District Council 37, Local 1457, 1 OCB2d 32 (BCB 2008)

(IP) (Docket No. BCB-2607-07)

Summary of Decision*:** The Union filed an improper practice petition alleging that the Department of Juvenile Justice violated NYCCBL § 12-306(a)(1) and (4) when employees were affected during a search of a facility for drugs using canines, and the DJJ issued a new directive regarding the searching of employees and their belongings without first bargaining with the Union. The City argues that the petition must be dismissed as untimely, as canine searches have been conducted for several years, and is moot, as the DJJ has addressed the Union's concerns. The City further contends that drug searches are not mandatory subjects of bargaining as they fall under the managerial rights set forth in NYCCBL § 12-307(b). This Board finds that the DJJ's decision to search its employees under the circumstances present in this case is a nonmandatory subject of bargaining, but that the procedures for implementing such searches are a mandatory subject of bargaining. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 1457,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE,

Respondents.

DECISION AND ORDER

On February 12, 2007, District Council 37, AFSCME, and its affiliate Local 1457 ("Union"), filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Juvenile Justice ("DJJ" or "Department") alleging that the DJJ interfered with, restrained, and coerced employees in the exercise of rights granted in § 12-305 of the New York City

Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL") in violation of NYCCBL § 12-306(a)(1) and (4) when it used a fire drill to detain Union members for over two hours, in a gymnasium whose windows remained open during inclement weather in November and which lacked an adequate bathroom, while searching a facility for drugs using canines, resulting in the searching of Union members with a canine, and requiring one member to remove some clothing as part of a search, which the Union characterizes as a "strip search." After the initial petition was filed, the DJJ issued Directive # 04/08, entitled "Searches in DJJ Facilities" ("Directive # 04/08"), which addresses, among other topics, searches with Canine Officers, the searching of staff lockers, that the DJJ can search employees and their belongings at any time they are on DJJ property, and that the DJJ will implement new search methods to utilize enhanced technology. The Union amended its petition to include claims that Directive # 04/08 results in unilateral changes in a mandatory subject of bargaining, specifically allowing (i) for the searching of staff lockers, (ii) for searching employees and their property at any time while on DJJ property; (iii) for the DJJ to change search methods to utilize enhanced technology without bargaining with the Union. The City argues that the petition must be dismissed as untimely, as canine searches have been conducted for several years, and as moot, as the DJJ has addressed the Union's concerns. The City further contends that drug searches are not mandatory subjects of bargaining as they fall under the managerial rights set forth in NYCCBL § 12-307(b). This Board finds that the DJJ's decision to search its employees under the circumstances present in this case is a nonmandatory subject of bargaining, but that the procedures involved with implementing DJJ's employee search policy are a mandatory subject of bargaining.

BACKGROUND

Six days of hearings were held.[1] The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

The DJJ provides assistance, including housing, to alleged juvenile delinquents, juvenile offenders with cases pending, and post-adjudicated juveniles awaiting transfer to state custody. The DJJ operates both secure and non-secure facilities to house these juveniles, who are referred to as residents. One such secure detention facility is Bridges Juvenile Center ("Bridges"). The incident that gave rise to this improper practice petition occurred at Bridges on November 20, 2006. Over two hundred people work at Bridges, some of whom are employed by other agencies to provide services to the residents. Juvenile Counselors and Associate Juvenile Counselors comprise the majority of the DJJ childcare staff at Bridges. They maintain safety and order of residents and perform searches of residents and of the dormitory areas of DJJ facilities. The Union represents Juvenile Counselors and Associate Juvenile Counselors.

The DJJ Drug Policy

The DJJ Standard of Conduct, § C.1.4, explicitly forbids an employee to use, possess, or be under the influence of alcohol on DJJ property, or to use, possess, or be under the influence of any drug or any controlled substance at any time (on or off duty) unless prescribed by a physician and, if such a prescribed drug may impair the employee's activities or judgment, the employee must

[1] The Union called the following witnesses: Local 1457 President Alex Parker; Local 1457 Vice-President Darek Robinson; and Juvenile Counselor Raquel Brown. The City called the following witnesses: Captain Efrain Madero, Head of the Department of Corrections Canine Unit; Canine Unit member Robert DeMaio; DJJ Supervising Investigator for the DJJ's Disciplinary Affairs Unit Tracy Jordan; and Rhoda Moore, the Director of Operations of the DJJ's Crossroads facility.

immediately so notify the DJJ Executive Director. The DJJ Standard of Conduct, § M.1.2, prohibits employees from bringing contraband into any DJJ facility. Contraband is defined to include "[a]ny intoxicant, dangerous drug, or controlled substance." (City Ex. 2 at § M.1.1(3)). DJJ Supervising Investigator Tracy Jordan testified that in the last 15 years, there have been about five instances of drugs being brought into a DJJ facility by a DJJ employee. (Tr. 538).

The DJJ Contraband and Search Policies

Everyday, thousands of people pass through Bridges and all property of staff and visitors is searched upon entering Bridges. The DJJ policy regarding such searches for contraband, including narcotics, is memorialized in Operations Order # 01/03, entitled "Inspection of packages when entering or exiting DJJ secure detention facilities," which states, in pertinent part:

> I. Purpose
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> This order is promulgated to establish the authorized items that may be brought into a [DJJ] secure detention facility.
>
> II. Policy
>
> A. . . . All items shall be examined by the Front Entrance Officer via the x-ray machine. . . . Conversely, packages must be inspected prior to being taken out of the facility.
>
> B. All packages, parcels, bags, container or carry cases, etc. when presented by an employee or visitor are subject to a complete and thorough search when entering or departing a DJJ facility. . .
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> * * *
>
> III. Procedures
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> A. Any employee or visitor passing Security Control Room and entering the interior of the facility with knapsacks, packages, bags, pocketbooks, briefcases, garment bags, etc., shall be required to place the item(s) on the x-ray machine conveyor belt prior to passing through the magnetometer. However food and medicine are not required to pass through the x-ray

> machine. These items shall be visually inspected and a hand held transfrisker [a metal detector] shall be passed over the items.
>
> * * *
>
> C. Should a suspicious item be observed, the owner shall be required to open the bag, carrying case, etc., and submit the item for visual inspection
>
> * * *
>
> F. Any person refusing to submit any piece of their personal items or packages for inspection via the x-ray machine, or to any other authorized search method used, shall not be permitted access into the facility and a Sergeant shall be notified. The Sergeant shall report to the area and evaluate the circumstances. When appropriate, disciplinary action shall be initiated against the DJJ staff member falling to comply with the provisions of this order.

(Ans. Ex. 2) (emphasis in original). Operations Order # 01/03, which has been in effect since 2003, does not address the searching of individuals.

Operations Order # 01/03 applies only to entering and exiting a DJJ facility. At the time of the incident (November 20, 2006), there were, other than Operations Order # 01/03, no written policies regarding the searching of employees' belongings and there were no written policies regarding the searching of employees. Regarding the searching of individuals, testimony established that the standard practice is to have all individuals entering Bridges pass through a magnetometer. If the magnetometer sounded, a hand held scanner known as a transfrisker would then be passed over the individual.

On March 3, 2008, the DJJ issued Directive # 04/08, entitled "Searches in DJJ Facilities," which applies to staff as well as visitors and residents. Section II of Directive # 04/08, entitled "Policy," states, in pertinent part:

> It shall be the policy of DJJ to conduct random, scheduled, unscheduled and unannounced searches in and around DJJ operated facilities and group homes utilizing various methods of search deemed necessary and appropriate. The

> Department's authorized methods of search shall include but not be limited to the use of metal detectors, scanners, the B.O.S.S. chair [a metal detector], trained and duly recognized Canine Officers, visual inspections, pat frisks and strip-searches consistent with Directive # 11.1 – Personal Resident Searches.[2] Designated areas of search shall include but not be limited to the interior and exterior of DJJ facilities, group homes and vehicles, resident living quarters, staff lockers, closets, visiting and common areas and the property found within. It is the Department's intention as enhanced technology and methods for searching becomes available, DJJ shall evolve its searching strategies to meet these new standards and implement best practices in preventing contraband from coming into DJJ facilities and group homes.
>
> For security purposes and to minimize the introduction of contraband within DJJ facilities, all employees, contract staff, visitors and residents who enter upon any portion of the Department's facilities shall be subject to a search of their person and their property at any time while on Department property at the sole discretion of the Department.
>
> Employees, including their personal belongings shall be subject to search when entering and/or exiting a DJJ operated facility in accordance with this policy.[3]

Prior to Directive # 04/08, the DJJ did not search employees or their belongs other than upon entering or leaving a DJJ facility. Directive # 04/08, however, states "all employees . . . who enter upon any portion of the Department's facilities shall be subject to a search of their person and their property at any time while on Department property at the sole discretion of the Department." (Trial Examiner Ex. 2). Directive # 04/08 also states that among the DJJ's "authorized methods of search shall include . . . trained and duly recognized Canine Officers." (*Id.*). This is the first, and only,

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[2] DJJ Directive 11.1: Personal Resident Searches addresses procedures regarding the physical searching of residents, defines several types of physical searches (strip, body cavity, pat, security), and the circumstances under which each is permitted.

[3] The Union first learned of Directive # 04/08 during the testimony of Rhoda Moore, the Director of Operations of the DJJ's Crossroads Juvenile Center and former Executive Assistant to the Deputy Commissioner Thomas Tsotsoros. Moore worked at Bridges in 1999 and was present at the 2006 incident. While testifying as to DJJ policy, Moore disclosed the existence of a new written policy issued in 2008 regarding employee "belongings being subject to a search while in the confines of the facility at any time." (Tr. 585).

written DJJ policy regarding canines. Further, Directive # 04/08 states that among the "[d]esignated areas of search shall include . . . staff lockers . . . and the property found within." This is the first, and only, written DJJ policy regarding searching staff lockers and the contents thereof. Directive # 04/08 also states the DJJ"s "intention as enhanced technology and methods for searching becomes available, DJJ shall evolve its searching strategies to meet these new standards and implement best practices in preventing contraband from coming into DJJ facilities and group homes." (*Id.*).

At both at the time of the incident and today, it has not been DJJ policy to search employees with canines, to strip search employees, or to pat-frisk employees. It is undisputed that the DJJ had not used canines to search employees prior to the November 20, 2006, incident that gave rise to this petition, nor have they used canines to search employees since.

Fire Drill and Canine Search Policies

The DJJ does not have any written policy for fire drills at Bridges, although written fire drill procedures exist for other DJJ facilities, which mirror the practices at Bridges. Testimony established that fire drills at Bridges are ordinarily completed in 15-20 minutes. It is undisputed that, when a fire drill is conducted during inclement weather, the established practice at Bridges was to gather residents and staff in the gymnasium. (Stip.¶ 8).[4]

The DJJ does not have a written policy regarding canine searches other than Directive # 04/08. The DJJ arranges with the Department of Corrections ("DOC") to use its Canine Unit, and someone from the DJJ Disciplinary Unit and from its Inspector General's Office would accompany

[4] References to the Stipulation of Facts entered into by the parties in this matter shall be designated by "Stip."

the Canine Unit on the search.[5] It is undisputed that the DJJ has used canines to search its facilities since at least 2005, and witness testimony indicates that the practice began years earlier. Alex Parker, the President of Local 1457, worked at Bridges from 1992 to 2002 and testified that during his time at Bridges canine searches occurred there approximately once a year. Although the DJJ does not have any written policies regarding the use of a fire drill to clear a facility for a canine search, testimony established that is the practice.

The head of the DOC Canine Unit, Captain Efrain Madero, testified that the DJJ Commissioner will first contact the DOC Chief of Special Operation to arrange use of the Canine Unit, and will then contact Captain Madero to arrange the details – the date, time, and facility to be searched. Captain Madero described the Canine Unit as "on loan . . . to use us for the day." (Tr. 296). When conducting a search, the Canine Unit is a "tool" of the DJJ – searching where requested, identifying if there is a scent of narcotics. (Tr. 323). What to do, should a canine detect the scent of narcotics, is entirely up to DJJ management, to "handle it however way you choose." (*Id.*). Captain Madero testified that in his four years heading the Canine Unit, no drugs were ever found during a search of a DJJ facility but drug related paraphernalia, specifically "leftover papers," had been found in the residents' dormitory. (Tr. 322).

In addition to being head of the Canine Unit, Captain Madero is also responsible for the training of the canines. German Shepherds and Labrador Retrievers are used when the Canine Unit searches a DJJ facility, but only Labrador Retrievers are used to search individuals because Labrador

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[5] The DOC Website describes the Canine Unit as "consisting of 17 specially trained officers. The unit currently includes 16 dogs; seven patrol dogs, six narcotics dogs, and six bloodhounds; each trained from about one year to assist on tactical search operations, searches for contraband materials, and to aid in high-risk crisis situations that might arise." http://www.nyc.gov/html/doc/html/home/home.shtml.

Retrievers are considered less intimidating. The Labrador Retrieves receive 12 weeks of narcotics detection training and regular maintenance training of at least 16 hours per month. The German Shepherds, in addition to the narcotics detection training and regular maintenance training, also receive 16 weeks of patrol training. Each canine is assigned a handler, and each handler works with only one canine. Canine Handler Robert DeMaio, who handled the canine used in the searches of DJJ employees on November 20, 2006, also testified.

Upon detecting the scent of drugs, the canines alter their behavior, often in ways so subtle that only the canine's assigned handler would notice. The canines are also trained to give a more noticeable response to the presence of narcotics, called an "alert." (Tr. 243). For example, German Shepherds are trained to scratch and bite at the location that they detect the scent of drugs. This is considered an "aggressive alert." (*Id.*). A "passive alert" is when the canine sits to indicate the scent of drugs. (*Id.*). The passive alert is designed not to raise anxiety levels. Labrador Retrievers are trained to give a passive alert – they will sit in front of the individual from whom the scent of drugs is emanating. A canine may try to indicate where on a person the scent is emanating from by pointing its snout.

An alert means there is the presence of the odor of narcotics, but does not necessarily indicate the presence of narcotics, as the odor could be a residual odor from the use of narcotics. Captain Madero compared it to when a person can smell cigarette smoke on someone after they are finished smoking. The canines' sense of smell, however, is "over a thousand times stronger" than a human's sense of smell. (Tr. 295).

The canines are never off of the leash and are always escorted by their handler. A search of an individual is conducted by having the party to be searched sit in a chair while a handler walks the

canine past, which is sniffing the whole time. Ordinarily, the handler conducts at least two such passes. The canines do not jump upon or lick the individuals or try to touch the individual being searched. The canines are trained to be "neutral" – meaning a work mode where the canine "would know not to run around and start sniffing everything." (Tr. 338). However, it is common for a canine to brush against the party being searched when being walked by the person.

November 20, 2006, Incident

DJJ Deputy Commissioner Tsotsoros arranged with Captain Madero for the Canine Unit to search Bridges on November 20, 2006, and at 6:35 pm, members of the Canine Unit began the search. (Stip. ¶ 9). The Canine Unit consisted of Captain Madero, nine canines, both German Shepherds and Labrador Retrievers, and their handlers, including DeMaio. Accompanying them on the search was Tsotsoros, Jordan, Moore, and DJJ Department of Investigations Investigator Brandly Howard. The Executive Director of Bridges, Donna Locke, and four DJJ Special Officers assigned to Bridges, were also involved.

To facilitate this canine search, on or about 6:20 p.m., a fire drill was conducted. As it was extremely cold on November 20, 2006, all residents and staff were directed to the gymnasium in accordance with DJJ policy that places residents and staff in the gymnasium when a fire drill is conducted in inclement weather. (Stip ¶ 8). Residents and staff were restricted to the gymnasium for between two and two and a half hours and it is undisputed that staff were not allowed to leave the gymnasium during the fire drill. The windows in the gymnasium were open and several staff members and residents complained that the gymnasium was cold and uncomfortable. Many residents and staff did not have time to get their outerwear.

Staff members also complained that they were denied access to a bathroom during the fire drill and the uncontroverted testimony of Union witnesses was that the bathroom in the gymnasium lacked a working light fixture, and was therefore unusable. While it is undisputed that one pregnant employee left Bridges in an ambulance, no medical records or testimony regarding this witness were entered into evidence and it can not be determined whether her removal by ambulance was in any way attributable to her detention in the gymnasium.

Bridges has six dormitories, designated A2, A3, A4, B2, B3, and B4. When the Canine unit searched the A2 dormitory, a canine "alerted" – indicated the possibility of narcotics – to a closet in the residents' day room. (Tr. 293). Captain Madero then had a second canine check the closet, which verified the first canine's alert. The closet contained belongings of the staff. (Stip. ¶ 13). The canine examined the contents of the closet and alerted to a black jacket.

It is undisputed that none of the contents of the closet, including the black jacket, were ever subject to a physical search. Moore testified that the items were not searched "because it was people's personal items. We were pretty much restricted to dealing with the residents' items." (Tr. 430). After the alert, Captain Madero was asked by DJJ management if the canines could detect narcotics on a person, and he informed them that they could.

Tsotsoros moved the items from the closet to a table and inquired whom they belonged. Locke then informed him which Juvenile Counselors were assigned to the A2 dormitory. Tsotsoros then asked that those Juvenile Counselors – Jewlene Scott, Yiro Izquierdo, and Natasha Roberts – be summoned from the gymnasium to the A2 dormitory.[6] The Juvenile Counselors had to pass

[6] Prior to the hearings, the parties only stipulated that Scott and Izquierdo were summoned to the A2 dormitory. (Stip. ¶ 13). However, at the hearings counsels for the City and the Union identified the first round of DJJ employees summoned to the A2 dormitory and searched as Scott,

several canines in the hallway to reach the A2 dormitory and were described as "flinching" when doing so. (Tr. 481). These employees were directed to Locke's office where Jordan informed them that she was there with the Canine Unit conducting a canine drug search and that their clothes had been positively identified as to drugs by the canines. They were then directed to the A2 dormitory, where they were instructed to gather their belongings from the table. The black jacket was not claimed by Scott, Izquierdo, or Roberts.

The Juvenile Counselors were instructed to sit down, and place their belongings on the chair next to the chair they were sitting, resulting in six chairs in a row occupied by a Juvenile Counselor, her belongings, the next Juvenile Counselor, her belongings, etc. The Juvenile Counselors, and their belongings, were then searched by a Labrador Retriever.[7] Its handler, DeMaio, testified he gives a standard speech before commencing a search:

> They were told to sit down in the seats. They were given what we call the speech. You know, place hands – feet flat on the ground, place hands on their laps. The dog was just going to go by them. There would be no problem. It's very – it's not an aggressive dog at all. You know, don't be afraid. And that was pretty much [*sic*].

(Tr. 349). DeMaio walked the canine in front of the seated Juvenile Counselors and their belongings several times, during which the canine sniffed the individuals and their belongings. Both Canine Unit members testified that unintentional minor contact, consisting of the canine brushing against an individual while walking past, may have occurred. This is supported by the testimony of Moore

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Roberts, and Izquierdo.

[7] The canine, Judd, is an eight year old Labrador Retriever certified to detect Hashish, Methamphetamine, Heroin, Marijuana, and Cocaine.

that the canines touched the Juvenile Counselors while sniffing them.[8] The canine did not indicate the presence of narcotics on the Juvenile Counselors or their belongings.

At this point, DJJ management noticed that none of the Juvenile Counselors had claimed the black jacket found in the closet. They were asked to whom it belonged, and they informed management that the black jacket belonged to Juvenile Counselor Raquel Brown. (Stip. ¶ 14). They were then instructed to return to the gymnasium.

Brown was then summoned from the gymnasium to the A2 dormitory and, like the other Juvenile Counselors, passed several DOC officers and their canines. Jordan testified that Brown "flinched" when passing the canines. (Tr. 489). Brown testified that she informed management prior to being searched that she was afraid of and allergic to canines. Jordan and Moore testified that they did not hear Brown tell anyone how she felt about canines.

Brown was treated like the other Juvenile Counselors. She was first directed to Locke's office where Jordan informed her that she was there with the Canine Unit conducting a drug search. Jordan asked Brown if the black jacket was hers and she acknowledged it was. She was then

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[8] The pertinent testimony is as follows:

> Q. When you say, sniffed, did the dog put – did the dog come in contact with humans? Did the dog touch the human beings in any way?
>
> A. Yes. I would say Yes.
>
> Q. Where?
>
> A. Probably maybe their knees, maybe sniffed. There was no paw contact, it didn't jump on them or anything. It was just a sniff, you know how you're sniffing? It was that kind of contact.

(Tr. 408).

directed to the A2 dormitory where she was instructed to sit and place her belongings, including her jacket, on the chair next to her and informed that she would be searched by canines. Brown was informed that the canines would not touch her and she was searched in the same manner as the other Juvenile Counselors – DeMaio walked the canine in front of Brown and her black jacket several times.

The canine indicated the possibility of narcotics on Brown. While this indication was clear to DeMaio, it was not noticeable to everyone else as DeMaio pulled the canine away as soon as it indicated the possibility of narcotics and prior to giving the passive alert of sitting down. As is the standard procedure, the search was repeated. The canine again indicated the possibility of narcotics on Brown. This time DeMaio did not immediately remove the canine, who gave the passive alert of sitting down in front of Brown. The canine indicated that the scent of narcotics emanated from the chest area of Brown. It did this by pointing its snout at Brown's chest area.

When informed of the canine's reaction, Brown denied being in the possession of any drugs. Tsotsoros decided that Brown should be searched. Brown was informed by Jordan she had to be searched because "we just want to make sure that you're not getting terminated for something that the dog is IDing [*sic*] on you ." (Tr. 500-501). Brown had on several layers of clothing and it is undisputed that she removed the outer layer, was not instructed to fully disrobe, but, in front of two women (Jordan and Moore) was instructed to lean forward and lift her shirt and bra in manner that did not reveal her breasts such that if she had any contraband in that area it would fall out. The parties disagree as to whether Brown initiated the removal of clothing, whether she was ordered to remove any clothing, or whether the search constitutes a strip search. No drugs or other contraband was found on Brown or her belongings and no disciplinary action was taken against her.

Brown testified that her allergic reaction to the canines began shortly after the search; that by the time she was allowed to leave the gymnasium hives had broken out on her face and her eyes were swollen. Darek Robinson, Vice President of Local 1457, who works at Bridges and saw Brown shortly after she was searched, confirmed Brown's face was red and swollen. Brown went to a physician on November 21 and again on November 24, 2006. She was out for nine days and has a Workers' Compensation claim pending. The City has committed that it will make Brown whole for any loss suffered due to this incident, specifically to reimburse her for the sick days used.

On March 9, 2007, the Union filed the instant improper practice petition requesting Respondents bargain over procedures used in drug searches and fire drills. Of the Union members searched, the Union only alleges that Brown suffered any loss, and the Union agreed it will drop its requests regarding Brown if the sick days used as a result of her allergic reaction are restored, and the City has committed to do so.[9] Therefore, this matter as it relates to Brown has been resolved by the parties and is not before the Board.

After learning of Directive # 04/08, the Union amended their petition to include claims that the following are unilateral changes: issuing a written policy allowing (i) for the searching of staff lockers, (ii) for searching employees and their property at any time while on DJJ property; and (iii) the DJJ to change search methods to utilize enhanced technology without bargaining with the Union.

[9] In addition to the City's commitment on the record to do so, on April 17, 2008, Beverly McInnis, Director of Labor Relations for the DJJ, formally requested the return of the leave days to Brown.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the DJJ altered terms and conditions of employment for Juvenile Counselors when, on November 20, 2006, it held them in what it describes as a freezing gymnasium for over two hours without access to a bathroom while their belongings were searched by canines, some employees were searched by canines, and one employee was subject to what it characterizes as a strip search. The Union further contends that the issuance of Directive # 04/08 also altered terms and condition of employment by allowing for the searching of staff lockers, by allowing for the searching of all employees and their property at any time while on DJJ property, and by allowing the DJJ to change search methods without bargaining with the Union. The City's actions violated NYCCBL § 12-306(a)(1) and (4) by failing to bargain with the Union over the above.[10] Further, the City's actions constitute a change in a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(4).

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[10] NYCCBL § 12-306(a)(1) provides, in pertinent part, that it shall be an improper practice for a public employer or its agents "to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter; . . ."

NYCCBL § 12-305 provides, in relevant part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

NYCCBL § 12-306(a)(4) provides, in pertinent part, that it shall be an improper practice for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees . . ."

The Union argues that their claims are timely because the events giving rise to this improper practice petition – holding members in an allegedly freezing gymnasium for over two hours while some members were searched by canines and one was allegedly strip searched – did not occur until November 20, 2006, less then four months prior to the filing of the petition. The Union does not challenge the DJJ's right to conduct fire drills or the right of the DJJ to search its facilities with canines. Rather, they challenge its right to use a fire drill to detain members and argue that the use of canines to search members or their belongings is a unilateral change in a mandatory subject of bargaining. At no time prior to November 20, 2006, was the Union aware of the use of canines to search members. As for the claims stemming from Directive # 04/08, the Union had no knowledge of the Directive until June 2008 and its amendments, made on June 20 and July 1, 2008, are timely in light of its effective date of March 8, 2008. Nor did the Union have any knowledge of the DJJ's policy allowing for the searching employee lockers prior to the disclosure of Directive # 04/08.

The Union states that the Board "uses a balancing test to determine of whether employees' privacy interest are involving [*sic*] working conditions are mandatory subjects of bargaining" and that the Board "determines whether the employers' interest outweigh the privacy interests of the employee." (Union Brief at 6).[11] The Union concedes that the DJJ has an interest in making certain drugs and other contraband are not brought into their facilities but argues that the existing policy of searching everyone and their belongings upon entering a DJJ facility is sufficient to meet that interest. In fact, of the over 100 instances of drugs being discovered in the last 15 years in DJJ facilities, only about five concerned drugs brought in by DJJ employees. The DJJ stated that this was

[11] The Union submitted a Post Hearing Brief, which is designated herein as "Union Brief." The City also submitted a Post Hearing Brief, which is designated herein as "City Brief."

an isolated incident – that prior to and subsequent to November 20, 2006, the DJJ "has not used canines to search members, has not strip searched members, and that it is not its policy to pat frisk members." (*Id.* at 8). This indicates that the DJJ's interest is minimal and "far outweighed by the privacy interest at stake." (*Id.*).

The Union argues that strip and canine searches involve far greater privacy interest than searching a locker and ask "the Board to find that the privacy interest of bargaining unit members outweighs any employer interest such that these searches are mandatory subjects of bargaining." (*Id.* at 7). Assuming, *arguendo*, that, because of the pre-existing DJJ policy calling for the searches of packages, employees have no expectation of privacy for property they bring into a DJJ facility, the employees still have an expectation of privacy regarding their bodies.

Further, the "DJJ severely altered the terms and condition of employment by allowing drug sniffing dogs to come into physical contact with Union members." (*Id.* at 9). Brown informed DJJ management prior to the search of her allergy to canines, yet was nonetheless searched by a canine, resulting in a severe allergic reaction. The Union "can only assume even a prisoner would have the right to request an alternative search method if he/she were allergic to dogs." (*Id.* at 9).

The Union argues that, assuming that the Board finds that the DJJ's interest outweighs its members' privacy interest, "clear Board precedent holds that procedures involved implementing such policies [of drug and strip searches] are mandatory subjects of bargaining." (*Id.*). The Union argues that "[c]learly whatever procedure DJJ currently uses does not work." (*Id.*). Similarly, the DJJ is obligated to bargain over procedures used to conducted fire drills, for the "clearing of areas can be accomplished without denying bargaining unit members access to staff bathrooms. A freezing cold gym is not an appropriate place to detain employees for an extended period of time." (*Id.* at 10).

City's Position

The City argues that the petition is time barred pursuant to § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") and NYCCBL § 12-306(e) which provide that an improper practice petition must be filed within four months.[12] The City argues that the Union had actual or constructive knowledge of the acts they now challenge more then four months prior to the filing of the petition as the DJJ has conducted canine drug searches in its facilities since at least 2005, more then a year prior to the filing of the instant petition, and the Union must be deemed to have had actual knowledge that such canine drug searches would have affected their members since 2005.

The City also argues that the improper practice petition is moot as the DJJ has addressed all the concerns raised by the Union. Specifically, the DJJ (i) acknowledges that the November 20, 2006, incident involving Raquel Brown was an isolated incident; (ii) does not have a policy to strip search employees; (iii) has made Brown whole by restoring the days she lost as a result of the

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[12] OCB Rule § 1-07(b)(4) provides:

> 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.

NYCCBL § 12-306(e) provides, in relevant 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. . . .

November 20, 2006, incident; and (iv) has agreed to allow employees to use a staff restroom during a fire drill. As for Directive # 04/08, the City argues it is not a new policy but merely codifies long standing practices of the DJJ.

The City argues that drug searches and fire drills are not mandatory subjects of bargaining pursuant to NYCCBL § 12-306(a)(4) because they fall within the managerial rights set forth in NYCCBL § 12-307(b).[13] Also, the Union has not established "significant impacts on the terms and conditions of employment, to the extent that it would warrant bargaining." (*Id.* at 9).

The City describes the balancing test employed by the Board as weighing "the vital interest of government to manage its affairs" against "the public policy underlying the bargaining obligations." (*Id.* at 10). This Board, as well as the Public Employees Relations Board ("PERB") and the National Labor Relations Board, "have restricted the scope of bargaining whenever it intrudes into those areas that primarily involve a basic goal or mission of the employer." (*Id.*). In the instant case, it is the DJJ's mission to provide safe and drug free juvenile facilities, and it is within its managerial prerogative to have a drug free environment. The "DJJ is not required to bargain over the use of canines to do drug searches at its facilities because said searches are not intrusive upon the employees' privacy interest." (*Id.* at 11). The DJJ policy of a prohibiting contraband from entering their facilities is long standing. All visitors and employees entering a DJJ facility are subject to search, including x-ray and visual searches of belongings. The use of canines

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[13] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services offered by its agencies; . . . direct its employees; . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization . . .

is an extension of the DJJ contraband policy which allows an individuals' belongings to be scanned and, where the possibility of contraband is indicated, to be visual inspected. Areas in which canine searches are performed are under DJJ control. It is necessary for the DJJ to conduct these types of searches because narcotics have been found in the past in employees' belongings.

Canine searches are the least intrusive measure available to address DJJ's concerns regarding maintaining a drug free environment. The canines do not jump on or lick employees; they make no contact whatsoever. Since canine drug searches are not so intrusive as to outweigh the DJJ's legitimate interest in maintaining a drug free environment, the City has no duty to bargain over them. Also, employees do not have a right to privacy for belongings stored in DJJ closets, which are unlocked, owned, and managed by the DJJ. Nor do employees have an expectation of privacy in odors emanating from their body, which is what the canines detect.

The City further argues that there can be no derivative NYCCBL § 12-306(a)(1) violation when there is no NYCCBL § 12-306(a)(4) violation. There is also no independent NYCCBL § 12-306(a)(1) violation as no facts have been alleged to support a claim of interference, improper motive, or anti-union animus.

DISCUSSION

Timeliness

As a threshold matter, we must address the City's argument that the petition is untimely. Our OCB Rules and the NYCCBL require that "[a] charge of improper practice must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office*

of Collective Bargaining, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003); *see also Walker*, 79 OCB 2, at 12 (BCB 2007); *Tucker*, 51 OCB 24, at 5 (BCB 1993). Here, the City claims that the Union had actual knowledge of the DJJ's policies regarding fire drills and canine searches from at least 2005.

Were the Union challenging the right of the DJJ to conduct fire drills or canine searches of its facilities, such a challenge would be untimely. But the Union does not challenge the DJJ's right to conduct fire drills or to use canines to search its facilities. Rather, the Union is challenging the DJJ's adoption of a procedure under which a fire drill was used to facilitate a canine search, allegedly resulting in the detention of its members in a cold gymnasium for over two hours without adequate access to a bathroom, the use of a canine to search its members, and the alleged strip search of a member. These alleged events did not occur until November 20, 2006 – less then four months prior to filing the improper practice petition. Additionally, the effective date of Directive # 04/08 is March 3, 2008 – less then four months prior to the amendment of the improper practice petition. The Unions claims are, therefore, timely.

Mootness

We next address the City's claim that the improper practice petition is now moot. The City argues that "[s]ince Respondents have addressed all of Petitioner's claims that were raised in the Improper Practice Petition, the Board should rule that the actual controversy at issue has been rendered moot." We disagree. The Board has repeatedly stated that an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open to consideration." *DC 37*, 75 OCB 14, at 12 (BCB

2005); *see also Asst. Deputy Wardens/Deputy Wardens Assn.*, 71 OCB 9, at 8 (BCB 2003) (same); *Cotov*, 53 OCB 16, at 20 (BCB 1994) (same); *Sferrazza*, 47 OCB 56, at 6 (BCB 1991) (same); *Price*, 47 OCB 32, at 9 (BCB 1991) (same); *Cosentino*, 29 OCB 44, at 11 (BCB 1982) (same, first case using quoted language). PERB has similarly stated in the context of the Public Employees' Fair Employment Act ("Act") :

> The doctrine of mootness prescribes that where an issue is purely academic, a consideration of the underlying merits of a charge or other allegation of wrongdoing shall not be undertaken. Hence, where there is no actual controversy to be determined, the matter is moot. To the contrary, where it is alleged that a public employer has engaged in conduct motivated by union animus and with an intent to interfere with union operations and protected rights, public policy and the principles of the Act require a finding even where intervening developments may limit the remedy. Indeed, violations of subsections (a), (b) and (c) of § 209-a.1 of the Act have a chilling effect on the exercise of protected rights. Although a decision at this point in time would not include an order that [petitioners] be reinstated to their schools, it would offer a finding of violation and an order affecting future action by the District. The value of those remedies in a context of unlawful interference and/or retaliation is great. As such, the questions before me remain ripe for analysis and decision.

New York City Sch. Dist., 40 PERB ¶ 4550, at 4640 (2007) (citing *Southold Union Free Sch. Dist.*, 36 PERB 4508 (2003) (in depth discussion of mootness doctrine)) (other citation omitted); *see also Plainedge Union Free School District*, 31 PERB ¶ 3063 (1998) (corrective action may effect remedy but "does not render moot the District's violation."). Therefore, assuming, *arguendo*, that the DJJ has addressed all of the Union's concerns, "the question of a remedy for a prior violation of law and the matter of deterring future violations remain open to consideration." *DC 37*, 75 OCB 14, at 12.[14]

[14] In *DC 37*, 75 OCB 14, the City ceased its unilateral imposed requirement for employees to complete a residency affidavit after the Union filed an improper practice petition. This Board rejected the City's claim that the issue was moot, citing *Asst. Deputy Wardens/Deputy Wardens Assn.*, *Cotov*, and *Sferrazza*.

The City has made four representations, that: (i) the November 20, 2006, incident involving Brown was an isolated incident; (ii) it is not DJJ policy to strip search employees; (iii) Brown was made whole; and (iv) the DJJ has agreed to allow employees to use a staff restroom during a fire drill. These representations do not fully address the Union's concerns.

As for the first, representing that the November 20, 2006, incident involving Brown was an isolated incident does not limit DJJ's ability to repeat the act in the future. *See Davis v. FEC*, 2008 U.S. LEXIS 5267, * 21 (2008) (explaining "the established exception to mootness for disputes capable of repetition, yet evading review."); *Southern Pacific Terminal Co. v. Interstate Commerce Com.*, 219 U.S. 498, 515 (1911); *Matter of M.B.*, 6 N.Y.3d 437, 447 (2006). Regarding the second representation, the City disputes that the search of Brown can be considered a strip search, therefore their representation that they will not strip search employees, even if enforceable, would not prevent the DJJ from searching an employee in a manner similar to how Brown was searched. As for the third representation, that Brown would be made whole, the City made this representation on the record as well as provided a April 17, 2008, memorandum, documenting the return to Brown of the sick days used. However, while "remedial actions may have eliminated any harm to [the individual], we find that the underlying controversy, which could affect the entire bargaining unit, is not moot." *Asst. Deputy Wardens/Deputy Wardens Assn.*, 71 OCB 9, at 8. The final representation, that employees will have access to a staff restroom during a fire drill, does not address the Union's concerns about the length of time staff will be detained or the conditions of the gymnasium.

In other words, in addition to concerns of future violation, the underlying actual controversies still exist in this case. *See PBA*, 73 OCB 21, at 5 (2004) (mootness occurs only when "a change in circumstances prevent a court from rendering a decision that would effectively determine an actual

controversy.") (quoting *Matter of Dreikausen v. Zoning Bd. of Appeals of City of Long Beach*, 98 N.Y.2d 165, 172 (2002)); *see also PBA*, 23 OCB 79, at 2 (BCB 1979) ("an improper practice charge is moot when a change in circumstances eliminates the underlying controversy"). Therefore, we find the issues raised in the instant improper practice petition are not moot and proceed to the merits.

Merits

We find that, under the circumstances of this case, the DJJ's decision to search its employees "is a nonmandatory subject of bargaining, but that the procedures involved in implementing the policy are a mandatory subject of bargaining." *DC 37*, 75 OCB 13, at 7 (BCB 2005).

The Union does not challenge the DJJ's right to conduct fire drills or to search its facilities with canines. However, the Union argues that implementing a search policy that permits holding its members for hours in an allegedly freezing gymnasium without adequate bathroom facilities while conducting a canine search of a DJJ facility, searching members with canines, and an alleged strip searching of a member, without having bargained over it, violates the NYCCBL. The City responds that drug searches and fire drills are not mandatory subjects of bargaining because they fall within the managerial rights set forth in NYCCBL § 12-307(b).

The initial question facing the Board is whether there has been a change in a DJJ policy. We find that the evidence establishes that the November 20, 2006, incident was an isolated incident, not occurring previously nor repeated since, where DJJ management encountered a present security risk (possibility of narcotics) under circumstances not addressed by any pre-existing policy, resulting in an *ad hoc* response that included the searching of four employees with a canine and a further visual search of one employee which included the removal of an outer layer of clothing. The DJJ did not target employees; the incident arose during the search of the residents' dormitory when a canine

alerted to the contents of a resident's closet. As such, in and of itself, while raising concerns, the November 20, 2006, incident is not a change in policy.

The record shows, however, that the issuance of Directive # 04/08, represents a clear change from past DJJ practices and policies and we find that it is a unilateral change in the DJJ's policy regarding the searching of employees and their belongings. Prior to Directive # 04/08, DJJ employees' belongings were only subject to search upon entering or leaving a facility under Operations Order # 01/03, section II(B) of which states: "All packages, parcels, bags, container or carry cases, etc. when presented by an employee or visitor are subject to a complete and thorough search when entering or departing a DJJ facility." Similarly, prior to Directive # 04/08, there were no written DJJ policies for the searching of employees, and testimony established that the only searches of employees occurred upon entering and leaving. Directive # 04/08 changes DJJ policy regarding when an employees' belongings can be searched and is the first written policy addressing the searching of employee and staff lockers.

We next turn to whether the DJJ is required to bargain over its search policies, or changes thereto. We have repeatedly stated:

> It is an improper practice under NYCCBL §12-306(a)(4) for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment.

DC 37, 75 OCB 13, at 8 (citing *COBA,* 69 OCB 26, at 6-7 (BCB 2002); *DC 37, Locals 2507 and 3621,* 63 OCB 35, at 12 (BCB 1999)); *see also DC 37,* 75 OCB 8, at 6-7 (BCB 2005) (same).[15]

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[15] NYCCBL § 12-307(a) provides in pertinent part:

Neither the NYCCBL nor the New York Civil Service Law ("CSL") "expressly delineates the nature of 'working conditions' or 'conditions of employment,' [therefore] both this Board and [PERB] determine on a case-by-case basis the extent of the parties' duty to negotiate." *DC 37, Local 1457*, 77 OCB 26, at 12 (BCB 2006) (citing *Board of Ed. of the City School Dist. of the City of New York v. New York State Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 666 (1990); *UFOA, Local 854*, 45 OCB 5, at 8 (BCB 1990); *DC 37*, 45 OCB 1, at 7-8 (BCB 1990)); *see also DC 37,* 77 OCB 8, at 8 (BCB 2006) (same).

The Court of Appeals has recognized that determining whether something is a mandatory subject of bargaining under the NYCCBL often requires a balancing of interest:

> Although terms and conditions of employment (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principle, the practical task of assigning a particular matter to one category or the other is often far more difficult. Indeed, in many instances a matter may partake of both categories, requiring a balancing of the interests involved. No litmus test has yet been devised that automatically identifies a term or condition of employment, or a management prerogative, or establishes whether a particular subject should be placed into the first category or the second.

Matter of Levitt v. Board of Collective Bargaining of City of N.Y., Off. of Collective Bargaining, 79 N.Y.2d 120, 127 (1992) (citing *Matter of Levitt v Board of Collective Bargaining of City of N.Y.*, 140 Misc 2d 727, 732 (Sup. Ct. New York Co. 1988); *Matter of Association of Cent. Off. Adm'rs (Board of Educ.)*, 4 PERB ¶ 4509, at 4599 (1971)).

> Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions . . .

We similarly recognize the balancing of interest required by the NYCCBL:

> The NYCCBL reflects such a legislative "prebalancing" of interests. Section 12-307(a) enumerates certain subjects that the legislature has determined to be mandatorily bargainable (*e.g.*, wages, hours and working conditions), while § 12-307(b) identifies those subjects that the legislature has reserved for managerial discretion (*e.g.*, the right to direct its employees, to determine the methods, means, and personnel by which government operations are to be conducted). Certain of the reserved rights are described in specific terms, such as the right to determine the content of job classifications and the right to relieve employees because of lack of work, and other rights are stated in more general terms, such as the right to "maintain the efficiency of government operations."

DC 37, 75 OCB 13, at 8. We note that PERB undertakes a similar analysis when interpreting CSL, Article 14 ("Taylor Law") § 209-a(1)(d):

> The [Taylor Law] requires negotiations about "terms and conditions of employment." In a very real sense, the determination regarding the negotiability of all terms and conditions of employment is premised upon a balancing of employer-employee interests. A very few subjects have been prebalanced, in effect, by the Legislature according to the nature of the subject matter. Certain subjects are mandatory, *e.g.*, wages and hours and, until recently, local government agency shop fees. Certain others are prohibited, *e.g.*, retirement benefits as defined in § 201.4 of the Act. A balance of interests on the facts of each particular case as to these subjects is quite obviously not undertaken because no amount of fact-based persuasion can alter the balancing determination which the Legislature has already made. The negotiability analysis is the same with respect to the vast majority of subjects whose negotiability has been left for determination by us in the first instance. A balance of interests is undertaken, directed again to the nature of the subject matter in issue.[16]

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[16] The Taylor Law has no statutory management rights clause. However, PERB often has balanced the interest of the employer and the employee organization and has long recognized decisions that go to the heart of an agency's mission are not negotiable. In *Local 280, New Rochelle Federation of Teachers*, 4 PERB ¶ 3060, at 3706 (1971), PERB stated:

> Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail service, are matters the public employer should not be compelled to negotiate with its employees.

State of New York (Department of Transportation), 27 PERB ¶ 3056, at 3131 (1994).

When a subject has not been prebalanced by the Legislature, the Board determines the negotiability of a subject which is asserted to be a working condition by weighing the interests of both the employer and the Union concerning that subject. *DC 37,* 75 OCB 13, at 7-8; *DC 37,* 75 OCB 8, at 7. Since the implementation of a policy regarding the searching of employees is not among the rights expressly referred to in the NYCCBL, this Board "must consider and balance the competing interests of the City and the Union." *DC 37*, 75 OCB 13, at 9. The interest averred by the City is the DJJ's obligation to provide a safe and drug free environment, and the parties agree that the "DJJ has a clear interest in making sure drugs and other contraband are not brought into the facility." (Union Brief at 8).

However, the Union argues that its members' privacy interest outweighs the interest of the DJJ. In support, the Union notes that the pre-existing policy of searching employees' property when entering and exiting a DJJ facility – a policy that the Union does not challenge – is sufficient to satisfy the DJJ's interest, as in the last 15 years the DJJ is aware of only five instances of an employee bringing drugs into a facility. The Union further argues that the fact that the November 20, 2006, incident is the only known instance of canine or strip searches of DJJ employees underscores that the DJJ has only a minimal interest in canine searches or strip searches of employees.

See also City of Niagara (Mount View Health Facility), 21 PERB ¶ 3014, at 3030 (1988) (quoting *County of Montgomery*, 18 PERB ¶ 3077, at 3167 (1985) ("If it is faced with an objectively demonstrable need to act in furtherance of its mission, the employer may unilaterally impose work rules which are related to that need, but only to the extent that its action does not significantly or unnecessarily intrude on the protected interests of its employees.")).

The City counters, quoting the trial court in *People v. Bramma,* 171 Misc.2d 480 (Dist. Ct. 1st Dist., Nassau Co. 1997), that the DJJ's interests outweigh the employees' interest since there is "no reasonable expectation that odors emanating from one's person will, under all circumstances, remain private or that an expectation of privacy extends to the atmosphere generally." (City Brief at 15, quoting *Bramma*, 171 Misc.2d at 483).

Although both the City and the Union frame their arguments around the expectation of privacy, or the lack thereof, we do not engage in a constitutional law analysis. *See DC 37*, 75 OCB 13, at 11, n.4; *Dimps*, 63 OCB 39, at 7 (BCB 1999); *Pruitt*, 55 OCB 11, at 10-11 (BCB 1995); *Trammel*, 39 OCB 38, at 7 (BCB 1987) ("The NYCCBL does not give this Board jurisdiction to consider and attempt to remedy every perceived wrong or inequity which may arise out of the employment relationship."). We look to these cases only as guidance regarding the impact of a canine search.

The City's reliance on *Bramma* is misplaced, as that court held that:

> Since the police were acting *pursuant to a valid search warrant* and in the course thereof, *without directing the dog to the defendant*, the dog indicated that a drug was present in the defendant's back pocket by lunging toward him but not biting him, the court concludes that there was no intrusion of the defendant's person. . . . Accordingly this court holds that in the circumstances of the instant case, the canine's actions did not constitute an unreasonable search.

Bramma, 171 Misc.2d at 483 (emphasis supplied).[17] The *Bramma* court limited its holding to "the circumstances of the instant case" – two of the three of which are absent from the instant case – there was no search warrant and the Canine Handlers directed the canines to the individuals searched.

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[17] The issue in *Bramma* was "one of first impression in New York, can be posed as follows: does a person have a reasonable expectation that the air surrounding his body and any odors emanating from him remain private against the revealing 'sniffs' of a trained drug-smelling dog when that person is in a public place at which the canine is also lawfully present?" *Id.*

Therefore, *Bramma* appears, on its face, inapplicable.

More importantly, the *Bramma* holding turned on constitutional analysis of both the Federal and New York State Constitutions. The balancing test required by the NYCCBL, however, does not turn on such distinctions, and we do not opine on constitutional issues. *See DC 37*, 75 OCB 13, at 11, n.4 ("We note that the City's reliance on cases involving individual constitutional rights and privacy expectations of private-sector employees is not relevant because here we are concerned with the collective bargaining rights of public employees."); *see also Dimps*, 63 OCB 39, at 7; *Pruitt*, 55 OCB 11, at 10-11; *Trammel*, 39 OCB 38, at 7. Rather, our inquiry focuses upon the terms and conditions of employment.

Bramma, and all New York case law on the legality of canine searches, rely upon *People v. Dunn*, 77 N.Y.2d 19 (1990), *cert denied*, 501 U.S. 1219 (1991).[18] *Dunn* involved a canine indicating the presence of drugs in an apartment while the canine was in a common hallway. The Court held that while a canine sniff is a search under the New York State Constitution, it may be done without a warrant because it is "far less intrusive than a fullblown search of a person's home. It does not entail entry into the premises or exposure of one's personal effects to the police." *Id.* at 26 (citations omitted).

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[18] *Dunn* addressed "the question of whether the use of these 'canine cannabis connoisseurs' – as they have been termed – to detect the presence of controlled substances in a person's apartment is subject to the strictures of the Fourth Amendment of the Federal Constitution or article I, § 12 of the New York State Constitution." *Id.* at 21 (citations omitted). The *Dunn* Court noted that, as compared to other searches, canine sniffs are less intrusive as the canine only detects what has left the person body and evidence of illegality. Indeed, "that a 'canine sniff' reveals only evidence of criminality" was the basis for the *Dunn* Court's holding that a canine sniff is not a search under the Fourth Amendment. *Id.* at 23.

However, the *Dunn* Court went on to state:

> Thus, we conclude that 'canine sniff' in question here was a search within the meaning of article I, § 12 of our State Constitution. To hold otherwise, we believe would raise the specter of the police roaming indiscriminately through the corridors of public housing projects with trained dogs in search of drugs. Such an Orwellian notion would be repugnant under our State Constitution.

Id. at 25-6. Courts following *Dunn* have recognized that a canine search can be more intrusive than a mere sniff. *People v. Gangler*, 227 A.D.2d 946, 947 (4th Dept. 1996) (citing *Horton v. Goose Creek Ind. School Dist.*, 690 F.2d 470 (5th Cir. 1982)); *People v. Willette*, 42 A.D.3d 674, 675 (3rd Dept. 2007) (interpreting *Dunn* as holding "a canine sniff may constitute an impermissible search depending on the circumstances."); *see also People v. Dunn*, 155 A.D.2d 75, 84 n. 3 (4th Dept. 1990) (also citing *Horton* and distinguishing the canine search it upheld from "the situation, not before us, in which narcotics-detecting dogs are indiscriminately employed to sniff individuals or items in their possession.").[19]

As discussed *supra*, we are not engaging in a constitutional law analysis and look to these cases only as noting that courts have found that canine searches can be intrusive. While we do not opine upon constitutionality, we have previously held that searches, even if minimally intrusive, impinge upon terms and conditions of employment.

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[19] The Fourth Department in *Gangler* surveyed various cases from around the country addressing canine searches, recognizing that under certain circumstances they can be considered intrusive. One example given was where "drug sniffing dogs were used while students were seated at desks taking exams, sniffing each student in turn, placing their noses directly upon the students and engaging in excited behavior if drugs were detected." 227 A.D.2d at 947 (describing the facts of *Horton*, *supra*). We note that the intrusive canine search described in *Gangler* bears several common factors to the canine searches at issue here, to wit, seated individuals not allowed to leave, drug sniffing dogs passing in close proximity, and minor contact.

In *DC 37*, 75 OCB 13, we found that employee privacy interests are intruded upon during searches of employer provided lockers, that "the search of storage facilities used by employees to store personal property is, undoubtedly, an intrusive procedure. The outcome of these searches can affect the employee's reputation and employment in several ways and may lead to discipline and/or criminal prosecutions." *Id* at 9. Nevertheless, we held that "[a]lthough the decision to search storage facilities where employees may keep personal belongings is intrusive, and triggers personal privacy issues, the interests of the employees is not greater than those of the employer here." *Id* at 10. *DC 37*, 75 OCB 13, is highly analogous to the instant case, as it involves the employer's right to conduct searches to ensure safety. We stated:

> In light of heightened concerns about safety in the transportation industry, DOT's decision to search its own storage facilities used by employees . . . is intrinsic to the core mission of DOT, *i.e.,* providing safe transportation in the City of New York. This decision falls directly within the City's statutory right to "maintain the efficiency of government operations" and is not bargainable. DOT's interests are not unreasonable: citizens depend on DOT employees to provide them with safe transportation and DOT's ability to search its own facilities fosters the public's confidence in the security of this transportation system.

Id. at 9-10. As far as searching of employees' belongings, *DC 37*, 75 OCB 13, is squarely on point. In the instant case, the employees' belongings were not even in a staff locker, but in a unlocked closet in a common area of the residents' dormitory.

We recognize that the interests raised by the Union in this case involving the searching of employees are more substantial than those raised in *DC 37*, 75 OCB 13. However, it is hard to imagine anything more intrinsic to the core mission of the DJJ then to provide safe and secure housing for the minors in its care. The safety concerns that underlie *DC 37*, 75 OCB 13, are at least as strong here, and arguable stronger as our holding here turns on the protection of minors. The Union's reliance upon the rarity of DJJ employees being caught with narcotics on DJJ property is

misplaced. It is for the DJJ to decide whether five instances in 15 years is five too many, especially since the search procedures the Union does not challenge (magnetometer and transfrisker) detect metal, not narcotics.

Therefore, we find that the DJJ's interests in providing a safe environment for juveniles outweighs the interests of its employees and that the DJJ's decision to search its employees and their belongings is not bargainable.

This, however, does not end our inquiry, as "bargaining is mandatory if the procedures qualify as a 'term and condition' of employment." *City of Watertown v. State Pub. Empl. Rels. Bd.*, 95 N.Y.2d 73, 81 (2000); *see also Matter of Park v. Kapica*, 8 N.Y.3d 302, 311 (2007) (reaffirming the holding of *City of Watertown*). As we found in *DC 37*, 75 OCB 13, while the decision to conduct searches of its employees and their belongings is a nonmandatory subject of bargaining, the procedures involved with implementing this policy are a mandatory subject of bargaining:

> While the City has the right to make and implement decisions concerning its management prerogatives without bargaining, the procedures for implementing decisions that affect terms and conditions of employment are mandatorily bargainable. For example, while it is within management's discretion to evaluate its employees' performance, impose discipline, and grant merit pay, the procedures for implementing performance evaluations, imposing and reviewing disciplinary action, and determining eligibility for merit pay are mandatory subjects of bargaining. Similarly, there is a distinction between DOT's decision to create a policy regarding the search of these storage facilities and the procedures used to implement that decision. We hold that the procedures involved with searches of and seizures from DOT-provided storage facilities, *e.g.*, the procedures for notification and documentation of searches, and the removal and safeguarding of property, are mandatorily bargainable because they affect terms and conditions of employment.

Id. at 11 (citing *Local 371, SSEU*, 71 OCB 31 (BCB 2003) (merit pay procedures); *DC 37*, 67 OCB 25 (BCB 2001) (disciplinary procedures); *DC 37*, 65 OCB 36 (BCB 2000) (disciplinary procedures); *PBA*, 63 OCB 2 (BCB 1999) (performance evaluation procedures); *UPOA*, 37 OCB 44 (BCB 1986)

(merit pay procedures)); *see also State of New York (Department of Correctional Services)*, 38 PERB ¶ 3008 (2005) (while not disputing right to search employee belongings, PERB found limitations on the size and number of food containers are mandatory negotiable as it "adversely impacts the comfort, convenience, and expenses of officers."); *Buffalo Sewer Authority*, 27 PERB ¶ 3002, at 3006 (1994) ("work rules generally and security procedures which require employee participation specifically are mandatory subjects of negotiations.").

The searches at issue here have a greater impact upon the terms and condition of employment for DJJ employees than those of DOT employees in *DC 37*, 75 OCB 13. We are satisfied that the implementation of Directive # 04/08 has a substantial impact on terms and conditions of employment. For example, the November 20, 2006, incident illustrates the intrusive effects that may result from procedures implementing such searches, including having employees remain in an unheated space for an extended period of time, their close proximity to canines, and minor contact therewith.

Accordingly, we deny the Union's petition to the extent that, under the circumstances present in this case, the DJJ has the right unilaterally to promulgate a policy to search its employees and their belongings but we grant the petition insofar as the City failed to bargain over the procedures for implementing the policy. Such procedures are a mandatory subject of bargaining. The failure to bargain over procedures is a violation of NYCCBL § 12-306(a)(4), and we order the City to bargain over that subject. Additionally, when a public employer violates §12-306(a)(4), it derivatively violates §12-306(a)(1) of the NYCCBL. *DC 37*, 75 OCB 13, at 12; *see also UFOA*, 71 OCB 6 (BCB 2003).

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, BCB-2607-07, is denied to the extent that, under the circumstances present in this case, (a) DJJ's search of employees and their belongings as described on November 20, 2006, did not constitute the unilateral adoption of a new policy; and (b) to the extent that DJJ"s promulgation of Directive # 04/08, entitled "Searches in DJJ Facilities," constitutes a decision to search DJJ's employees and their belongings within a DJJ facilities it is a nonmandatory subject of bargaining, and it is further

ORDERED, that the improper practice petition, BCB-2607-07, is granted with respect to violations of NYCCBL § 12-306(a)(1) and (4) to the extent that the procedures for implementing the provisions of DJJ Directive # 04/08 with respect to searching of DJJ's employees and their belongings within a DJJ facilities are a mandatory subject of bargaining, and it is further

ORDERED, that the City bargain over the procedures for implementing the provisions of DJJ Directive # 04/08 with respect to the searching of DJJ's employees and their belongings within DJJ facilities.

Dated: September 24, 2008
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER