COBA, 10 OCB2d 19 (BCB 2017)

(IP) (Docket No. BCB-4179-16)

Summary of Decision: The Union alleged that the City and DOC violated NYCCBL § 12-306(a)(1) and (4) by directly negotiating with bargaining unit members and making unilateral changes to mandatory subjects of bargaining. The City maintains that any communication that took place with these employees was simply to provide information and direction regarding the new programs to which they were being assigned and that there was no change of DOC policy or practice on these subjects. The Board found that DOC engaged in direct dealing and violated its duty to bargain in good faith concerning parking privileges. The Board did not find that DOC violated NYCCBL § 12-306(a)(1) or (4) with respect to any of the other claims. Accordingly, the petition was granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY DEPARTMENT OF CORRECTION,

***Respondents*.**

DECISION AND ORDER

On August 30, 2016, the Correction Officers' Benevolent Association ("Union" or "COBA") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Correction ("DOC") (collectively "Respondents"). The Union alleges that Respondents violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by

directly negotiating with bargaining unit members and unilaterally changing working conditions without first negotiating those changes with the Union.[1] The Union asserts that DOC officials engaged in direct negotiations with Correction Academy cadets over benefits available to them upon assignment to two newly established units and implemented the results of those direct negotiations. The City maintains that it did not engage in direct negotiations with employees represented by the Union. It asserts that any communication that took place with these employees was simply to provide information and direction regarding the new programs to which they were being assigned and that there was no change of DOC policy or practice on these subjects. Thus, the City asserts that the Union has failed to establish that DOC endeavored to obtain bargaining unit members' agreement on a matter affecting terms and conditions of employment or otherwise subverted members' organizational rights. The Board finds that DOC engaged in direct dealing and violated its duty to bargain in good faith concerning parking privileges. The Board does not find that DOC violated NYCCBL § 12-306(a)(1) or (4) with respect to any of the other claims. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

The Trial Examiner held four days of hearing and found that the totality of the record, including the pleadings, exhibits, and post-hearing briefs, established the relevant facts to be as follows:

[1] The improper practice petition asserts violations of NYCCBL § 12-306(a)(1), (4), and (5); however, a violation of NYCCBL § 12-306(a)(5) was not advanced in the Union's pleadings, at the hearing, or in its post-hearing brief. Thus, this decision will only address whether there was a violation of NYCCBL § 12-306(a)(1) and (4).

The Union is the certified collective bargaining representative for DOC employees in the civil service title of Correction Officer ("CO"). The City and the Union entered into a memorandum of agreement on December 30, 2015, covering the period from November 1, 2011, to February 28, 2019 ("MOA").

After disbanding the Central Punitive Segregation Unit ("CPSU"), DOC developed multiple alternatives to punitive segregation.[2] At issue here is the Transitional Restoration Unit ("TRU"), which was created in 2014 as an alternative to punitive segregation for inmates ages 16 to 17, and the Secure Unit ("SU"), which was created in 2016 as an alternative to punitive segregation for inmates ages 18 to 21 with "a history of persistent violent and/or assaultive behavior and/or whose assaultive behavior results in a serious injury to staff, the public, or other young adults."[3] (City, Ex. 4)

The Union's claims concern meetings that were held with management and a group of COs who for the most part were Correction Academy cadets in the process of completing initial training and scheduled to graduate in late May 2016. Four of these COs, Jesus Fernandez, Bridget Fowler, Kenneth Harrison, and Christopher Euvin testified to the alleged events.[4] The City did not present a witness to rebut these witnesses' testimony regarding what transpired at the meetings. For the most part, the COs testimony was consistent, but relevant discrepancies are noted.

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[2] Punitive segregation is known colloquially as solitary confinement.

[3] Both are located on Rikers Island; the TRU is located in the George Motchan Detention Center ("GMDC"), the SU is located in the George R. Vierno Center ("GRVC").

[4] For ease of reference, Fernandez, Fowler, and Harrison will be referred to as COs throughout this decision even though they were cadets until their graduation from the Academy.

Unless otherwise noted, no union representatives were present during these meetings, and the following topics were discussed: Gate 1 passes, probationary periods, special assignment pay, shift reduction, and in-house mutuals. Shift reduction is the transfer of COs assigned to one unit to temporarily cover vacancies in another unit. Gate 1 passes allow COs to drive their cars directly to their assigned facility rather than park in a DOC lot farther away and take a bus.[5] Gate 1 passes are distributed by the Office of the Bureau Chief of Security. According to Captain Roy Miller, the Operations Captain to the Bureau Chief of Operations, these passes are given to supervisory employees, Captains and Assistant Deputy Wardens, and employees assigned to certain specialty units.[6] Some Gate 1 passes are assigned to individual employees, and some are given to the specialty unit and rotated among its employees. Specifically, a certain number of Gate 1 passes were rotated among CPSU employees prior to its closing. While Capt. Miller testified that units established as alternatives to CPSU received Gate 1 passes, he did not know whether the SU or the TRU were receiving Gate 1 passes.[7]

The parties' 2009-2011 Collective Bargaining Agreement ("Agreement") provides for "special assignment pay" for COs detailed on "special assignment" in DOC and that such pay

[5] Most COs use the two main parking lots on Rikers Island, the East and West lots, and take a bus from the lots to their assigned facility.

[6] Like Capt. Miller, the COs testified that Gate 1 passes are given to supervisory employees and to employees assigned to certain posts, such as punitive segregation.

[7] The City submitted affidavits from DOC Deputy Commissioner for Youth Offender Programming Winette Saunders, and Assistant Chief of Data Analytics Brian Sullivan, with its answer, but neither testified at the hearing. We note that like Capt. Miller, both Saunders and Sullivan affirmed that the issuance of Gate 1 passes was not guaranteed. Also like Capt. Miller, Sullivan affirmed that Gate 1 passes are occasionally provided to certain COs in certain steady assignments, such as a punitive segregation unit. He also asserted that there was an application process for the passes, and that they were sometimes given in recognition for good conduct.

"shall be in the sole discretion of the Commissioner." (City, Ex. 1) The Agreement limits the number of employees eligible for special assignment to 4.92% of the budgeted positions in the bargaining unit and states that the "initial receipt of special assignment pay shall commence upon completion of six (6) months of satisfactory performance in the special assignment designation." (City, Ex. 1) The CPSU and the Mental Observation Segregation Unit had special assignment pay. Since they were disbanded, special assignment pay has been distributed to COs that work in adolescent housing areas in Robert N. Davoren Center, Restrictive Housing Units in Otis Bantum Correctional Center ("OBCC") and GRVC, and Enhanced Security Units in OBCC. The SU and the TRU do not receive special assignment pay.

A mutual is an agreement between two COs to swap tours. The swap takes place within a specified period and is subject to approval by DOC. The parties' MOA includes a provision titled "Mutual Exchange of Tours," which reads:

> a. Commanding Officers shall permit members performing similar duties to exchange tours voluntarily when there is no interference with correction service and where such exchange of tours does not result in overtime for either member.
> b. All mutuals shall be between two members and completed within a two week period. "Self-mutuals" are expressly prohibited.

(Joint, Ex. 1) Both a City witness and a Union witness explained that while regular mutuals are approved by the personnel office, in-house mutuals can be approved by the unit manager.[8] Capt. Miller testified that in specialty housing units, like the CPSU, in-house mutuals were approved by the unit manager, the assistant deputy warden of the specific unit.

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[8] CO Euvin testified that the difference between regular mutuals and in-house mutuals is that "instead of going to the personnel office, which is the administration office where they take care of our mutuals for the days off, instead of having to wait days to get it approved, our dep [Assistant Deputy Warden] would approve it on the spot." (Tr. 154-55)

The Secure Unit

In May 2016 a few weeks before the cadet class' graduation, Capts. Lomas and Wolmack, both captains at the Training Academy, gathered the class of cadets, including Fernandez, Fowler, and Harrison. Capt. Lomas explained to the cadets that they had been "selected" or "chosen" for a new unit called the SU based on their experience.[9] (Tr. 32, 34, 39, 89, 90, 129). A few days later, the same cadets met with the Commissioner at DOC headquarters.[10] The Commissioner explained the role of the SU and why the cadets had been selected to work in the SU and advised them that if they "had any questions or concerns, talk amongst yourselves, you know, but . . . you're welcome to come back and discuss it at a later time." (Tr. 39)

Either shortly before or after the meeting at DOC headquarters, Capt. Wolmack told the cadets who were at the Headquarters meeting with the Commissioner that since they had all been selected for a new unit they could ask management for things such as Gate 1 parking passes ("Gate 1 passes"), special assignment pay,[11] and a shortened probationary period.[12] According to CO

[9] The Union alleges that these meetings with the cadets were either part of a recruitment effort or that the statements made to the cadets were inducements for the assignment. None of the SU cadets testified that the assignment was voluntary. To the contrary, CO Harrison testified that the assignment was not voluntary.

[10] CO Harrison testified about two separate meetings at DOC Headquarters with the Commissioner, while COs Fernandez and Fowler testified about one such meeting. For the most part, the testimony of COs Fernandez and Fowler is consistent with CO Harrison's description of the second meeting at DOC Headquarters.

[11] The COs testified about "hazardous duty pay," "hazard pay," and "hazardous pay." (*See, eg*. Tr. 40, 119, 149, 178-179) In this decision we use the term "special assignment pay" for this type of compensation as that is the term used in the parties' Agreement and post-hearing briefs. (City, Ex. 1)

[12] CO Fowler and CO Harrison consistently testified about the content of Capt. Wolmack's statements and varied only concerning when the statements were made. CO Harrison testified that Capt. Wolmack talked to the cadets on a bus ride back to the Academy after the first meeting with

Fowler: "she told us to ask questions, ask for certain things. We asked her if we should ask for Gate 1, shortened probation, [special assignment] pay. She said yes. She said nothing is off the table, it's a new unit, just ask, the worst they could say is no." (Tr. 120) According to CO Harrison, Capt. Wolmack "said you know, you all have been selected to a new unit and you are in a position to ask for things, the most they can tell you is no" and gave them some suggestions like Gate 1 passes, special assignment pay, and shortened probationary periods. (Tr. 40)

Shortly after the discussion with Capt. Wolmack, the cadets again met with the Commissioner at DOC Headquarters. The cadets were congratulated for being selected for the SU, told about the objectives of the SU, and introduced to SU Commanding Officer, Capt. Depreidine.[13] The Commissioner also said that there would be some "incentives" for working in the SU. (Tr. 119, 121) Thereafter, CO Harrison said, "my coworkers and I, we talked about some things … that we'd like to bring to the table that we'd like to ask for" including Gate 1 passes, shortened probation, and special assignment pay. (Tr. 70-71)

With respect to a shortened probationary period, it is undisputed that management told the cadets that probationary periods would not be shortened. With respect to special assignment pay, the request was not rejected, but the cadets were not given a definitive answer.[14] In essence, management's response was that the benefit may be possible, but they would have to look into it.

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the Commissioner. CO Fowler testified that Capt. Wolmack talked to the cadets at DOC Headquarters before the cadets met with the Commissioner.

[13] While COs Fernandez, Fowler and Harrison were all present at this meeting, they identified various supervisors who may have been present. In this regard, Capt. Wolmack, Dr. Adams, and Deputy Commissioner Saunders may have also been in attendance.

[14] CO Harrison testified that the Commissioner told them that "due to budget constraints . . . [it] may or may not happen." (Tr. 44) CO Fowler testified that the cadets were told that they "should get it," (Tr. 119) and CO Fernandez testified that they were told that they would get back to us.

The testimony of COs Fernandez, Fowler, and Harrison was not entirely consistent as to how management responded to CO Harrison's request for Gate 1 passes. CO Harrison testified that the Commissioner clearly told the cadets that they would be getting Gate 1 passes. On the other hand, CO Fowler testified that the cadets were told they would not be getting Gate 1 passes because "there were not enough to go around," and CO Fernandez testified that the cadets were told that they would get back to us. (Tr. 119) According to CO Harrison, management also informed the cadets that the ratio of inmates to COs in a "quad" would be eight to one.[15] There was no further discussion about the inmate to officer ratio, and the cadets did not raise any concerns about the ratio.

In late May 2016, the cadets graduated from the Academy. Shortly after graduation, they were allowed to tour the SU with GRVC Warden Windley, GRVC Deputy Warden Hill, Capt. Depreidine, Union Recording Secretary Belfield, and Union Delegate CO Noel. During that tour, the Union representative objected to the eight inmates to one officer ratio per quad and the Union discussed an appropriate ratio with the Warden and Deputy Warden. (Tr. 51) After the tour, the Union representatives told the COs that the ratio had been resolved. When the COs got to the SU, the ratio was four inmates to two COs per quad.

In September 2016, there was a meeting with the Commissioner, GRVC Warden Windley, Deputy Warden Espada, Capt. Augustin (an SU commanding officer), and some SU COs.[16] The

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[15] In the SU there are four locked rooms or quads, two libraries, a classroom, and an outdoor recreation area separate from the rest of the inmate population. The locked quads have telephones, televisions, and tables. The inmates meet with each other, with COs, and with other programming providers in the quads.

[16] CO Harrison was the only witness that testified about the September 2016 meeting with the Commissioner.

COs were asked how the inmates were responding to the SU and how the COs were doing. The Commissioner asked about the status of the Gate 1 passes for the SU and was upset when Warden Windley responded that the Gate 1 passes had not been issued to the COs. The Commissioner told the Warden, "this doesn't make any sense, we made a promise to them, let's give them the damn Gate 1s." (Tr. 58) Additionally, Capt. Augustin mentioned to the Commissioner that there were risks of "shift reduction," in the SU.[17] In response to Capt. Augustin's concerns regarding shift reduction, the Commissioner stated that they would not shift reduce the SU because the unit needed to be properly staffed. The Warden and Deputy Warden agreed with the Commissioner's statement.

Later in September 2016, the COs assigned to the SU were given generic Gate 1 passes issued by the Chief of the Department that had no expiration date. Shortly thereafter, each CO assigned to the SU was issued an individualized Gate 1 Pass with their name, vehicle information, and a one-year expiration date.

In December 2016, CO Harrison asked Deputy Warden Espada about special assignment pay and Deputy Warden Espada told him that he still hadn't heard anything regarding if or when the COs would get it.[18]

The Transitional Restoration Unit

In September 2016, the TRU moved locations within GMDC. When the TRU moved, there was a three-day orientation for staff assigned to the TRU, at which no Union representatives

[17] Although the inmate to officer ratio in the SU quads had not been affected yet, temporarily transferring COs out of the SU due to staffing issues could make it difficult to maintain the ratio in the quads in the future.

[18] Deputy Warden Espada did not testify.

were present.[19] The orientation consisted of presentations on the goals of the TRU, training on the types of inmates in the unit and the programs intended to help the inmates reintegrate back into the general population, and tours of the newly constructed housing area. At some point during the orientation, a CO who had been assigned to the TRU prior to its relocation made a request for in-house mutuals, Gate 1 passes, and special assignment pay. Assistant Deputy Warden Shannon responded that the TRU COs would be granted in-house mutuals and Gate 1 passes and that special assignment pay was something they were going to work on getting them.

Sometime after the orientation, in-house mutuals and Gate 1 passes were granted to TRU COs. The Gate 1 passes are rotated among the TRU COs. There is no evidence that COs received special assignment pay or that this benefit was discussed again after the September 2016 orientation meeting.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that DOC violated NYCCBL § 12-306(a)(1) and (4) by engaging in direct negotiations with Academy cadets over five benefits that might become available to them upon assignment to two newly established units, specifically Gate 1 passes, special assignment pay, shortened probationary periods, limitations on shift reduction, and in-house mutuals.[20]

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[19] CO Christopher Euvin was the only witness to testify concerning the meeting with TRU COs. After graduating from the Academy in May 2016, Euvin was assigned to work in both the TRU and another Housing Unit. He requested and was granted an assignment exclusively to the TRU in July 2016 and was permanently appointed to the TRU in September 2016.

[20] NYCCBL § 12-306(a) provides, in pertinent part, that:

> It shall be an improper practice for a public employer or its agents:

Additionally, the Union asserts that DOC has granted Gate 1 passes, in-house mutuals, and a moratorium on shift reduction, which are mandatory subjects of bargaining, without first negotiating with the Union.[21]

According to the Union, the record establishes that supervisory DOC officials including the Commissioner, a Deputy Commissioner, Wardens, Deputy Wardens, and Captains engaged in direct communication with bargaining unit members at multiple meetings without the Union's presence in order to recruit cadets.[22] Further, the Union asserts that the topics discussed were terms and conditions of employment. As for Gate 1 passes, it argues that free parking is a

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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter;
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> * * *
>
> (4) 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;

NYCCBL § 12-305 provides, in pertinent part, that: "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."

[21] Initially, the Union claimed that DOC also engaged in direct dealing with the COs concerning the inmate to officer ratio in the SU. The Union did not advance this claim in its post-hearing brief. Instead, it cited to the evidence presented that the Union representatives persuasive challenge to DOC's initial staffing ratio resulted in a reduction in the ratio that aided the cadets. Accordingly, we do not address the claim further.

[22] The Union urges that the affidavit of Deputy Commissioner Saunders carries no weight and should be disregarded and that an adverse inference should be drawn as to all topics contained in her affidavit. Because Deputy Commissioner Saunders did not testify, her assertions that Gate 1 passes and special assignment pay are not guaranteed for COs in the SU and the TRU have only been considered to the extent they corroborate other facts in the record. *See* fn. 7.

mandatory subject of bargaining because it is an economic benefit to employees. As a result, the Union asserts that Gate 1 passes, an improved parking option, are a mandatory subject of bargaining.

As for special assignment pay, the Union asserts that while the Agreement grants the Commissioner the sole discretion to designate COs on special assignment, special assignment pay is a monetary benefit and a mandatory subject of bargaining. Indeed, the Union argues that, as the party with the right to agree to the sole discretion language in the contract, the Union has the corresponding right to bargain over any changes to the contractual provision.

Further, the Union asserts that shortened probationary periods and in-house mutuals are mandatory subjects of bargaining. It argues that probationary periods are part and parcel of the evaluation process for newly hired employees,[23] and in-house mutuals involve scheduling and rescheduling of shifts. As for the prohibition on shift reduction, the Union asserts that while it may be seen as a change in work location without an economic impairment, a non-mandatory subject, it is certainly not a prohibited subject of bargaining. Thus, the Union asserts that DOC violated the NYCCBL by directly negotiating these items.

According to the Union, DOC sought to establish a negotiating relationship with unit members to the exclusion of their bargaining agent. The Union asserts that Capt. Wolmack specifically invited the selected cadets to engage in a discussion over terms and conditions of employment and that this invitation satisfies the portion of the standard that requires the employer to attempt to establish a negotiating relationship. The Union also asserts that other supervisory

[23] The Union acknowledges that the Board held otherwise in *LEEBA*, 79 OCB 18, at 22 (BCB 2007); however, it asserts that the Board overlooked the overriding purpose of probationary periods as part of a system of evaluation and that probationary periods are purportedly at the discretion of the employer, not imposed upon the employer.

personnel were present for Capt. Wolmack's comments and they failed to discourage her invitation. Further, DOC officials actually engaged in negotiations. Indeed, the Union argues that the negotiations with high-ranking officials led to decisions regarding several tangible benefits that were realized including Gate 1 passes, in-house mutuals, and a prohibition on shift reductions. Additionally, one requested benefit (special assignment pay) was tabled, and one (shortened probationary periods) was rejected. Regardless, each topic was given consideration and addressed specifically by management. Moreover, it argues, the fact that the cadets may have made the initial demands does not negate DOC's response, which was bargaining directly with the COs. Finally, because the Union forcefully advocated regarding the inmate to officer ratio and affected a change that aided the cadets, DOC saw the Union as an obstacle to establishing working conditions in the SU and the TRU.

According to the Union, by unilaterally implementing the directly negotiated items, the City further violated the NYCCBL. Thus, the Union requests that the Board grant the petition and require the employer to cease and desist from engaging in direct dealing with the Union's members and cease and desist the conditions of employment that are the product of direct dealing.

City's Position

The City argues that the instant petition must be dismissed as DOC has not violated NYCCBL § 12-306(a)(1) or (4). It alleges that DOC did not engage in direct dealing over any subject affecting terms and conditions of employment with cadets assigned to the SU or the TRU.[24]

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[24] The City argued that the assignment of cadets to the SU and the TRU were in its discretion in the exercise of its rights under NYCCBL § 12-307(b) and not voluntary. The Union did not advance a claim challenging the City's discretion to assign the cadets and therefore a full summary of the City's response is unnecessary.

The City argues that any communication that took place with these employees was simply to provide information and direction regarding the new programs to which they were being assigned. Thus, the City asserts that the Union has failed to establish that DOC endeavored to obtain cadets' agreement on some matter affecting terms and conditions of employment or otherwise subverted its members' organizational rights.

Additionally, the City asserts that the record in this matter does not establish any facts to show that DOC officials attempted to mislead, persuade, or otherwise negotiate with cadets regarding the SU or the TRU. When cadets inquired about the existence of specific items, DOC responded with its policies on those subjects. It asserts that there was no change of DOC policy or practice on these subjects that flowed from discussions with the cadets. Specifically, as Capt. Miller, CO Euvin, and CO Fowler testified, Gate 1 passes are distributed to certain COs according to their assignment to certain posts. The City asserts that Gate 1 passes are issued to Department supervisors and to certain COs assigned to specialty units, which in the past included the CPSU, among others. It argues that since the CPSU was disbanded, Gate 1 passes have been distributed to programs that were established as alternatives to punitive segregation, such as the SU and the TRU. Thus, the City alleges that the SU and the TRU would have received Gate 1 passes irrespective of any conversations between the cadets and managers. Moreover, it argues that it has never bargained with the Union regarding access to Gate 1 passes, and such passes have always been issued at the discretion of DOC.

Similarly, the City argues that the availability of in-house mutuals was not negotiated with cadets and was not subject to any change in this instance. It asserts that, as Capt. Miller testified and CO Euvin confirmed, an Assistant Deputy Warden in charge of a specialty unit has the discretion to approve proposed swaps between COs within the same unit without the involvement

of the Central Personnel Office. The City asserts that the cadets did not receive any benefit with respect to in-house mutuals as this procedure predates the cadets' assignment to the SU and the TRU.

The City argues that, as the Agreement provides that the designation of "special assignment" is in the sole discretion of the Commissioner, such designation in the circumstances of this case was not subject to further negotiation. The City also asserts that the first conversation between the cadets and management about special assignment pay took place after the cadets had already been informed of their assignments to the new units and that the cadets' testimony regarding what management said about this subject is inconsistent. Therefore, the evidence did not establish that DOC negotiated with the cadets on this subject. Regardless, the City contends that the COs assigned to the SU and the TRU are not receiving special assignment pay.

The City also argues that the evidence shows that the cadets' inquiry into shortening their probationary period was met with a direct and simple "no." It argues that such a response, regarding a subject that is clearly not a mandatory subject of bargaining, is not direct dealing.

Additionally, the City asserts that the record demonstrates that no change was made to a mandatory subject. Specifically, the subject of probationary periods is not within DOC's jurisdiction, special assignment is at the sole discretion of the Commissioner by the terms of the parties Agreement, and staffing levels are reserved to the employer's discretion under NYCCBL 12-307(b) and are not a mandatory subject of bargaining. With respect to Gate 1 passes, the City argues that the distribution of them was not altered as they continue to be assigned to units entitled to such passes as successors to the recently closed CPSU.

Accordingly, the City requests that the Board dismiss the petition in its entirety.

DISCUSSION

The Union claims that DOC violated NYCCBL § 12-306(a)(1) and (4) by negotiating directly with bargaining unit members on five terms and conditions of employment (Gate 1 passes, probationary periods, special assignment pay, shift reduction, and in-house mutuals) and by failing to negotiate with the Union before implementing the Gate 1 passes, shift-reduction, and in-house mutuals.[25] We find that DOC engaged in direct dealing and violated its duty to bargain in good faith concerning parking privileges, but did not violate NYCCBL § 12-306(a)(1) or (4) with respect to any of the other claims.

NYCCBL § 12-306(a)(4) states that it is an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." *See also DC 37, L. 461 & 508*, 8 OCB2d 11, at 14 (BCB 2015). Mandatory subjects of bargaining include those "concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *MLC*, 7 OCB2d 6, at 15 (BCB 2014) (quoting *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009)); *see also* NYCCBL § 12-307(a). We have long held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012); *see also PBA*, 63 OCB 4, at 10 (BCB 1999). To establish that a unilateral change constitutes an improper practice, the Union "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing

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[25] The record does not show that the cadets' assignments to the SU and the TRU were voluntary. Accordingly, to the extent the Union is arguing that these items were inducements made to recruit the cadets, there was no evidence presented in support of this claim.

policy." *DC 37, L. 436 & 768*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37, L. 376*, 79 OCB 20, at 9 (BCB 2007)); *see also DC 37*, 4 OCB2d 19, at 22 (BCB 2011), *affd Matter of Roberts, et al. v. NYC Off. of Collective Bargaining, et al.*, Index No. 106268/2011 (Sup Ct New York County Apr. 30, 2012) (Torres, J.), *affd* 113 AD3d 97 (1st Dept 2013)).

NYCCBL § 12-306(a)(1) states that it is an improper practice for a public employer to "interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter." Consistent with the New York State Public Employment Relations Board ("PERB"), this Board has determined that communicating directly with bargaining unit members may violate the NYCCBL. *See UFT*, 4 OCB2d 4, at 22 (BCB 2011), *affd Matter of City of New York v. NYC Bd. of Collective Bargaining*, Index No. 451411/2013 (Sup Ct New York County Aug. 14, 2014) (Freed, J.) (employer engaged in direct dealing when it issued a memorandum to employees which invited them to negotiate individually with management regarding a new breakdown in their hours worked, a mandatory subject of bargaining); *UFA*, 69 OCB 5, at 7-8 (BCB 2002). In order to establish direct dealing, "an employee organization must allege . . . that an employer impermissibly bypassed the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion."[26] *DC 37, L. 2507*, 2 OCB2d 28, at 10 (BCB 2009) (quoting *Dutchess Comm. College*, 41 PERB ¶ 3029, at 3129 (2008)); *see also Matter of Patrolmen's Benevolent Assn. v. NYC Off. of Collective Bargaining,* 35 Misc3d 1234(A), 2012 NY Slip Op.

[26] The Board has repeatedly acknowledged that not all direct communications between employers and bargaining unit members are prohibited. *See IUPAT, L. 806*, 7 OCB2d 25, at 22 (BCB 2014); *UFA*, 69 OCB 5, at 7; *CIR*, 49 OCB 22.

50997(U), at 6-7 (Sup Ct New York County May 29, 2012) (Schoenfeld, J.). This Board has consistently held that direct dealing occurs when an employer, "in its communications with employees, [] obtains or endeavors to obtain the employees' agreement to some matter affecting a term or condition of employment, whether by making either 'a threat of reprisal or promise of benefit,' or 'otherwise subvert[ing] the members' organizational and representational rights.'" *DC 37*, 5 OCB2d 1, at 15 (BCB 2012) (quoting *CIR*, 49 OCB 22, at 22 (BCB 1992)); *see also Matter of Patrolmen's Benevolent Assn. supra*. Prohibited direct dealing is "characterized by actions that attempt to mislead employees or to persuade them to believe that they will best achieve their objectives directly through the employer rather than through the union; in other words, the employer, by what it says or does, attempts to establish a negotiating relationship with unit employees to the exclusion of the employees' bargaining agent." *PBA*, 77 OCB 10, at 14 (BCB 2006) (citing *Americare Pine Lodge Nursing and Rehabilitation Ctr. v. Natl. Labor Relations Bd.*, 164 F3d 867 (4th Cir 1999); *City of Buffalo*, 30 PERB ¶ 3021 (1997)); *see also DC 37*, 6 OCB2d 3, at 13-14 (BCB 2013).

Gate 1 Passes

The Board's "cases, and those of PERB, have consistently held that the availability of free parking … is a mandatory subject of bargaining." *DC 37*, 4 OCB2d 43, at 9 (BCB 2011) (quoting *DEA*, 2 OCB2d 11, at 13 (BCB 2009)) (internal quotations omitted); *see also DC 37*, 71 OCB 12, at 8 (BCB 2003); *County of Nassau,* 14 PERB ¶ 3083 (1981), *affd sub nom. Matter of County of Nassau v. Pub. Employ. Relations Bd. of the State of NY, et al.*, 15 PERB ¶ 7002 (Sup Ct Nassau County), *affd* 90 AD2d 693 (2d Dept), *app denied* 58 NY2d 603 (1982). Indeed, "an employer cannot discontinue or alter the availability of free parking previously available to employees without first bargaining with the employees' certified or designated representative." *DC 37, L.*

461 & 508, 8 OCB2d 11, at 15. In *DC 37*, 4 OCB2d 43, the Board found that the New York City Police Department ("NYPD") violated the NYCCBL by unilaterally changing the availability of free parking when it restricted a parking area it previously made available to employees in two titles to employees in one title. By eliminating the more convenient parking benefit for a subsection of the employees, the NYPD unilaterally changed a term and condition of their employment. It noted that a "unilateral change which provides a benefit to some (but not all) unit members remains actionable by the union representing both the beneficiaries of the change as well as those who are not."[27] *DC 37*, 4 OCB2d 43, at 11; *see also Board of Education of the City School District of the City of NY*, 42 PERB ¶ 4568, at 4760 (ALJ Maier 2009), *affd* 44 PERB ¶ 3003, *affd City of New York, et al. v NYS Pub. Employ. Relations Bd.*, 44 PERB ¶ 7007 (Sup Ct Albany County), *enforced* 44 PERB ¶ 7007 (Sup Ct Albany County 2011).

We find that DOC's actions concerning Gate 1 passes at the SU and the TRU constitute direct dealing. Here, DOC engaged in discussions with bargaining unit members over a term and condition of employment, parking privileges, without involving the Union. With respect to the SU, the record shows that in May 2016, Capt. Wolmack suggested that the COs ask for Gate 1

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[27] Similarly, PERB has found that:

> There is no evidence that any unit member lost his parking privileges; it is clear, however, that the new parking facility is less desirable than the old because of distance and that the curtailment of the original available space was occasioned by the County's decision to expand its building. Even though parking was permitted on a "space available" basis, it was nonetheless quantifiable and diminished in convenience. The subject matter being a term and condition of employment, the County's failure to negotiate the change was an improper practice.

County of Schenectady, 18 PERB ¶ 4550, at 4599 (ALJ), *affd* 18 PERB ¶ 3038 (1985).

passes.[28] Shortly thereafter, in a meeting between management and the COs, the COs requested Gate 1 passes, and management responded to their request. Although the COs' recollections of management's response to the request differed, in light of other undisputed facts, we do not find the variation significant. Specifically, at a meeting in September 2016, the Commissioner followed-up and said "we made a promise to them, let's give them the damn Gate 1s." (Tr. 58) In addition, shortly after the Commissioner's comments in September, the SU COs received Gate 1 passes. Similarly, with respect to the TRU, the evidence shows that, at the orientation for the new TRU location in September, a CO who had been in the TRU prior to its relocation made a request for Gate 1 passes, and management agreed to grant the passes in response. Shortly thereafter, Gate 1 passes were issued and rotated among the TRU COs.

Moreover, the City failed to show that its response to the COs request for Gate 1 passes and/or the granting of the passes was merely informational, or that COs in the SU and the TRU were to receive the passes anyway. Indeed, at the time of the September 2016 meeting, TRU had been in existence since 2014 but COs assigned to the unit did not have the passes. Additionally, while it may be true that the SU and the TRU units were established as alternatives to punitive segregation, no evidence was offered to show that SU or TRU COs had been slated to receive Gate 1 passes prior to the meetings with the COs. Capt. Miller, the City's only witness, was not even aware of whether SU and TRU COs were receiving Gate 1 passes at the hearing, and thus he could

[28] We do not find Capt. Wolmack's statements to the cadets, specifically that they were "in a position to ask for things" like Gate 1 passes, special assignment pay, and shortened probationary periods, and that "the worst they could say is no," in and of themselves rise to the level of direct dealing. (Tr. 40, 120) While it is clear that she encouraged the cadets to ask management for certain things, she did not seek the cadets' agreement or make any threats or promises of benefits in exchange for said agreement, or otherwise subvert the members' organizational and representational rights.

not confirm whether Gate 1 passes had been distributed in a manner consistent with distribution of passes in the CPSU. Moreover, the record shows that the Gate 1 passes, once issued, were distributed differently in the SU than in the TRU. Therefore, it is unlikely that any practice regarding issuance of the passes in the CPSU was continued unchanged in the new units.[29]

We find that in communicating with unit members about Gate 1 passes, DOC management obtained or endeavored to obtain the employees' agreement to a matter affecting a term or condition of employment by making a "promise of benefit," or "otherwise subvert[ing] the members' organizational and representational rights." *CIR*, 49 OCB 22, at 22; *see also DC 37*, 5 OCB2d 39, at 9 (BCB 2012). Indeed, "an employer's direct communications with [unit members] violates the NYCCBL when [the employer] bypasses a certified bargaining representative and negotiates directly with members." *UFT*, 4 OCB2d 4, at 22 (internal alterations omitted) (quoting *DC 37, L. 2507*, 2 OCB2d 28, at 11); *see also Matter of Patrolmen's Benevolent. Assn*, *supra*, at 10 (the Court found that the NYPD "by offering (and extending) a wage benefit outside of the collective bargaining negotiations . . . subverted the [u]nion and the negotiation process."). We find that here, as in *DC 37*, 5 OCB2d 39, regardless of management's "subjective intention, its actions had the effect of circumventing the [u]nion entirely and thereby subverted the [m]ember's right to be represented by [the] [u]nion." *Id.*, at 10 (Board found direct dealing where management met with an employee without the union to discuss changing a contractually mandated term of

[29] We reject the City's claim that *DC 37*, 6 OCB2d 3, is analogous to this matter. Unlike that case, the City here does not assert that it notified the Union at any point prior to the issuance of the passes. In contrast, in *DC 37*, 6 OCB2d 3, the Board held that the employer violated the duty to bargain by making a unilateral change, but did not find the employer's direct communications to employees about the program to be direct dealing. In doing so, the Board found that the employer notified the union of the program before initiating it, met repeatedly with the union, and did not negotiate directly with members nor imply that the members were better off dealing with it rather than their union.

employment, the employee's work schedule). Additionally, it is undisputed that Gate 1 passes allow for more convenient parking privileges. Thus, we find direct dealing regarding the Gate 1 passes.

Further, by unilaterally providing improved free parking privileges to bargaining unit members at the SU and the TRU, DOC failed to bargain with the Union in violation of NYCCBL § 12-306(a)(4). *See DC 37*, 4 OCB2d 43, at 10-11; *UFT*, 4 OCB2d 4, at 21. As noted earlier, the City did not present evidence sufficient to show that there was no change in the issuance of the Gate 1 passes. While it may have considered the SU and the TRU units replacements for the CPSU units, it did not clearly establish how passes were previously issued to COs in the CPSU or that the distribution to COs in the SU and the TRU was consistent with that practice. Further, the fact that DOC had always issued Gate 1 passes unilaterally does not make them a permissive or prohibited subject of bargaining. In sum, we find that DOC engaged in direct dealing and violated its duty to bargain in good faith under NYCCBL § 12-306(a)(1) and (4).

Probationary Periods and Special Assignment Pay

We find that the record does not support a claim of direct dealing regarding probationary periods at the SU or special assignment pay at either the SU or the TRU since the Union failed to establish that DOC bypassed the Union for the purpose of negotiating or attempting to negotiate directly with the cadets to reach an agreement on a term or condition of employment. *See DC 37, L. 2507*, 2 OCB2d 28, at 10 (quoting *Dutchess Comm. College*, 41 PERB ¶ 3029, at 3129 (other citations omitted) (finding that the employer did not make an offer to the employees but, rather, stated its interpretation of a prior agreement with the union). Here, it is undisputed that, at the meeting with the Commissioner at DOC Headquarters, CO Harrison asked about receiving a shortened probationary period and the Commissioner responded by saying they would be subject

to the standard probationary period. The SU COs did not receive a shortened probationary period. The Union has not demonstrated that DOC made any effort to engage the bargaining unit members in direct negotiation. Instead the agency's response clearly communicated that the standard practice would be followed.

Additionally, it is undisputed that, at the same meeting at DOC Headquarters, CO Harrison asked about receiving special assignment pay and management responded by saying it would have to look into it. In December 2016, CO Harrison asked Deputy Warden Espada about special assignment pay and was told that he had not heard anything regarding if or when the COs would get it. The SU COs never received special assignment pay. At the TRU orientation in September 2016, the COs similarly requested special assignment pay, and management responded by saying that they would work on it, but it was never discussed further, and the TRU COs never received it. Based on these facts, there is no evidence that DOC, in its communication with the employees, obtained or endeavored to obtain the employees' agreement on some matter affecting a term or condition of employment. To the contrary, they merely responded that they would look into the benefit. Nor did management promise special assignment pay, instead the response that they would look into the subject was consistent with the parties' Agreement, which provides that determining special assignments is "in the sole discretion of the Commissioner." (City, Ex. 1)

In *DC 37*, 5 OCB2d 1, we found that an employer did not engage in direct dealing where, through memoranda distributed to employees and informational meetings, it did not demonstrate any effort to engage employees in negotiation, rather it plainly conveyed the message that layoffs would occur, and it made no promise of benefit or threat of reprisal. *See id.*, at 15. *See also CIR*, 49 OCB 22, at 22. Here, the facts are similar. DOC management did not make any effort to engage the bargaining unit members in direct negotiation. Rather, it merely responded that probationary

periods would not be shortened and that it would look into special assignment pay, but it made no promise of benefit or threat of reprisal and took no other action that otherwise subverted the members organizational and representational rights. Therefore, we find that direct dealing has not been established with respect to probationary periods or special assignment pay. *See, e.g., DC 37*, 5 OCB2d 1, at 15; *DC 37, L. 2507*, 2 OCB2d 28, at 10-11.

To the extent that the Union is claiming a unilateral change, it has failed to demonstrate the existence of any change from the existing policy or practice regarding probationary periods or special assignment pay. Thus, we do not find a violation of NYCCBL § 12-306(a)(4).

Shift Reduction

We also find that the record does not support a claim of direct dealing regarding shift reduction in the SU. The evidence shows that concerns about shift reduction in the SU were presented by an SU commanding officer, Capt. Augustin, to the Commissioner, Warden, and Deputy Warden. In response to the Captain's concerns, the Commissioner stated that they would not shift reduce the SU because the unit needed to be properly staffed, and the Warden and Deputy Warden agreed with the Commissioner. There is no dispute that Capt. Augustin was not a member of the bargaining unit. Thus, there is nothing in the record that establishes that DOC negotiated or attempted to negotiate directly with the COs regarding shift reductions.

To the extent that the Union is claiming that DOC violated the NYCCBL by unilaterally prohibiting shift reductions at the SU, the Union has failed to demonstrate the existence of a change from the existing policy or practice. There was little evidence concerning where and how shift reductions are accomplished and, therefore, insufficient evidence to conclude that there was a unilateral change to a mandatory subject of bargaining. Accordingly, we do not find a violation of NYCCBL § 12-306(a)(4) by DOC's prohibition on shift reductions in the SU.

In-house Mutuals

Finally, we are not persuaded by the Union's claim that management dealt directly with bargaining unit members at the TRU over in-house mutuals, which the Union defines as an expedited process of approval since the mutuals are approved by unit managers rather than by the personnel office. A section entitled "Mutual Exchange of Tours" was bargained by the parties and memorialized in their MOA dated December 30, 2015, approximately nine months before the TRU orientation. (Joint, Ex. 1) The MOA provision reads, in pertinent part, that "Commanding Officers shall permit members performing similar duties to exchange tours voluntarily when there is no interference with correction service and where such exchange of tours does not result in overtime for either member." (Joint, Ex. 1) The mutual approval process memorialized in the MOA does not mention approval by the personnel office. Rather, it refers only to approval by "Commanding Officers." This provision appears consistent with Capt. Miller's testimony that, in the former CPSU, as well as in other specialty housing units, mutuals are approved by unit managers, the Assistant Deputy Warden in charge of the unit. As a result, we cannot conclude that the in-house mutuals raised by the CO and confirmed by the Assistant Deputy Warden at the TRU orientation are anything different from the rights that bargaining unit members already have under the MOA. Thus, we find that management's response to the COs' inquiry about in-house mutuals was consistent with the bargained-for pre-existing policy. As there is no evidence that management attempted to negotiate with the bargaining unit members or that there was a threat of reprisal, promise of benefit, or other subversion of the unit members organizational or representational rights or that there was any change to a past practice, we find that DOC did not violate NYCCBL § 12-306(a)(1) or (4) regarding in-house mutuals.

In sum, we find that by engaging in direct dealing with bargaining unit members on the subject of more convenient parking privileges and ultimately granting them, DOC violated NYCCBL § 12-306(a)(1) and (4). We do not find that DOC violated NYCCBL § 12-306(a)(1) or (4) with respect to any of the remaining claims. Accordingly, the petition is granted, in part, and denied, in part.

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 filed by the Correction Officers' Benevolent Association, docketed as BCB-4179-16, be, and the same hereby is, granted to the extent that it involves claims that the New York City Department of Correction violated NYCCBL § 12-306(a)(1) and (4), by negotiating directly with Correction Officers' Benevolent Association members over the subject of parking privileges, known as Gate 1 Passes, and by failing to bargain in good faith over the issuance of Gate 1 passes to Correction Officers in the Secure Unit and the Transitional Restoration Unit; and it is further

ORDERED, that the improper practice petition filed by the Correction Officers' Benevolent Association, docketed as BCB-4179-16, be, and the same hereby is, dismissed to the extent that it involves claims that the New York City Department of Correction violated NYCCBL § 12-306(a)(1) and (4) with respect to any of the remaining claims; and it is further

ORDERED, that the New York City Department of Correction cease and desist from engaging in direct dealing over the subject of parking privileges at the Secure Unit and the Transitional Restoration Unit; and it is further

ORDERED, that, upon demand, the New York City Department of Correction bargain in good faith with the Correction Officers' Benevolent Association regarding the subject of parking privileges at the Secure Unit and the Transitional Restoration Unit.

Dated: December 14, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CAROLE O'BLENES
MEMBER

DANIEL F. MURPHY, JR.
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER