DC 37, 1 OCB2d 21 (BCB 2008)

(IP) (Docket No. BCB-2550-06).

Summary of Decision: The Union claimed that the City unilaterally revised the random drug and alcohol testing policy at the Department of Transportation by treating employees who had received treatment or counseling after a first positive drug or alcohol prior to the revised policy as having already received their opportunity for treatment and counseling as provided for in the policy. The Board found that the petition was untimely, because the improper practice claim accrued, at the latest, upon the refusal to provide treatment in lieu of discipline and not upon the subsequent result of the disciplinary process. Accordingly, the Union's petition is dismissed. **(*Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO

Petitioners,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION

Respondents.

DECISION AND ORDER

On May 26, 2006, District Council 37, AFSCME, AFL-CIO ("DC 37" or the "Union") filed a verified improper practice petition against the City of New York (the "City") and the New York City Department of Transportation ("DOT"). The Union alleges that the City violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4) by unilaterally deciding to apply its revised policy regarding

employees with commercial drivers' licenses who test positive in random drug tests, terminating them when under the prior policy such employees would be afforded treatment and counseling, combined with an opportunity to return to duty after completing treatment. The City argues that the petition is time-barred, that the issues presented herein should be deferred to arbitration, that there has been no change in policy, and that the employee who tested positive was not, in fact, a first time offender, but rather a second-time offender. This Board finds that the petition is untimely. Accordingly, the Union's petition is dismissed.

BACKGROUND

On January 18, 2008, the parties filed with the Board a stipulation of undisputed facts (the "Stipulation"), from which the following statement of facts is drawn, unless otherwise noted.

The mission of the DOT is to provide for the safe, efficient and environmentally responsible movement of people and goods in the City of New York, and to maintain and enhance the transportation infrastructure crucial to the economic vitality of the City and quality of life of residents. DOT manages much of the City's transportation infrastructure, including city streets, highways, sidewalks and bridges. DOT is responsible for installing and maintaining street signs, traffic signals and street lights, resurfacing streets, repairing potholes and other street defects, installing and maintaining parking meters, managing municipal parking lots, and operating and maintaining the Staten Island Ferry.

In furtherance of its mission, DOT is committed to providing a safe working environment for its employees, and to ensure the safety of the public. Accordingly, DOT prohibits the use of controlled substances and alcohol and requires that employees serving in certain titles be subject to

drug and alcohol testing. Over the years, DOT employees who have been subject to such random drug testing have, from time to time, tested positive or been deemed by DOT to have tested positive because they were unable to provide a urine sample for testing within the prescribed three hour time period.

On May 28, 1997, the City and the Union entered into a side-letter agreement (the "Side Agreement") regarding drug and alcohol testing of City employees for whom DC 37 is the exclusive representative. The parties have stipulated that the Side Agreement:

> recognizes that employees covered by Section 75 of the Civil Service Law, and/or a collective bargaining agreement "are subject to service of disciplinary charges in the event on a verified positive drug-test result. However the [Side] Agreement provides that the first time an employee verifiably tests positive for a controlled substance, the City, absent compelling circumstances, will offer the employee the opportunity to participate in a treatment program, provided the employee agrees to certain conditions specified in the Agreement. If the employee thereafter receives another verified positive for a drug test or a verified positive for an alcohol test, the [Side] Agreement leaves a referral to further counseling or treatment to the discretion of the City employer. Thus, DC 37 employees have a right under the [Side] Agreement to only one referral to and participation in counseling and treatment as an alternative to discipline after a verified positive drug test result.

(Stipulation ¶ 1(l), quoting Side Agreement, Ans. Ex. 1 (editing marks omitted)).

On September 22, 2004, DOT faxed to the Union and presidents of several of its constituent locals a document entitled "Controlled Substance and Alcohol Abuse Policy for Holders of a Commercial Driver's License" ("CDL Policy"), which states on its face that it is a "policy" which "supercedes all previous drug and alcohol testing policies." (Pet. Ex. A; Stipulation ¶ 1(a)). A second policy, entitled New York City Department of Transportation Controlled Substance and Alcohol Abuse Policy for Employees Assigned to Work In Connection with the Staten Island Ferry ("SIF

Policy"), was distributed at or about the same date, also by facsimile. In each case, the DOT invited the presidents of the affected locals to an Open House Question and Answer session regarding the newly affected policy and procedure, which was held on October 20, 2004 at DOT Headquarters.

The CDL Policy applies to employees in the following titles, some of which are represented by DC 37:

> Area Supervisor Highway Maintenance, Assistant City Highway Repairer, Auto Mechanic, Auto Mechanic, Auto Mechanic, Auto Mechanic (Diesel), Bricklayer, Bridge Painter, Bridge Repairer and Riveter, Climber and Pruner, Gasoline Roller Engineer, Highway Repairer, Motor Grader Operator, Oiler, Supervisor Bridge Painter, Supervisor Highway Repairer, Supervisor of Mechanics (Mechanical Equipment), Tractor Operator, Traffic Device Maintainer.

(Pet. Ex. A, at 2).[1]

Pursuant to the CDL Policy, and consistent with federal regulations, a refusal to test is treated as a positive test result. One feature of the CDL Policy is a "zero tolerance" policy, pursuant to which DOT will seek the termination of an employee who receives a verified positive drug or alcohol test result and is either (1) in one of several job titles specifically listed in that section of the

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[1]The SIF Policy, by its terms, is applicable to DOT employees covered by the drug and alcohol testing regulations of the U.S. Coast Guard and the U.S. Department of Transportation, which include:

> Boilermaker; Supervisor Boilermaker; Assistant Captain; Captain;Deckhand; Dockbuilder; Electrician; Supervisor Electrician; Ferry Terminal Supervisor; Deputy Director of Ferries; High Pressure Plant Tender; Laborer; Machinist; Maintenance Worker; Marine Engineer; Chief Marine Engineer; Marine Oiler; Mate; Pile Driving Engineer; Plumber; Supervisor Plumber; Rigger; Sheetmetal Worker; Ship Carpenter; Supervisor Ship Carpenter; Steamfitter; Steamfitter Helper; and Supervisor Steamfitter.

Stipulation at ¶ 1(c).

CDL Policy, or (2) who operates a commercial vehicle and is not represented by the Union. The Union is not the exclusive representative for any of the specifically enumerated titles. The "zero tolerance" provision of the CDL Policy does not apply to employees who are represented by the Union.

On January 21, 2005, the Union filed an improper practice proceeding, docketed as BCB 2453-05, which challenged as violative of NYCCBL § 12-306(a)(1) and (4) the "unilateral promulgation and adoption of two comprehensive drug and alcohol testing policies and procedures," denoting the CDL and SIF Policies, which were alleged to have "altered the terms and conditions of Unit employees represented by the Union." (BCB 2453-05 Pet. ¶ 3; see Stipulation at ¶ 1(d)). According to the Stipulation, the parties are engaged in resolving this improper practice proceeding; subsequent to receipt of the Stipulation, the parties settled that case.[2]

In December, 1999, Reinaldo Pollock (the "Employee") was a DOT employee in the title Highway Repairer for which DC 37 is the exclusive representative. On or about December 13, 1999, he received a positive drug test result after a random drug test. On or about January 7, 2000, the Employee entered into a stipulation of settlement with DOT under which he agreed to attend and successfully complete treatment and counseling through the Citywide Employee Assistance Unit ("EAU"). The Employee complied with the requirements of his settlement with DOT, and, as of January 2001, was no longer subject to its terms.

On December 5, 2005, the Employee declined to submit to a random drug test. On or about December 14, 2005, the Employee was served with disciplinary charges arising from this refusal

[2]This account of the allegations of the petition in BCB 2453-05 is drawn from the petition as filed with the Office of Collective Bargaining, of which we take administrative notice; the records of the Office of Collective Bargaining reflect that the case was settled January 30, 2008.

("Charges"). The Charges recited that, under the CDL Policy, "employees who are covered by the collective bargaining agreement between [DC 37] and the City[] and receive a first time positive drug and/or alcohol result are, except in compelling circumstances, offered the opportunity to return to work." (Stipulation at ¶ 1(v), quoting Charges (editing marks omitted)). The Charges acknowledged that the Employee was "covered by the CBA" and further recited the fact of the 1999 positive drug test result. (Stipulation at ¶1(w)). The Charges further asserted that, under the CDL Policy, DOT "will seek the termination of any employee covered by the CBA who receives a second time positive drug and/or alcohol result." (Stipulation at ¶ 1(x)). The Charges conclude by reiterating the Employee's 1999 positive test, and then asserting that the refusal to submit to a random drug test on December 5, 2005 "is deemed a positive." (Stipulation at ¶ 1(y)).

On January 3, 2006, an informal conference took place, which resulted in a decision sustaining the Charges and recommending termination. The Employee proceeded to seek review of this recommendation a the Office of Administrative Trials and Hearings ("OATH"), which held a pre-trial conference on or about January 26, 2006. On or about January 26, 2006, the Employee resigned rather than proceed to on OATH hearing.

The parties further stipulate that:

> [The Employee] had already tested positive for marijuana and cocaine on November 30, 1999, and was not disciplined but instead referred to and completed counseling and treatment. Petitioner filed the instant Petition on May 26, 2006, claiming that DOT deprived [the Employee] of a first-time opportunity to obtain treatment, counseling and rehabilitation when he failed the second drug test on December 5, 2005 by refusing to submit a specimen.

(Stipulation at ¶¶ 1(dd)-(ee)).

POSITIONS OF THE PARTIES

Union's Position

The Union argues that DOT's enforcement of the CDL Policy constitutes an official policy or practice or policy to terminate employees represented by the Union who have previously tested positive or who were deemed to have tested positive for drugs and/or alcohol prior to the adoption of the CDL. The Union claims that in so doing, DOT has unilaterally altered the terms and conditions of employment by adding a new condition of employment, that is, automatic termination for conduct that pre-dated the promulgation of the policy. The Union further asserts that the DOT's enforcement of the CDL policy in this manner will treat employees with a past history of drug use to harsher discipline for a first time positive under the new CDL Policy than other employees who did not have earlier positive test results.

The Union denies that its claim is based upon enforcing the collective bargaining agreement, or the 1997 Side Agreement, but rather in the City's unilateral decision to change the terms and conditions laid out within those documents, absent bargaining with the Union. Thus, the claim sounds in the City's violations of the NYCCBL, and lies within the Board's jurisdiction.

Similarly, the Union denies that this claim is time-barred, asserting that the petition was filed within the four month limitations period measured from the termination of the Employee. Additionally, because DOT did not make its intentions clear prior to the enforcement against the Employee, the Union's cause of action on behalf of other employees and itself as exclusive bargaining agent did not accrue until the cause of action on behalf of the Employee did.

City's Position

The City argues that this Board lacks jurisdiction over the instant petition because the source

of the rights alleged to have been violated is the Side Agreement, which provides for the right, in all but compelling cases, of an employee who tests positive for drugs or alcohol to obtain counseling and treatment the first time said employee tests positive. To exercise jurisdiction over this case, the City reasons, would involve the Board's enforcement of purely contractual rights, in violation of the Taylor Law.

Secondly, the City argues that the petition was untimely filed, in that the Union knew of the City's determination to consider positive test results obtained prior to the adoption of the CDL Policy as a "first positive" as of the October 24, 2005 meeting, or, at the latest, at the informal conference on January 3, 2006, at which the Charges were discussed between the City and the Union.[3] This proceeding was commenced on May 26, 2006–more than four months after the latest possible date on which the charges accrued.

Additionally, the City asserts that the treatment of pre-CDL Policy positive results as a "first positive" result does not constitute a unilateral change, for the simple reason that such positive results were likewise a "first positive" giving rise to the opportunity for counseling or treatment, but, after a second positive result, leading to discipline up to and including termination at DOT's discretion. Finally, the City asserts that the decision to terminate an employee who has tested positive for drug use constitutes a "management right."

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[3]The parties have not stipulated as to whether or not the City enunciated this understanding to the Union at the October 24 meeting; because the merits of this case do not require resolution of this contested issue of fact, we are able to decide this case on the stipulated facts presented here.

DISCUSSION

As a threshold matter, we find that this Board has jurisdiction over the claims asserted by the Union. NYCCBL § 12-309(a)(4) vests in this Board exclusive jurisdiction "to prevent and remedy improper public employer . . . practices as such practices are listed in section 12-306;" among such improper employer practices is "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining . . ." NYCCBL § 12-306(a)(4). On the face of the pleadings, the Union's claim that the City has made, absent bargaining with the Union, a unilateral change to terms and conditions of employment by denying employees who test positive for drugs or alcohol an opportunity for treatment and counseling who previously would have been previously provided such an opportunity "sounds not in the terms of the collective bargaining agreement, nor yet even in the Citywide Agreement, but rather raises claims over which this Board has jurisdiction." *CSTG*, 79 OCB 41, at 11 (BCB 2007); citing *SSEU L. 371*, 79 OCB 31, at 10-11 (BCB 2007); *DC 37, Local 1508*, 77 OCB 23, at 11 (BCB 2006).

As we have often acknowledged, this Board, like the Public Employment Relations Board ("PERB"), is bound by Section 205.5(d) of the Civil Service Law, which provides in pertinent part:

> . . . the board shall not have the authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

CSTG, 79 OCB 41, at 11-12 (quoting *DC 37*, 77 OCB 23, at 10-11).

We have, therefore, declined to exercise jurisdiction over improper practice claims "when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement or mutually agreed-upon policies." *Id.*, quoting *Civil Serv. Bar Ass'n, Local 237*, 71

OCB 24, at 10-11 (BCB 2003)(emphasis added); *see also DC 37, L. 3621*, 77 OCB 6 (BCB 2006); *DC 37*, 67 OCB 36 (BCB 2001). Thus, we have stated that when "a claim under § 12-306(a)(4) that a public employer changed a policy on a mandatory subject without bargaining also involves a matter that is arguably covered by a negotiated agreement and the claim under the NYCCBL could be resolved in the arbitral process, this Board will defer to arbitration." *Id.; citing Civil Serv. Bar Ass'n, Local 237*, 71 OCB 24, at 11.

However, in this case, the Side Agreement is not the source of the right involved. *See Uniformed Sanitationmen's Ass'n*, 45 OCB 68, at 18-19 (BCB 1990); *DC 37*, 77 OCB 23, at 13 (BCB 2006). Rather, the Union asserts a right to bargain, pursuant to the NYCCBL, over a change to the *status quo*, which is merely evidenced by the Side Agreement. Where such claims are, as here, raised, we have in prior cases reviewed policies or collective bargaining agreements as evidencing whether the prior and revised policies in fact differ such that a unilateral change took place. *See, e.g., PBA*, 73 OCB 12, at 14, *et seq.* (BCB 2004), *aff'd*, *Patrolmen's Benevolent Ass'n v. NYC Bd. of Collective Bargaining,* Index No. 112687/04 (Sup. Ct. N.Y.Co. August 17, 2005)(Friedman, J.), *aff'd*, 38 A.D.3d 482 (1st Dept.), *app. denied*, 9 N.Y.3d 807 (2007); *DC 37*, 79 OCB 37, at 9-10, 12-13 (BCB 2007); *Civil Serv. Bar Ass'n*, 65 OCB 9 (BCB 2000) (mere reference to collective bargaining agreement does not preclude analysis of elements of improper practice claim); *UFA*, 77 OCB 39, at 14-15 (BCB 2006) (same). In this case, moreover, the parties have stipulated as to the import of the Side Agreement, thus obviating any need for the Board to interpret the parties intent in the applicable provisions. Accordingly, we find that the Board has jurisdiction over the statutory cause of action.

An improper practice petition must be filed within four months of the alleged

violation; that is, within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. NYCCBL § 12-306(e); OCB Rules § 1-07(b)(4);[4] *see also Local 1549, DC 37*, 43 OCB 25, at 20 (BCB 1989) (timeliness measured from the dates of occurrence).

The dates in this matter are not in dispute; the issue is which date is controlling, or, rather, on what date did the improper practice occur. By definition, the act alleged to have taken place inconsistent with the NYCCBL was DOT's treatment of the 2005 refusal to submit to a drug test as a second positive result, and its decision to, accordingly, not offer the Employee the option of treatment or counseling. That action was given concrete expression in the service of disciplinary charges predicated on this "second" positive result, which was known to the Employee upon service, and, as the City argues, to the Union no later than January 3, 2006. Regardless of the outcome of the disciplinary process, either in favor of the Employee or to his detriment, the alleged change in policy by declining to offer a non-disciplinary option, had been consummated well prior to any

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[4]NYCCBL 6 § 12-306(e) provides, in pertinent part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

OCB Rules § 1-07(b)(4) provides, in pertinent part:

> **Improper practices.** One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

resolution of the charges.

The statute of limitations begins to run upon the party having actual or constructive knowledge of definitive acts which put it on notice of the need to complain. *DC 37*, 77 OCB 6, at 13 (BCB 2006); *COBA*, 69 OCB 26, at 6 (BCB 2002); *Probation Officers Ass'n*, 37 OCB 44, at 18 (BCB 1986). See *Matter of Eadie v. Town of N. Greenbush*, 7 N.Y.3d 306, 316 (2006). In this case, either of the discrete acts alleged to constitute a breach of the NYCCBL, or acted to have provided actual or constructive knowledge of the violation took place more than four months prior to the filing of the improper practice charge herein on May 26, 2007. Thus, whether the improper practice accrued upon the service of the charges (December 14, 2005), or the informal conference which provided actual and definitive knowledge to the Union, through its representative in attendance, that the Employee's pre-CDL Policy positive result was being treated by DOT as a "first" positive result (January 3, 2007), the petition is in any event untimely. Accordingly, the petition is dismissed.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, Docket No. BCB-2550-05, filed by District Council 37, AFSCME, AFL-CIO, against the City of New York, and the New York City Department of Transportation, be, and the same hereby is, dismissed.

Dated: June 9, 2008
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M.DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER