABLE BY EMPLOYER: $4,500.00

Arbitrator Signature Ralph S. Berger Date 8/7/09

Employer Identification Number: 11-2793161
Invoice Number: 080709-A

IMPORTANT NOTE
MAKE CHECK PAYABLE TO, AND MAIL DIRECTLY TO, THE ARBITRATOR

Payment is due to be received within 30 days.

AMERICAN ARBITRATION ASSOCIATION
CASE NO. 13 390 02352 08

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In the Matter of the Arbitration

- between –

COUNCIL OF SCHOOL SUPERVISORS and ADMINISTRATORS,

Association,

OPINION & AWARD

RALPH S. BERGER
Arbitrator

-- and --

NEW YORK CITY DEPARTMENT OF EDUCATION,

Employer

Re: Reduction of Parking Permits

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APPEARANCES

For the Association:
Barbara Jaccoma, Esquire

For the Employer:
Robert E. Waters, Esquire
Seth Blau, Esquire

The undersigned, pursuant to the selection of the parties, was duly designated to serve as Arbitrator of the dispute described below. Hearings were held in Brooklyn, New York on January 13, February 5, March 6, March 11, and April 28, 2009. The hearing was transcribed. Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties filed post-hearing briefs, which the undersigned received on June 24, 2009. The record

was closed at that time.[1] The evidence adduced and the positions and arguments set forth by the parties have been fully considered in preparation and issuance of this Opinion and Award.

THE ISSUE:

At the commencement of the hearing, the parties stipulated to the following issue for arbitral determination:

> Did the Department of Education violate Article XVIII of the collective bargaining agreement when as part of an overall parking placard reduction program, parking placards to CSA represented employees were reduced in August 2008. If so, what, consistent with the Agreement, is the appropriate remedy?

(Transcript p. 6)

RELEVANT CONTRACT PROVISIONS:

Article XVIII - Matters Not Covered

> With respect to matters not covered by this Agreement which are proper subjects for collective bargaining, the Board agrees that it will make no changes without appropriate prior negotiation with the CSA. The Board will continue its present policy with respect to sick leaves, sabbatical leaves, vacations, holidays and injury in the line of duty, except insofar as change is commanded by law.

(Joint Exhibit 1.)

[1] On July 29, 2009, the Association requested leave to file a reply brief to address the Department's citation in its brief to NYC Office of Collective Bargaining cases. On June 30, 2009, the undersigned denied the Association's request.

REMEDIES SOUGHT:

> To restore the status quo ante and to require the Department to negotiate with the Association prior to implementing a change in the parking permit policy.

(Transcript p. 7; Association Brief p. 6.)

BACKGROUND

The New York City Department of Education ("the Department") and the Council of School Supervisors & Administrators ("CSA" or "the Association") are parties to a collective bargaining agreement (the Agreement) (Joint Exhibit 1). The Agreement covers all Department employees in the School Administrative Unit, including pedagogical supervisory and administrative positions.

The Department had for many years, prior to October 2008, approved requests for, and issued, parking permits to pedagogical supervisors who have cars registered in their names and who request permits. The number of parking permits issued by the Department exceeded the number of available parking spaces. (Joint Exhibit 2).

In this regard, the Department issued over 63,000 parking permits to Department employees. However, there are only approximately 25,000 Department-designated parking spaces. Approximately 10,000 of these are on-street parking spaces, designated by signs that read: "Board of Education Only." The remaining 15,000 parking spaces are off-street, and are located on Department property (i.e., school parking lots or schoolyards.) Therefore, a parking permit authorized the holder to park in a Department-designated parking

spot; it did not guarantee the permit holder a parking space. (Joint Exhibit 2; Transcript pp. 202-204.)

In early 2008, Mayor Michael Bloomberg announced an initiative aimed at reducing the number of cars entering New York City. The purpose of the initiative was to "reduce traffic congestion, decrease the City's carbon footprint, and encourage the use of public transportation." Part of this initiative included "reduc[ing] the number and abuse of Government parking placards." (Department Exhibit 9.) On August 26, 2008, Deputy Mayor for Operations Edward Skyler sent United Federation of Teachers President Randi Weingarten a letter memorializing discussions that the Mayor's Office had with the UFT regarding the reduction of parking permits. That same month, the Department announced its decision to reduce the number of parking permits available for staff, including those represented by the Association (Joint Exhibit 2).

Specifically, in October 2008, the New York City Department of Transportation ("DOT") issued on-street parking permits for Department employees that roughly corresponded to the approximately 10,000 Department-designated on-street parking spaces. The spaces were assigned to individual schools based on the location of the on-street spaces and their proximity to the schools. Additionally, the Department issued approximately 15,000 off-street parking permits to correspond to the roughly 15,000 off-street parking spaces existing on Department property. (Joint Exhibit 2; Department Exhibit 9.)

Beginning in August 2008 and continuing through October 2008, the Department informed principals of the planned parking permit changes in weekly

issues of the publication "Principals' Weekly." Principals were directed to submit applications for the available parking permits. Principals were instructed to jointly decide with their UFT chapter leaders whether to issue the available permits to specific staff members, or to "pool" or "rotate" the available permits among staff members. Any disputes were to be referred to "the Commissioner of the Mayor's Office of Labor Relations and the UFT President to make a final decision." Moreover, principals were informed that if the number of spaces allocated to their schools was incorrect, they could file an appeal to the Mayor's Office of Operations. (Department Exhibits 1-4, 9-10.)

Association member and Department Placement Officer Braulio Navarro testified that he has worked for the Department for nine years and that every year he has received a parking permit. The permit allowed him to park in on-street parking spaces designated for Department employees. Since the Department took away his permit, he now uses public transportation to commute to work. Navarro testified that it used to take him 40-45 minutes to drive to work, but "now it takes me about two and a half hours, two hours" each way (Transcript p. 50). He also stated that he had used the permit to park when he had meetings away from his office. Navarro now uses public transportation, or walks to get to these meetings. The walk can take him 45 minutes to an hour.

On cross-examination, Navarro testified that the permit did not guarantee him a parking spot at his primary work location, but that he could always find a spot when he arrived to work in the morning. If there were no spots available when he returned from a meeting away from his office, he would use a parking

garage. Navarro also stated the permit did not guarantee him a parking spot at meetings away from the office, but that he would usually park in an off-street spot next to the school or call the principal "and the principal would make an accommodation." (Transcript pp. 55-56.)

Association member and Assistant Principal Joseph Clausi testified that he had to turn in his parking permit in October 2008. He stated that at his school, Astor Collegiate Academy, there are 27 teachers and three administrators, but the school received only two parking permits. Clausi also testified that there are four other schools operating on the same campus as his school, and claimed that at this location "[t]here are way more [parking spots] then the allotted placards" (Transcript p. 65). He testified further that when he had a parking permit, he arrived at school "a little after seven [a.m.]" for a 7:25 a.m. start time. Clausi stated he now arrives at school "around 6:00 [a.m.]." (Transcript p. 67.)

On cross-examination, Clausi testified that his principal has filed three appeals to the Mayor's Office of Operation to obtain more parking permits. He stated that only 14 parking permits have been distributed to all five schools operating at his location, but there are additional Department-designated on-street parking spots that are not being used.

Principal and Association member Barbara Hanson testified that she is principal of P.S. 10, which is in District 75 and comprised of seven cluster schools in the Bronx. This requires her to travel to the different schools several times a week. She stated that prior to the 2008-2000 school year, she and her three assistant principals had parking permits that enabled them to park "in front

of any school building that had Board of Ed parking." (Transcript p. 86.) Hanson stated that she was first given a permit in the early 1990s, but now neither she nor her assistant principals have parking permits. She averred that she received only "one permit per site" (Transcript p. 91).

Hansen testified further that she contacted the Department to request a parking permit and was told that District 75 was not entitled to any permits. Hanson also stated that she spoke with Department Director of Special Projects Charles Stamm several times, who told her that District 75 "was forgotten about." Hanson averred further that one of her assistant principals had to use public transportation to travel from her school to Hanson's office, and it took her an hour and a half. (Transcript pp. 88-91.)

Hanson reiterated that when she had a permit and visited her sites, she "was able to park in front of the Board of Ed school." Now it can take her "five minutes . . . twenty minutes, a half an hour driving around." (Transcript pp. 93-94.) She also testified that there are 14 open parking spots at IS 162, for which she has requested parking permits. One of her assistant principals parked in one of those spots and her car was towed away. Hanson testified that one permit for each of her six sites is inadequate, since there are four administrators for each school.

On cross-examination, Hanson testified that at her main site (P.S. 304), there has never been any on-street or off-street Department-designated parking spaces. She stated that when she had a permit, it did not guarantee her an actual parking space at P.S. 304 or anywhere else. Hanson also testified that

with respect to the six parking permits she received for six of her sites, she did not assign them to the assistant principals at those locations. The permits are given to teachers on a first-come, first-served basis, since the teachers are there every day. Hanson added that Stamm told her he was going to make a request for additional permits for her. (Transcript p. 128).

Department Director of Special Projects Charles Stamm testified that prior to changing the process for issuing parking permits, Department employees were able to obtain a permit as long as they provided complete information on the application. He stated that "in the vast majority of cases they were approved." (Transcript pp. 203-205.) Stamm averred that he was involved with assigning the parking permits in 2008. He stated that by using surveys showing that there were 25,000 Department-designated spaces, "I determined where the school locations were and the building location and based on the proximity of the school to the parking spaces, I then made my allocation" (Transcript pp. 207-208). Stamm testified that between 2007 and 2008 there were no reductions in the designated Department parking areas throughout New York City.

Stamm explained the new parking permit process, as described in the Principals' Weekly. However, he added that in the event the principal and UFT chapter leader could not agree as to how permits would be distributed, a "default" process was triggered whereby the principal would receive one permit and the

remaining permits were rotated among school staff on a first-come, first-served basis.

According to Stamm, 470 schools did not receive any on-street parking permits in 2008-2009, because they did not have any Department-designated on-street parking spots in 2007-2008 (Department Exhibit 5). He also explained that there are District 75 sites and schools that did not receive any on-street parking permits in 2008-2009, because they did not have any Department-designated on-street parking spots in 2007-2008 (Department Exhibit 6). Stamm further testified that some schools and District 75 sites and schools were neither given on-street nor off-street parking permits in 2008-2009, because they had no on-street or off-street parking spaces in 2007-2008 (Department Exhibits 7-8).

In response to being asked whether there were any discussions held with the Association on these changes to the parking permits, Stamm replied: "There may have been, but to my knowledge, I really can't recall" (Transcript pp. 225-226). He did remember, however, speaking to Hanson in late October 2008, who complained that one of her secondary locations has six authorized spaces that were assigned to another school. To resolve the matter, Stamm asked DOT to issue six additional permits so Hanson could access the spaces. He denied telling Hanson that District 75 was "forgotten about," although he stated that the parking spaces he mistakenly assigned to another school were at a school that, according to his records, "did not exist."

On cross-examination, Stamm testified that he was aware that there were complaints regarding Department employees abusing their parking privileges, but

he did not know how many of the complaints concerned CSA-represented employees. He averred that "the entire system [for allocating and distributing parking permits] was new this year" (Transcript p. 259).

On rebuttal, Association General Counsel Bruce Bryant testified that the Association first learned of the parking permit changes during the summer of 2008. He described an August 2008 conversation that he had with Dan Weisberg, the Department's "chief labor policy person," as follows:

> I initiated the conversation with Mr. Weisberg to indicate that we were aware of the change in policy. . . . We were told that there was going to be a severe limitation and that the parking permits that had already been issued for the 2008/2009 school year were going to be revoked.
>
> I indicated to Mr. Weisberg that this change without any negotiation with CSA was a violation of our contract, our collective bargaining agreement and also a violation of the Taylor Law.
>
> * * *
>
> He said he understood the complaint that I was making and the issues that CSA had with this change. He indicated that we [CSA] would have to go forward and do what we needed to do.

(Transcript pp. 291-292.)

Bryant testified that prior to implementing the parking permit change, there were no negotiations. He stated that the phone calls he made to Weisberg "were in essence to meet to begin negotiations, if that was needed or to undertake some action to bring remedy to our members that were being injured by this." Bryant averred further that Weisberg's response "was clearly, can't do it, you got to go ahead and do what you have to do." (Transcript pp. 293-294.)

On cross-examination, Bryant stated that he "can't quote [Weisberg's] exact words," but that his words were "in effect . . . you'll have to file what you need to file" (Transcript p. 306). According to Bryant, although he did not file a written demand for bargaining, he verbally asked Weisberg to negotiate and Weisberg told him "there is nothing we can negotiate about" (Transcript p. 307).

On sur-rebuttal, former Department Chief Executive of Labor Policy Daniel Weisberg testified that he had multiple conversations with Bryant in the summer of 2008, concerning the Mayor's policy to reduce the number of City issued parking permits. He stated that Bryant "objected" to the policy, since it meant that assistant principals and other Association members who previously had parking permits might no longer have access to them. Weisberg testified further that he told Bryant that he "understood his concern," but that the policy came from the Mayor and that the Deputy Mayor "had decided on how it would be implemented." He denied ever refusing to negotiate with Bryant on the issue of parking permits, and could not recall whether Bryant requested the Department to negotiate over the issue.

On cross-examination, Weisberg could not recall offering to negotiate the parking permit issue with Bryant. He stated that it is "unclear" whether this issue is a mandatory subject of bargaining, but acknowledged that the Department has an obligation to negotiate with the Association prior to making a unilateral change in a mandatory subject. Weisberg further testified that he told Bryant that the decision to make the parking permit change "had been made at the mayoral level

and that certainly we at the DOE would not have the ability to unilaterally . . . make a change to the policy." He also recalled that Bryant "talked about filing a charge," and that Weisberg "said something to the effect of, I understand, if you feel you have to do that, then you'll do that." (Transcript pp. 340-343.)

On August 21, 2008, the Association filed a grievance alleging as follows:

> Principals have been advised that the number of parking permits for staff in their schools must be reduced. Upon information and belief, parking permits currently valid through December 31, 2008 may be invalidated or revoked. These actions may result in loss of parking permits and privileges for CSA members in schools. Employer provided parking is a proper subject for collective bargaining but, to date, there have been no negotiations with the CSA regarding this subject.
>
> The remedy sought: Continue to provide DOE parking permits to all principals, assistant principals and other school-based supervisors.

(Department Exhibit 11.)

The parties mutually agreed to submit this case to the undersigned for resolution. The instant proceeding ensued.

POSITIONS OF THE PARTIES

The Association's Position

The Association submits that the Department violated Article XVIII of the parties' Agreement when it reduced the number of parking permits issued to its members. Specifically, it contends that the subject of parking permits is a "proper subject" for collective bargaining and that in October 2008, the Department reduced the number of parking permits available for CSA bargaining unit members. The Association also alleges that the testimony of Bryant and

Weisberg demonstrates that the Department did not negotiate with the Association prior to making this unilateral change. (Association Brief pp. 1-2.)

The Association challenges the Department's contention that the Association did not request bargaining, and that absent such request, the Department had no obligation to bargain. It maintains that as soon as Bryant learned of the impending change, he telephoned Weisberg and was told by Weisberg "he had nothing to offer" and "do what you have to do." The Association emphasizes that Article XVIII "does not impose an affirmative obligation on CSA to ferret out planned changes and demand bargaining about them in writing." Rather, it "imposes upon the employer a contractual obligation to make no change in 'proper subjects for collective bargaining' without appropriate prior negotiations." The Association argues that the Department "distorts" the holding in the Cunningham case. It asserts that there is nothing in that decision that stands for the proposition that a failure to submit a written request to bargain constitutes a waiver of bargaining rights (Association Brief pp. 3-4.)

Additionally, the Association argues that "the availability of free parking for employees while at work is an economic benefit and a mandatory subject." State of New York, 6 PERB ¶ 6-3005 (1973). It submits that "there is no merit" to the Department's contention that the subject of parking is a non-mandatory subject because CSA members were never guaranteed a parking space. The Association claims that, to the contrary, PERB precedent turns on the fact that free parking at work is "an economic benefit to the employees similar to the use

of an employer's vehicle for commuting to and from work and the furnishing by an employer of working tools." Quoting, County of Nassau, 14 PERB ¶ 3083 (1981). It also emphasizes that PERB has found parking issues not to be mandatory subjects of bargaining only where the employer merely changed the manner in which permits were displayed and where duplicate permits were improperly being used by family members. See, Rockland Community College Federation of Teachers, 22 PERB ¶ 4563 (1989). (Association Brief pp. 4-5.)

Finally, the Association maintains that "the analytical balance as to whether this was a proper subject for collective bargaining under the agreement is in favor of the employees' rights to bargain." It argues that the testimony of CSA's witnesses demonstrated that when they had parking permits, it "substantially eased their burdens" with respect to commuting to and from work and traveling from school to school during the workday. Moreover, the Association submits that there are still empty parking spaces near their workplaces that are not being used, which "undermines the DOE's stated rationale for the change." For all of these reasons, the Association requests that the grievance be sustained and that the undersigned "should restore the status quo ante and require the DOE to bargain with CSA prior to making any change." (Association Brief pp. 5-6.)

The Department's Position

The Department contends that the Association failed to establish that the issuance of parking permits is a "proper subject for collective bargaining," as

required by Article XVIII. It argues that Article XVIII's "arbitral history" has defined "proper subject of bargaining" as any mandatory subject of bargaining under the Taylor Law. See, New York City Board of Education, AAA Case No. 1339-0473-86 (Collins, D., Arb. 1987). PERB precedent has established that in determining whether a work rule is a mandatory subject of negotiation, "a balance must be struck between the employer's freedom to manage its affairs and the right of employees to negotiate their terms and conditions of employment. See, CSEA and Yonkers City School District, 25 NYPER (LRP) P4642 (1992). (Department Brief p. 6.)

The Department maintains that the mere issuance of a parking permit, without the guarantee of a parking space, is not a mandatory subject of bargaining. It emphasizes that it made no changes to the number or location of the Department-designated parking spaces, and that 20% of the schools have never possessed designated parking spaces. "[A] parking permit only constitutes an opportunity to park *in the event* a parking space was available." (Emphasis in original.) The Department insists that the opportunity to park "must be weighed against the objectives in the Citywide initiative," and the Association's interest herein "is so far removed it is far outweighed by the interests outlined in the Citywide initiative." Any interest the Association may have in the issuance of parking tickets is at best *de minimis*. (Department Brief pp. 7-8.)

Additionally, the Department submits that the only change in the issuance of parking permits is that rather than having a permit in their possession while looking for a space as under the "old method," employees must now obtain one

of the "pooled" parking permits from the school on a first-come, first-served basis after finding a parking spot. "This change poses only a minor inconvenience to employees," and therefore cannot constitute a mandatory subject of bargaining. Rockland Community College Federation of Teachers, 22 NYPER (LRP) P4563 (1989). Schools that are able to assign parking permits as agreed to between principals and the UFT chapter leaders, can design a distribution method "that is specially tailored to meet the needs of the particular school." Finally, employees who previously possessed a parking permit, who worked at schools that had no designated parking spaces, possessed "a worthless piece of paper." For these reasons, the Association's interest "is clearly outweighed" by the Citywide initiative. (Department Brief pp. 9-10.)

The Department notes that Office of Collective Bargaining of the City of New York ("OCB") precedent supports its assertion that it was not required to bargain over changes to the parking permit requirements. In this regard, OCB recently held that no such bargaining is required where, as here, the number of available parking spaces was not reduced and where the possession of the parking permit did not guarantee employees a dedicated space. See, Detectives' Endowment Association, 2OCB 2d 11 (BCB 2009). (Department Brief pp. 10-11.)

Moreover, the Department contends that even if the reduction of parking permits constitutes a "proper subject of bargaining," the Association has failed to demonstrate that the changes imposed were done without "appropriate prior negotiation" with the Association. It asserts that arbitral precedent has

interpreted "appropriate prior negotiation" as meaning that the Association is entitled to "notice of the proposed change and an opportunity to discuss the changes" before being implemented. See, CSA and Board of Education of NYC, AAA Case No. 1339-0621-80 (Monat, L., Arb., 1980) ("the Cunningham case"). (Department Brief p.12.)

The Department maintains that the Association received notice of the proposed changes to the issuance of parking permits, and Bryant testified "that he never demanded to negotiate the changes in the issuance of the parking permits with the DOE." Moreover, Weisberg testified "that he never said, or even inferred, that nothing could be done to address the CSA's concerns." Weisberg also testified that he never told Bryant he would not negotiate with the Association. The Department asserts that rather than demanding that the Department negotiate over the parking permit issue, the Association "appears to have concluded that there was no reason to proceed with negotiations . . . and filed the instant grievance." (Department Brief pp. 12-15.)

Finally, the Department contends that the Association has failed to establish that the Department violated the parties' Agreement. For example, it avers that "the three witnesses that the Union called on its case-in-chief merely testified as to their own specific facts and circumstances; none of these three people had any knowledge of the DOE's actions *vis-à-vis* the issuance of parking permits on the global level." The Department also maintains that neither Bryant, nor the Department's witnesses on cross-examination, established that the Department's actions violated the Agreement. For all of these reasons, the

Department requests that the grievance be dismissed in its entirety. (Department Brief p. 16.)

DISCUSSION

The issue before the Arbitrator is whether the Department violated Article XVIII of the Agreement -- entitled "Matters Not Covered" -- when in 2008 it reduced the number of parking permits available to bargaining unit employees. Article XVIII provides as follows:

> With respect to matters not covered by this Agreement which are proper subjects for collective bargaining, the Board agrees that it will make no changes without appropriate prior negotiation with the CSA. The Board will continue its present policy with respect to sick leaves, sabbatical leaves, vacations, holidays and injury in the line of duty, except insofar as change is commanded by law.

Thus, the resolution of this case turns on whether the reduction of parking permits is a "proper subject for collective bargaining," and, if so, whether the Department implemented the change "without appropriate prior negotiation with the CSA."

The undisputed record evidence establishes that effective October 2008, the parking permits held by bargaining unit members were no longer valid. The Department reduced the number of parking permits from approximately 63,000, to approximately 25,000. Whereas in the past, an employee could obtain a parking permit by merely applying for the same and providing certain personal and vehicle information, the new parking permits were allocated by the Department to certain schools, based on the number of Department-designated parking spaces located in proximity to those schools. If a school had no on- or

off-street Department-designated parking spaces located nearby (about 20% of the schools), the school did not receive any parking permits.

The Association's witnesses testified as to the impact of this change. Navarro testified that after his permit was taken away, he could no longer park at his school in the morning, which he had previously been able to do on a regular basis. He now uses public transportation, which takes him three times longer to commute to work. Additionally, without his parking permit, he can no longer park at meeting locations away from his office, which his job responsibilities require him to attend. Navarro must now use public transportation to get to those meetings, which takes longer than driving his automobile.

Clausi testified that when he had a parking permit, he arrived to work by 7:00 a.m. for a 7:25 a.m. start. Now, without a parking permit, he has to arrive by 6:00 a.m. to find parking. He also averred that there are many available Department-designated spaces at his school that are not being used since the number of parking permits were reduced.

Principal Hanson testified that she has only one parking permit for each of the six sites under her jurisdiction. As a result, she can no longer find adequate parking when traveling among her various sites. She also described the difficulty her three assistant principals now have finding parking spaces when they travel between the schools they are assigned. One of her assistant principals had her car towed while it was in a Department-designated parking spot.

In each of these instances, which are representative of the circumstances facing other bargaining unit members, the employees were adversely affected by

the parking permit change in a tangible way. Prior to October 2008, parking permits were assigned to individual bargaining unit members, and entitled them to park for free in any of the Department's 25,000 designated parking spaces, located both on and off the street. The Department slashed the number of available parking permits by more than half, and then rationed out the reduced amount to individual schools to distribute, rather than to individual employees. As a result, bargaining unit members lost an important parking benefit.

The undersigned concludes that these changes constituted a significant and adverse alteration of bargaining unit members' working conditions and therefore a "proper subject of bargaining," as that term is used in Article XVIII of the Agreement.

The Department's assertions to the contrary cannot succeed. That the parking permits did not guarantee bargaining unit members a parking spot is of no moment. The very fact that City parking spaces are so limited and sought after, made it especially beneficial to have the **opportunity** to park in a free Department-designated spot. The record evidence demonstrates that bargaining unit members were able to make good use of the parking permits when they had them. For example, Navarro testified that he always could find a spot in the morning when he arrived to work. Without the parking permit, he now uses public transportation.

Moreover, given the magnitude of the parking permit change, it cannot be considered *de minimus.* Indeed, regardless of whether the number of parking spots available remained the same, this contention is belied by Stamm's own

statement that "the entire system was changed." Individuals no longer had the opportunity to park as they once did. Nor can it be said that the permit was "worthless" if the administrator worked at a school with no designated parking spots. As testified to by Hanson, a permit held by an administrator working at a school with no designated parking could nonetheless be used when traveling to another Department site that had available permit parking.

The cases cited by the Department in support of its position that the change here was *de minimis* are inapposite. In the Rockland case, employees were merely forced to give up placards being used by family members in violation of the parking permit policy, and to relocate their placard on their vehicles. The OCB's Detectives' Endowment case is not controlling, inasmuch as OCB does not have jurisdiction over the Department. Additionally, the case involved an "improper practice" allegation under the New York City Collective Bargaining Law, not an alleged violation of a contractual bargaining requirement.

In any event, Detectives' Endowment is distinguishable. In that case, the Unions complained about a change requiring them to apply in writing for a parking permit. OCB held that "the Unions have not alleged facts which, if proven, would show that there has been a change in employees' terms and conditions of employment through a decrease in the availability of free parking." It found that "the increase in employee participation is not significant enough to require bargaining over that subject." Detectives Endowment, at pp. 13; 16-17. The Association here has not challenged a mere "increase in employee participation." Rather, it challenges a change to the entire parking permit system

that has substantially altered bargaining unit members' working conditions, by eliminating their eligibility to park in free Department-designated parking spots.

The undersigned further concludes that the Union has clearly established that the District implemented the parking permit change "without prior negotiation with the CSA." The record demonstrates that upon learning of the impending change, the Association, through Bryant, put the Department on notice that if the DOE made the change without negotiation it would violate the Agreement and the Taylor Law. Weisberg, the Department's chief labor representative, told Bryant that the decision had been made by the Mayor's Office "and certainly we at the DOE would not have the ability to unilaterally . . . make a change to the policy." After Bryant told him that the Association would have to legally challenge the Department's implementation of the change without bargaining, Weisberg testified that he told Bryant "if you feel you have to do that, then you'll do that." Bryant testified that Weisberg told him (words to the effect): "Do what you have to do."

Under these circumstances, the undersigned concludes that the Department implemented the permit parking changes "without appropriate prior negotiation with the CSA." The Department maintains that its only obligation under Article XVIII is to provide notice and an opportunity to bargain, and that it is the Association's obligation to make a written bargaining demand. At this juncture, it must be emphasized that there is nothing in the language of Article XVIII that supports this interpretation.

The Cunningham arbitration decision cited by the Department does not compel a different result. In Cunningham, the Association alleged a violation of Article XVIII after the Department refused to provide an assistant principal backpay after he was dismissed, but later reinstated by the Board of Education. Arbitrator Lawrence Monat found that there was a past practice of providing backpay under such circumstances. He concluded that the issue of backpay was a "proper subject of bargaining" that required "appropriate prior negotiation." Monat then parenthetically added that he construed "appropriate prior negotiations . . . to require, **at the very least**, prior notice to CSA of the proposed change and a reasonable opportunity for it to request a meeting concerning the change." Cunningham at p. 10. (Emphasis added.)

Arbitrator Monat's decision does not hold that Article XVIII requires the Association to submit a written request to bargain over a "proper subject of bargaining." In any event, it is clear that in the instant matter, the Department did not provide the Association with a "reasonable opportunity" to negotiate over the reduction of parking permits.

In this regard, the Department relies heavily on the fact that in his discussions with Bryant, Weisberg did not expressly say that he was refusing to bargain the issue. However, in concluding that the Department failed to engage in "prior negotiations," the undersigned finds far more probative and controlling the words Weisberg actually conveyed to Bryant, i.e., that the decision came from the Mayor's office and could not be changed. Thus, no reasonable

opportunity was afforded to the Association by the Department to negotiate the parking permits issue; "prior negotiations" did not take place.

For all of these reasons, the undersigned concludes that the Department violated Article XVIII of the Agreement when as part of an overall parking placard reduction program, parking placards to CSA represented employees were reduced in August 2008. Therefore, the grievance is sustained.

As a remedy, the Department shall: 1) immediately restore the status quo ante for all CSA bargaining unit members by returning all parking permits previously held by CSA bargaining unit members during the 2007-2008 school year; and 2) negotiate with the Association prior to reducing the number of parking permits made available to CSA bargaining unit members.

Accordingly, based on the record before him, and for reasons stated hereinabove, the Arbitrator renders the following

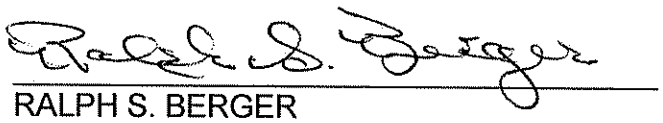
AWARD:

The grievance is sustained.

The Department of Education violated Article XVIII of the collective bargaining agreement when as part of an overall parking placard reduction program, parking placards to CSA represented employees were reduced in August 2008.

As a remedy, the Department shall: 1) immediately restore the status quo ante for all CSA bargaining unit members by returning all parking permits previously held by CSA bargaining unit members during the 2007-2008 school year; and 2) negotiate with the Association prior to reducing the number of parking permits made available to CSA bargaining unit members.

Dated: August 7, 2009
Brooklyn, New York



RALPH S. BERGER
Arbitrator

I, Arbitrator RALPH S. BERGER, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

RALPH S. BERGER
Arbitrator

Dated: August 7, 2009
Brooklyn, New York