Municipal Highway Inspectors Local Union 1042, **2 OCB2d 12 (BCB 2009)**
(IP) (Docket No. BCB-2726-08).

Summary of Decision: Petitioner alleged that, by changing the procedures regarding red light camera violations by Highway Inspectors to include warnings and discipline after a certain number of violations, the DOT made a unilateral change to a mandatory subject of bargaining. The Board found that the changes made by the City were mandatorily bargainable because they concern procedures for an alternative disciplinary program and did not constitute a mere change in assignment, as the City had claimed. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

MUNICIPAL HIGHWAY INSPECTORS LOCAL UNION 1042,

Petitioner,

- and -

The CITY of NEW YORK and the NEW YORK CITY DEPARTMENT of TRANSPORTATION,

Respondents.

DECISION AND ORDER

On October 29, 2008, the Municipal Highway Inspectors Local Union 1042 ("Union") filed a verified improper practice petition against the New York City Department of Transportation ("DOT") claiming that the City of New York ("City") 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"). The petition alleges that, by changing the procedures regarding red light camera

violations by employees in the title of Highway Inspector to include warnings and discipline after a certain number of violations, DOT made a unilateral change to a mandatory subject of bargaining. The City argues that the new policy does not constitute discipline or a change in disciplinary procedures, but the policy may result in a change of an employee's assignment, which is within the City's managerial rights to do. This Board finds that the changes made by the City are mandatorily bargainable because they concern procedures for an alternative disciplinary program and were not a mere change in assignment.

BACKGROUND

The DOT's Highway Inspections and Quality Assurance Unit ("HIQUA Unit"), News Rack Unit, and Street Assessment Unit (collectively, "Units") are responsible for maintenance and upkeep of the City's highways. The Units employ a total of approximately 150 employees in the civil service title of Highways and Sewers Inspector ("Highway Inspector"). Highway Inspectors perform their duties in the field, in the office, or by performing radio dispatch. When a Highway Inspector is assigned to work in the field, that Highway Inspector can be assigned to walk, ride a DOT-owned bicycle, ride a DOT-owned scooter, drive a DOT-owned vehicle, or be a passenger in a DOT-owned vehicle. DOT's Standard Operating Procedures ("SOP") provide that Highway Inspectors must adhere to all City and State driving regulations and traffic laws and makes them responsible for all summonses, fines, and/or penalties issued as a result of operating a vehicle during the course of City business.

In 1988, the New York State Legislature amended the Vehicle and Traffic Law to allow cities with a population of over one million to implement a red light camera program. If a vehicle drives

through a red light at an intersection where the DOT has installed a camera, the camera photographs the license plate of the vehicle. A Notice of Liability ("NOL") as well as a fine of up to 50 dollars is issued to the owner of the vehicle.

From the City red light camera program's inception in 1993 to the present, if the DOT determines that it is the registered owner of the offending vehicle, the NOL is delivered to the DOT Fleet Services Unit. The Fleet Services Unit then determines which DOT unit has possession of the offending vehicle and forwards the fine to the unit. When such a fine is delivered to the Units, the DOT Assistant Commissioner receives the paperwork, which is then forwarded to the Borough Chief of the borough of the unit linked to the vehicle, which is then reviewed by the Borough Chief to determine which employee was driving the vehicle at the time of the violation.

The "Parking Rules and Summons Procedures" section of the SOP provides that all summonses received for parking and moving violations, including red light camera violations, on City vehicles are to be paid by the employee identified as the driver of the vehicle at the time, and proof of payment of such summons must be supplied to that particular Unit's vehicle coordinator. Prior to August 18, 2008, a Highway Inspector who received a summons for a red light camera violation was only required to pay the fines and penalties assessed as a result of the violation.

According to the DOT, on August 18, 2008, the Assistant Commissioner was informed that since July 1, 2007, Highway Inspectors in the Units had been issued a total of 105 NOLs for driving through a red light at an intersection. On August 18, 2008, the Assistant Commissioner e-mailed the subordinate managers and supervisors of the Units to inform them that the SOP for red light violations would change for Highway Inspectors. The e-mail stated that for a first offense, an employee would receive a verbal warning. For a second offense, an employee would receive a

written warning, and for a third offense, an employee would not have the use of a DOT vehicle for a three-month period. It also stated that anyone allowing the employee to use a vehicle during the vehicle suspension would be "written up" for insubordination. (Ans., Ex. 5).

Several employees have received warnings for receiving a "red light" camera violation. The warning is placed on a form entitled, "New York City Department of Transportation Record of Progressive Discipline." The form has two portions, one marked "Supervisory Record of Verbal Warning" and another marked "Written Warning." A supervisor completes the applicable section by describing the violation and, in the event of a written warning, the employee also signs the form. Both sections of the form have a portion with the same language, "I reminded the employee that this is a violation of the code of conduct and/or rules and regulations." (Rep., Ex. A).

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DOT violated NYCCBL § 12-306(a)(1) and (4) by unilaterally issuing and implementing the revised SOP in the manner that it did.[1] The Union contends that under

---

[1]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:
Rights of public employees and certified employee organizations. 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

the revised SOP, Highway Inspectors will be exposed to discipline for red light camera violations when they had not been in the past. Although the Union recognizes that it is the employer's prerogative to take disciplinary action, the City must negotiate over the procedures necessary for the administration of discipline. The revised SOP, as issued and implemented by the DOT, contains two new steps in its progressive discipline policy, first, a verbal warning, then a written warning. After that, a third step has been implemented for an offense that results in an employee losing the use of his or her vehicle for a three-month period. Since the City altered the SOP by adding disciplinary procedures without discussing those changes with the Union, it must then bargain over those changes.

As a remedy, the Union requests that the DOT be ordered to rescind the August 18, 2008 revision of the SOP regarding red light camera violations, cease and desist from using the new provision, restore the provision which was in effect prior to the change, bargain in good faith with the Union over the unilaterally revised mandatory subjects of bargaining contained in the SOP regarding red light camera violations, rescind any disciplinary actions taken against any Highway Inspector under the revised SOP, and expunge any record of a violation from an employee's personnel file.

City's Position

The DOT argues that the Assistant Commissioner oversees Highway Inspectors of the Units and has the authority to determine the job assignments of these employees under NYCCBL § 12-

---

activities. . . .

307(b).[2] In his August 18, 2008 e-mail, the Assistant Commissioner exercised his managerial authority by outlining specific criteria with which Highway Inspectors must comply in order to be assigned to drive a DOT-owned vehicle. Highway Inspectors that do not meet the criteria set forth in the e-mail will be assigned duties that do not involve driving a DOT-owned vehicle. Moreover, as the DOT is the agency charged with monitoring and enforcing the red light camera program, the DOT is justified in taking steps to avoid any inference of hypocrisy with this program. The DOT does not wish to have its own employees running the same red lights that their agency is charged with monitoring.

Highway Inspectors can perform their job duties while on foot, driving a vehicle, as a passenger in a vehicle, on a bicycle or scooter, or in the Unit office on radio dispatch duty. Driving a DOT-owned vehicle is a discretionary job assignment, and it is within the DOT's managerial rights to assign employees in such a manner. The revocation of a Highway Inspector's driving privileges is just that–the revocation of a privilege. A Highway Inspector may prefer to be able to drive a DOT-owned vehicle while on-duty, but the DOT has the discretion to determine which Highway Inspectors will operate a vehicle and which will conduct his or her duties in a different manner.

Additionally, the Union cannot show that the DOT violated NYCCBL § 12-306(a)(1) either independently or derivatively.

---

[2] NYCCBL § 12-307(b) states, in pertinent part:
> It is the right of the City, or any other public employer, acting through its agencies to determine the standards of service to be offered by its agencies; . . . direct its employees; take disciplinary action; . . . 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 . . . .

DISCUSSION

In the instant matter, the Union argues that by implementing the revised SOP, the DOT has changed disciplinary procedures and, thus, must bargain over those changes. The City argues that since a Highway Inspector's duties may be performed in a variety of ways that do not involve the employee driving a DOT-provided vehicle, ordering the employee to utilize different means to perform those duties is a discretionary assignment, not discipline. Therefore, to maintain efficient operations, the DOT has a managerial right to determine these assignments at will.

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." Under NYCCBL § 12-307(a), 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.[3] *See DC 37,* 71 OCB 12, at 7 (BCB 2003); *Local 371, SSEU,* 69 OCB 22, at 7 (BCB 2002). Moreover, as we explained in *DC 37,* 79 OCB 20, at 9 (BCB 2007), "if a unilateral change is found to have occurred in a term and condition of employment which is determined to be a mandatory subject, then this Board of Collective Bargaining will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice." *See also Local 1182, CWA,* 26 OCB 26, at 4 (BCB 2001); *PBA,* 63 OCB 4, at 10 (BCB 1999).

---

[3] NYCCBL § 12-307(a) provides, in pertinent part, as follows:
[P]ublic 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 have long held that, while it is an employer's prerogative to take disciplinary action, the procedures necessary for the administration of discipline are mandatorily negotiable. As we stated in *DC 37,* 79 OCB 36 (BCB 2000):

> NYCCBL § 12-306(b) reserves to management the right to take disciplinary action against its employees. But the management prerogative provision of the NYCCBL was not intended to cover the entire area of discipline. In our view, it is not the intent of the NYCCBL to prohibit bargaining on the methods, means and procedures which may be used in effectuating disciplinary action.

Id. at 9 citing *DC 37,* 11 OCB 3, at 8-11 (BCB 1973).

And, in *DC 37,* 75 OCB 13 (BCB 2005), we further explained that:

> [w]hile 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.

Id. at 11 (citations omitted) citing *Local 371, SSEU,* 71 OCB 31 (BCB 2003) (merit pay procedures); *DC 37,* 67 BCB 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).

In the instant matter, the City's contention that the implementation of these changes is a mere change in assignment is contradicted by the warning letters received by Highway Inspectors, which clearly state, "New York City Department of Transportation Record of Progressive Discipline," speak of "Verbal" and "Written Warning[s]," and include a statement that the supervisor has "reminded the employee that this is a violation of the code of conduct and/or rules and regulations." (Rep., Ex. A). Since the actual warning letters sent to employees by the DOT specifically call the

alleged change in assignment "discipline," and the content of those letters fits that characterization, we find that this new program is properly considered to be an alternative disciplinary program, like that found to be unilaterally implemented in *DC 37,* 79 OCB 37 (BCB 2007). In *DC 37*, the Department of Parks and Recreation ("DPR") unilaterally established an alternative dispute resolution program characterized by the City itself as "an alternative to rigid discipline," even though the parties had already negotiated a grievance and arbitration procedure which encompassed disciplinary review procedures. *Id.* at 11. The Board held that, by unilaterally implementing procedures for an alternative disciplinary program, the City violated its bargaining obligation and in doing so committed an improper practice under NYCCBL § 12-306(a)(4).

At a minimum, on the facts of this matter, the use of a notice of progressive discipline, when coupled with the prospect of potential adverse employment action intended as a sanction, constitutes the establishment of a multi-step alternative disciplinary procedure. The parties already had established disciplinary review procedures when, on August 18, 2008, the DOT Assistant Commissioner promulgated an alternative disciplinary program and its attendant procedures regarding red light camera violations by Highway Inspectors driving DOT-owned vehicles. Prior to August 2008, the DOT's SOP "Parking Rules and Summons Procedure" provided that all summonses received by Highway Inspectors for red light camera violations on DOT-owned vehicles are to be paid by the employee identified to be the driver of that vehicle at the time. However, on August 18, 2008, DOT's Assistant Commissioner changed the SOP, as he stated outright in his email of the same date. By creating a three-step program through which this discipline would be meted out, the DOT Assistant Commissioner also created a new disciplinary procedure that did not exist prior to August 18. The SOP was amended to include a first verbal warning to an employee after

one red light camera violation, a second written warning, and then the loss the use of his or her DOT-issued vehicle for a period of three months after receiving a third red light camera violation. As our prior decisions make clear, procedures attendant to the administration of employee discipline are mandatorily negotiable and cannot be implemented or revised absent prior negotiation and agreement of the parties. See *DC 37*, 65 OCB 36, at 10 (BCB 2000) (method used to deduct disciplinary fines is a question of procedure and, therefore, mandatorily bargainable). Therefore, we find that the DOT's implementation of new disciplinary procedures regarding red light camera violations while driving a DOT-owned vehicle violates NYCCBL § 12-306(a)(4).

Furthermore, we have previously held that when an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37*, 79 OCB 37; *Committee of Interns and Residents*, 35 OCB 25, at 10-11 (BCB 1985). Accordingly, we find that the City has violated NYCCBL § 12-306(a)(4), and § 12-306(a)(1) derivatively, and order the City to bargain in good faith over its unilateral implementation of the alternative red light camera violation procedures. We also order that any re-assignment to non-driving functions or assignments must be based solely upon operational concerns independent of any disciplinary action related to the red light camera violation program herein, order the DOT to expunge any progressive disciplinary warning letters issued to employees in the same form produced by the Union to the Board, and order the DOT to rescind any disciplinary actions taken against Highway Inspectors under the alternative disciplinary red light camera violation program until such time as the parties negotiate over the attendant procedures.

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 City violated NYCCBL § 12-306(a)(1) and (a)(4) by failing to bargain in good faith over its unilateral implementation of the alternative red light camera disciplinary procedures pursuant to the August 18, 2008 email from the Assistant Commissioner at the New York City Department of Transportation; and it is further

ORDERED, that any re-assignment to non-driving functions or assignments be based upon operational concerns independent of any disciplinary action related to the red light camera violation program herein; and it is further

ORDERED, that the Department of Transportation expunge any progressive disciplinary warning letters issued to employees in the same form produced by the Union to the Board; and it is further

ORDERED, that the Department of Transportation rescind any disciplinary actions taken against Highway Inspectors under the alternative disciplinary red light camera violation program until such time as the parties negotiate over the attendant procedures.

Dated: New York, New York
March 9, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER