COBA, 10 OCB2d 21 (BCB 2017)

(IP) (Docket No. BCB-4226-17)

Summary of Decision: The Union alleged that DOC unilaterally amended an agency directive to establish new work rules that are mandatory subjects of bargaining, in violation of NYCCBL § 12-306(a)(1) and (4). It further alleged that the amendments are material changes that result in safety and workload impacts and expose bargaining unit members to discipline. The City argued that it amended the directive pursuant to its rights under NYCCBL § 12-307(b) and that the revisions are *de minimus*. It contended that the Union failed to offer sufficient details to support a claim that DOC's action results in a safety or workload impact on bargaining unit members. The Board held that the amendments do not result in any changes to a mandatory subject of bargaining. It further held that the facts pleaded were insufficient to support a claim of practical impact on bargaining unit members. Accordingly, the petition was dismissed. ***(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 July 17, 2017, the Correction Officers' Benevolent Association ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Correction ("DOC" or "Department"). The Union alleges that DOC 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") when it amended an agency directive by establishing new work rules concerning the use of security restraints on inmates in non-secure areas of hospitals, without first negotiating over the resulting changes to bargaining unit members' terms and conditions of employment. The Union further alleges that the directive's amendments have safety and workload impacts on its bargaining unit members and expose them to discipline. The City argues that its amendments to the directive fall within its rights under NYCCBL § 12-307(b) and that the revisions to the directive are *de minimus*. It contends that the Union failed to allege sufficient details to support a claim that DOC's action results in a safety or workload impact on bargaining unit members. The Board holds that the alleged amendments do not result in any changes to a mandatory subject of bargaining. It further holds that the facts pleaded were insufficient to support a claim of practical impact on bargaining unit members. Accordingly, the petition is dismissed.

BACKGROUND

The Union is the certified collective bargaining representative for DOC employees in the civil service title of Correction Officer ("CO"). The parties are signatories to a 2011-2019 Memorandum of Agreement ("MOA").

On or about March 15, 2017, DOC issued Directive 4202R-B entitled "Placement of Mechanical Security Restraints on Outposted Inmate Patients" ("Revised Directive"). (Pet., Ex. A) The Revised Directive supersedes Directive 4202R, dated November 30, 1999 ("1999 Directive"). The stated purpose of both Directives is "[t]o establish procedures concerning the application of restraints to inmates who cannot be confined in the secure environment of a hospital

prison ward while receiving medical treatment."[1] (Pet., Exs. A and B) Both Directives also provide that "Outposting inmates in a non-secure environment places them in close proximity to the general public and increases the possibility of a security breach. Maintaining security and public safety in a setting conducive to appropriate medical treatment is the paramount concern at all times." (*Id.*)

According to the Union, DOC amended the 1999 Directive in two ways that adversely affect bargaining unit members. First, it added a new sentence to § III(M) of the "Procedures" section, as indicated in boldface-type below. The Revised Directive, with the additional sentence, reads as follows:

> When an inmate patient has been outposted without a previous requirement for application of security restraints and suddenly evidences behavior or becomes the subject of information which tends to indicate a requirement for such restraint, the officer shall effect the placement of such restraints and contact the Tour Commander of the Hospital Prison Ward to request the immediate review, evaluation, and official authorization for continuation of such restraints by the Central Operations Desk. Officers assigned to outposts in facilities that do not have hospital prison wards should restrain the inmate and contact the Tour Commander of their parent facility for the immediate review, evaluation, and official authorization for the continuation of such restraints by the Central Operations Desk. **The outpost officer shall ensure the physician responsible for the inmate's medical care completes Health and Hospital Corporation's "Medical Status Form" (Attachment A), as soon as practicable.** All such authorizations shall be reviewed the next business day by the Chief of Security or his/her designee.

(Pet., Ex. A) (emphasis added)[2] The identical paragraph appears in the 1999 Directive, with the

[1] Mechanical restraints, including handcuffs and leg irons, are used by DOC for inmate control.

[2] DOC officials' authority to apply restraints following an inmate's change in behavior or circumstances, referenced in another section of the Directives, is unchanged. Section III(K) in both the Revised and 1999 Directives provides that a change in "security status," such as an attempted escape, or a change in medical status, such as a finding that the medical condition renders restraints unnecessary, would justify the modification of the inmate's original restraint

exception of the highlighted sentence.[3]

Second, DOC revised the Medical Status Form, which is Attachment A to the Revised Directive ("Revised Restraint Form").[4] The Revised Restraint Form replaces the corresponding form attached to the 1999 Directive ("1999 Restraint Form"). The heading at the top of the Revised Restraint Form states "New York City Health and Hospitals Corporation" and "New York City Department of Correction" while the 1999 Restraint Form heading lists only "New York City Health and Hospitals Corporation". Both the 1999 Restraint Form and the Revised Restraint Form must be completed by a physician responsible for the inmate's care whenever he or she is a patient on a civilian unit of the hospital. Both Forms also provide that a copy must be given to the CO guarding the patient upon completion.

The 1999 Restraint Form lists six questions that physicians must answer. The questions are as follows:

1. Has this patient been admitted for delivery?
2. Is this patient ventilator/respirator dependent?
3. Is this patient in imminent danger or expectation of death and unable to get out of bed without assistance?
4. Is the use of mechanical security restraints (i.e., metal handcuffs) to re-this [sic] patient to the bed medically contraindicated?
5. Is the use of mechanical security restraints to restrain this patient while she ambulates medically contraindicated?
6. Is this patient so debilitated that he/she lacks the physical strength to ambulate without assistance?

(Pet., Ex. B) Each question is followed by a "yes" or "no" check off option. Immediately following the six questions is a space for the physician to write a "specific description of the patient's medical condition and prognosis" for any of the questions answered in the affirmative.

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status by the Commanding Officer or his/her designee. (*See* Pet., Exs. A and B)

[3] The referenced paragraph is § III(L) in the 1999 Directive.

[4] The Medical Status Form is also referred to as the Security Restraint Form.

(*Id.*)

In contrast, the Revised Restraint Form lists only one question, "Is the use of mechanical security restraints (ex: metal handcuffs, shackles) to restrain this patient medically contraindicated?" (Pet., Ex. A) It then provides:

> TO THE PHYSICIAN: Shackling is medically contraindicated for a patient with any of the conditions listed below. Shackling may be contraindicated for patients with other conditions as well. The physician should NOT circle or otherwise identify a particular medical condition on this form.

(*Id.*) (emphasis in original) Directly below this paragraph, the form lists approximately 20 medical conditions.[5] Notably, the Directive itself also places restrictions on which inmates can be restrained based on their medical condition. Both the 1999 Directive and the Revised Directive provide that inmates who are "ventilator/respirator dependent," and "in imminent danger or expectation of death," "shall not be restrained at any time" unless they attempt escape or engage in violent behavior that presents a danger of injury. (*See* Pet., Ex. A, § III(B); Ex. B, § III(A)). Further, both Directives provide that an inmate who, based on the completion of the Restraint Form, is able to be restrained, shall not be "routinely restrained" and that the decision to restrain shall be made on a "case-by-case basis" taking a number of factors into consideration. (*See* Pet., Ex. A, § III(E); Ex. B, § III(C)).[6]

It is undisputed that under the 1999 Directive, the CO had an informal obligation to obtain

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[5] Some of the listed medical conditions are: admitted for delivery/any complication of a pregnancy, postpartum recovery, abscess/other dermatological conditions that would be adversely affected by use of mechanical restraint, altered mental status, arterial and venous insufficiency, cellulitis/skin restraints, and coma.

[6] Factors listed include, but are not limited to: the inmate's physical condition, the seriousness and nature of any pending criminal charges, prior criminal history, bail or remand status, facility conduct, and security level at sending facility.

the completed Restraint Form from the physician. However, there was no formal or written rule requiring the CO to obtain the Restraint Form from the physician or ensure its completion. It is also undisputed that under the 1999 Directive and the accompanying Restraint Form, the physician determined on a case-by-case basis whether to use restraints on an inmate in a non-secure environment.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Revised Directive amends the 1999 Directive by establishing new work rules for the use of mechanical restraints on inmates in non-secure areas of hospitals. It alleges that these new rules are mandatory subjects of bargaining, and that DOC violated NYCCBL § 12-306(a)(1) and (4) when it issued the Revised Directive without negotiating over the amendments.[7] The Union also contends that the amendments are material changes that result in safety and workload impacts on COs and expose them to discipline.

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

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> ***
>
> (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."

The Union asserts that the new sentence in § III(M) of the Revised Directive, and particularly the words "shall ensure" and "as soon as practicable," mandates that the CO "compel" the physician to comply with the instruction to complete the Restraint Form. (Rep. ¶¶ 7-8; Ex. A) It argues that this requirement places the CO in a new role and expands his duties, resulting in an increased workload. The Union emphasizes that this new role is not merely an "additional step" for the CO nor is the new work rule *de minimus*, because this task distracts the CO from his primary responsibilities in a non-secure environment, which are to closely guard the inmate to avoid escape and adverse interaction with staff, patients, and other civilians, and to remove the inmate to a secure environment.[8] (Rep. ¶ 10)

The Union argues that requiring the CO to "compel" the physician to complete the Form places the CO in the role of "enforcer." (Rep. ¶¶ 8-9) It contends that the CO cannot force the physician to complete the Restraint Form if he or she fails or refuses to do so. However, by making the CO the enforcer, "it is axiomatic that failure to perform this task could result in discipline and consequently constitutes a new work rule, again making the change bargainable." (Rep. ¶ 9) The Union asserts that the CO was not subject to discipline under the 1999 Directive to the extent that he or she did not or could not obtain the completed Restraint Form from the physician. Under the Revised Directive, in contrast, the new rule mandating that the CO ensure that the physician completes the Form "forces the [CO] to interact with a civilian non-DOC employee" in a situation where the CO may have a "vested interest" in the outcome of the physician's determination. (Pet. ¶ 7) Specifically, the Union argues, the CO may have a stronger interest in having the inmate restrained than the physician, since the CO is responsible for

[8] The Union also asserts that the plain language of this new sentence has a substantial impact on a CO's safety. It does not provide further explanation of how the CO's safety is affected by the addition of the new language to the Revised Directive.

maintaining safety and securing the inmate from escape. The Union asserts that the new rule thus places the CO in the role of liaison with the physician, and will expose the CO to false allegations that he or she coerced the physician into approving the restraint. This could result in the CO being subjected to discipline for failure to comply with the requirement.

Regarding the modifications to the Restraint Form, the Union argues that the 1999 Restraint Form asked the physician for his or her opinion as to whether the use of mechanical security restraints was medically contraindicated but gave the physician the leeway to answer the questions posed based on the inmate's actual physical condition and not simply based on a given diagnosis. In contrast, the Revised Restraint Form lists several dozen conditions that restrict the physician's discretion and shift the decision to restrain to DOC rather than a physician.

Further, the Union asserts that the modifications to the Restraint Form decrease the likelihood that the physician will opt for a restraint for the inmate and thus increase the possibility that inmates will remain unrestrained in a non-secure environment. This change leaves the CO who is responsible for that inmate "in a more vulnerable position," presents a "clear threat" to CO safety, and results in a *per se* safety impact on the COs responsible for guarding these inmates, according to the Union. (Rep. ¶ 11) More unrestrained inmates heighten the potential that the CO will have more "exposure to disciplinary events," such as the inmate's assault on a third party, than was the case under the 1999 Restraint Form.

For all of these reasons, the Union requests that the Board order Respondents to cease and desist from enforcing the contested provisions of the Revised Directive and bargain over the modifications contained in the Revised Directive.

City's Position

The City contends that the petition should be dismissed because it has no duty to bargain over modifications to the Directive. It argues that the specific revisions raised by the Union in the Revised Directive are proper exercises of management's right under NYCCBL § 12-307(b) and serve merely to clarify pre-existing policies and procedures applicable to COs in certain circumstances.[9] The City notes that NYCCBL § 12-307(b) explicitly guarantees it the right to direct its employees and determine the methods, means and personnel by which government operations are to be conducted. To the extent the changes to the Directive implicate the duties of COs, they represent a continuation of the existing responsibilities of the title, are consistent with the title's specifications and were properly assigned pursuant to DOC's authority under NYCCBL § 12-307(b).[10]

The City argues that the Union's allegation that the new language in § III(M) of the Revised Directive represents a mandatory subject of bargaining is conclusory. The Union has offered no

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

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and technology of performing its work.

[10] The City also argues that the Union's allegations do not establish an independent violation under NYCCBL § 12-306(a)(1). Since the Union did not allege such a violation of the NYCCBL, it is not necessary to summarize the City's argument or address this claim.

evidence that the Directive was ever previously bargained with the City. Rather, the "minor" changes set forth in the Revised Directive fall squarely within DOC's managerial right to "direct its employees" and "determine the methods, means and personnel by which government operations are to be conducted." (Pet. ¶ 23; *see* NYCCBL § 12-306(b)).

Regarding the Union's allegation that the revisions involve mandatory subjects of bargaining because they create a practical impact on terms of employment, the City argues that this argument must fail because the revisions represent a *de minimus* change to the previously-existing requirements covered by the Directive. Citing Board precedent, the City contends that the Board has held that where an employer clarifies or codifies an existing policy, the change is considered *de minimus* and does not trigger a duty to bargain. The City contends that the Revised Directive imposes no new substantive responsibilities on COs and merely clarifies the application of basic principles already set forth in the 1999 Directive. The City asserts while the 1999 Directive did not explicitly require COs to ensure that the treating physician completed the Restraint Form, it clearly contemplated that COs would have access to, and make decisions based on the Form. In this regard, the new language "asks no more of the officer than to determine the existence" of the Restraint Form or alert the hospital staff to its non-existence. (Ans. ¶ 46) Moreover, the City contends there is nothing in the Revised Directive to suggest that the CO is responsible for enforcing the physician's completion of the Restraint Form. The City argues that the Union's suggestion that COs in this situation may have actual or perceived influence on the outcome of the physician's determination is entirely speculative, if not frivolous.

Further, the City argues that to the extent the Board considers the petition to be a scope of bargaining claim, the Union has failed to provide sufficient details that the Revised Directive has had a practical impact on the terms and conditions of employment. Regarding workload impact,

the City asserts that a single change in the Revised Directive – that the CO "ensure" that the Restraint Form has been completed – cannot rationally create an unreasonably excessive or unduly burdensome workload. The Union's conclusory allegations in this regard are insufficient to warrant a hearing on workload impact.

Similarly, as to the safety impact allegation, the City argues that the Union has failed to specifically identify how changes to the Restraint Form subject COs to an increased safety risk beyond the conclusory allegation that it "decreases the likelihood that the physician will opt for restraint." (Rep. ¶ 70) The City contends that the Union has further failed to present sufficient evidence to establish an implicit safety impact in support of its *per se* safety impact claim. Contrary to the Union's assertions, the City maintains that there is no substantive change in the question presented to the physician on the Revised and 1999 Restraint Forms regarding whether the use of handcuffs as a mechanical restraint is contraindicated. The Revised Restraint Form does not alter the physician's discretion to determine on a case-by-case basis whether to use restraints. Moreover, the medical conditions listed on the Restraint Form contraindicate only shackles as a mechanical restraint. The City further asserts that DOC does not have the authority to alter or establish medical care standards for Health and Hospitals Corporation patients and, consequently, it cannot engage in collective bargaining over any details of those standards.

Finally, the City argues that the Revised Directive does not articulate new disciplinary procedures nor does it alter the standards that will apply in disciplinary cases for COs. It asserts that disciplinary consequences that may arise from the requirements of the Revised Directive are no different from those that existed under the 1999 Directive. Both before and after the revision to the Directive, COs are similarly exposed to discipline for failure or refusal to perform assigned duties. Accordingly, the City requests that the petition be dismissed.

DISCUSSION

The Union alleges that DOC engaged in an improper practice, in violation of NYCCBL § 12-306(a)(1) and (4), when it unilaterally amended the 1999 Directive without first negotiating over the changes. It asserts that the amendments reflected in the Revised Directive are new work rules that are mandatory subjects of bargaining. The Union also alleges scope of bargaining claims by asserting that the amendments are material changes that result in safety and workload impacts and expose COs to discipline.[11]

We first address the allegation that DOC engaged in an improper practice by creating a new work rule requiring COs to "ensure the physician responsible for the inmate's medical care completes the [Revised Restraint Form] as soon as practicable." NYCCBL § 12-306(a)(4) provides 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." The NYCCBL requires public employers and employee organizations to bargain over "matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *See CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009). We have consistently held that an employer commits an improper practice when it makes a unilateral change to a mandatory subject of bargaining. *See DC 37*, 6 OCB2d 14, at 16 (BCB 2013); *DC 37*, 3 OCB2d 5, at 8 (BCB 2010); *DEA*, 2 OCB2d 9, at 11-23 (BCB 2009). A unilateral change to a mandatory subject of bargaining amounts to a refusal to bargain in good faith and, therefore, constitutes an improper practice. *See DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006). To establish such an improper practice, the petitioner must

[11] Although the Union filed this matter as an improper practice petition and not a scope of bargaining petition, we will not dismiss the petition "simply because of its technical defects." *See Local 333, UMD*, 5 OCB2d 15, at 13 (BCB 2012); *see also NYSNA*, 71 OCB 23, at 12 (BCB 2003).

demonstrate both that the matter sought to be negotiated concerns a mandatory subject of bargaining and that a unilateral change has occurred with respect to that subject. *See DC 37*, 4 OCB2d 47, at 17-18 (BCB 2011); *UFOA*, 1 OCB2d 17, at 9-10 (BCB 2008).

Here, we find that the addition of the new sentence to § III(M) of the Revised Directive did not change the existing policy or practice and is not a new work rule. The undisputed practice under the 1999 Directive was that the CO was obligated to obtain the completed Restraint Form from the physician. There is no evidence that the new sentence in the Revised Directive requires the CO to do something other than obtain the form from the physician upon its completion. Moreover, the City has disclaimed any assertion that the CO is now required to do something additional to comply with the new sentence in the Revised Directive.[12] We therefore find that Respondents did not engage in an improper practice when it amended the 1999 Directive to add a new sentence providing that COs "ensure the physician responsible for the inmate's medical care completes the [Revised Restraint Form] as soon as practicable."

We also find that the City did not have a duty to bargain over the revisions to the 1999 Restraint Form. On its face, the wording changes to the Form do not constitute a new work rule for bargaining unit members. Rather, to the extent 1999 Restraint Form has been revised, such revisions affect the job responsibilities of the physician, who is the only employee assigned to complete the Form. The changes to the 1999 Restraint Form do not have any effect on the CO's terms and conditions of employment. Therefore, we find that they do not implicate a mandatory subject of bargaining.

[12] Even assuming, *arguendo*, that we had deemed the new sentence in the Revised Directive to be a substantive change, we would find that such a unilateral change did not concern a mandatory subject of bargaining. We conclude that instructing COs to ensure the Restraint Form is completed falls squarely within DOC's authority to direct its employees.

Having found that the amendments to the Revised Directive do not implicate mandatory subjects of bargaining, we next address the Union's claims that the implementation of the amendments result in practical impacts on matters of employment affecting COs. The NYCCBL "provides public employers with the discretion to act unilaterally in certain enumerated areas outside the scope of bargaining, including assigning and directing employees and determining their duties during working hours." *UFA*, 7 OCB2d 4, at 18 (BCB 2014). "However, an employer is required to negotiate over the alleviation of a practical impact stemming from managerial action taken on a non-mandatory subject of bargaining." *Id.* We have held that "a public employer is not required to bargain over a question concerning a practical impact prior to this Board determining that a practical impact exists." *CEU, L. 237*, IBT, 2 OCB2d 37, at 17. "A petitioner urging the Board to find such an impact must present more than conclusory statements of a practical impact in order to require the employer to bargain or, indeed, in order to warrant a hearing to present further evidence." *Id.* at 18; *see also CCA*, 51 OCB 28, at 8 (BCB 1993) ("As we have long held, practical impact is a factual question, and the existence of such impact cannot be determined when insufficient facts are provided by the union.")

For the Board to find a practical impact on workload, a petitioner must allege sufficient facts to show that the managerial decision creates an "unreasonably excessive or unduly burdensome workload as a regular condition of employment." *Local 333, UMD*, 5 OCB2d 15, at 14. A petitioner does not demonstrate a practical impact on workload "merely by enumerating additional duties assigned to employees or by noting a new assignment of duties covered in the job specifications." *Id.* at 14-15; *see PPOA*, 17 OCB 2, at 15 (BCB 1976) (denying petition where union demonstrated "some increase in workload," on ground that the demonstrated increase was

insufficient to constitute an unreasonably excessive or unduly burdensome workload as a regular condition of employment).

The Union alleges that the addition of the new sentence to § III(M) of the Revised Directive results in a workload impact on its members. It contends that the words "shall ensure" in the Revised Directive's new sentence expands COs' duties and places them in a position in which they must "compel" the physician to comply with the instruction to complete the Restraint Form. We have already concluded, based on the undisputed facts, that the new sentence in the Revised Directive did not change the obligation that COs already had under the 1999 Directive. On its face the mere change to the words used in the Directive does not suggest an "unreasonably excessive or unduly burdensome workload" as a regular term of employment. *ADW/DWA*, 69 OCB 16, at 7 (BCB 2002); *see also Local 333, UMD*, 5 OCB2d 15, at 10 (union's "claim of increased workload during the workday does not amount to a workload impact absent a showing that employees were subject to working more time than scheduled or overtime to complete their work."). Moreover, the new language explicitly directs the officer to ensure the Form's completion "as soon as practicable," an indication that he or she is not obligated to complete the task within a specified time frame. The insertion of this phrase ensures that the CO has discretion to perform this function without abandoning or minimizing their other job duties and undermines the Union's contention that ensuring the Form's completion "distracts" the CO from his primary responsibilities.

In sum, since there has been no substantive change in the COs' responsibilities, we cannot conclude that the change has resulted in a practical workload impact. As we have stated, a petitioner must present more than "conclusory statements" of a practical impact in order to require to the employer to bargain. *See CCA*, 51 OCB 28, at 8. In short, we find the factual allegations

insufficient to form a basis for a finding of practical impact on workload or to raise material issues of fact such that a hearing would be required on that issue.

We next address the allegations of a safety impact based on the changes to the Revised Restraint Form. The Union alleges that the Revised Restraint Form restricts the physician's discretion over whether to restrain an inmate with certain medical conditions.[13] It asserts that such reduced discretion will result in the likelihood that the inmate will be unrestrained in an unsecured environment and will place the CO responsible for that inmate "in a more vulnerable position," resulting in a "*per se* safety threat." It is not self-evident from the Revised Restraint Form that the physician's discretion has been limited or that the changes to the form will result in more unrestrained inmates. To the contrary, it appears that the Revised Restraint Form allows the physician to exercise the same discretion as always but removes the requirement that the physician disclose the patient's medical condition or diagnosis to DOC. Like its claim of workload impact, the Union provides only conclusory statements to support the allegation that the changes to the Directive and Restraint Form create a practical safety impact. As a result, in the absence of specific, probative facts to support its contention that the changes to the Restraint Form will subject bargaining unit members to "an increased safety impact, *per se* or otherwise," we do not find a practical impact on safety or material issues of fact such that a hearing should be ordered on that issue. *Local 333, UMD*, 5 OCB2d 15, at 14.

In addition, we note that the Revised Directive lists a number of medical conditions for which an inmate should not be restrained, some of which overlap with the conditions listed on the Revised Restraint Form. Both Directives emphasize that even inmates for whom restraints are

[13] The Union also alleges that the sentence obligating the CO to ensure that the physician completes the Restraint Form impacts the CO's safety, but does not indicate how CO safety is impacted nor does it provide any factual support for this assertion.

permitted "shall not be routinely restrained." It is also clear from the Directives that the decision to restrain an inmate in a non-secure facility is made on a case-by-case basis and multiple factors are considered in making such determination. The Union has not provided facts sufficient to show that the relatively minor changes to the Restraint Form place the CO in a "more vulnerable position" in light of the multiple factors that are considered in deciding whether to restrain an inmate. *See CCA*, 51 OCB 28, at 8. For all of these reasons, we also dismiss the safety impact claim.

Finally, we address the Union's allegations that the amendments reflected in the Revised Directive and Revised Restraint Form expose its members to discipline for failure to comply with the new rules established by the amendments. We have long held that "[i]t would be impractical and contrary to the policy of the NYCCBL to consider every managerial decision made within the scope of its statutory prerogative as giving rise to a practical impact, solely because an employee who does not conform to the decision could suffer the imposition of disciplinary action." *DC 37*, 45 OCB 1, at 15 (BCB 1990); *see Doctors Council*, 69 OCB 24, at 8-9 (BCB 2002) (same).

The Union offers no factual allegations to support its assertion that the new sentence in the Revised Directive subjects the CO to discipline for failure to ensure that the physician has completed the Form.[14] Regarding the Restraint Form, the Union goes further, asserting that the CO will have more "exposure to disciplinary events," such as an inmate's assault on a third party or attempt to escape, as a direct consequence of the physician's decreased discretion to restrain the inmate resulting from the modification to the Restraint Form. The record is devoid of any probative evidence to support a claim of a practical impact of a disciplinary nature and no new

[14] We note that the Union has not alleged that DOC unilaterally imposed new disciplinary consequences here, only that by not complying with the new portions of the Revised Directive, its members could be disciplined.

basis for discipline has been alleged. We therefore conclude that the factual allegations in this matter are simply insufficient for the Board to make a finding of practical impact on discipline or to even to raise material issue of fact such that a hearing would be in order on that issue. *See CEU, L. 237*, IBT, 2 OCB2d 37, at 17-18.

Accordingly, the petition is dismissed.

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-4226-17, filed by the Correction Officers' Benevolent Association, against the City of New York and the New York City Department of Correction, is hereby dismissed in its entirety.

Dated: December 14, 2017
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

CAROL O'BLENES
MEMBER

DANIEL F. MURPHY, JR.
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER