DEA, 2 OCB2d 9 (BCB 2009)

(IP) (Docket No. BCB-2715-08).

Summary of Decision*:** The Union, while not disputing the NYPD's right to assess members psychological suitability for continued service in undercover assignments, claimed that the City and the NYPD violated NYCCBL § 12-306(a)(4) by not negotiating the procedures to implement a new NYPD program requiring Union members in undercover capacities to undergo a psychological evaluation to determine their suitability to continue in those undercover positions regardless of whether the member has shown any indication of a psychological problem. The City argued that the Union failed to establish a violation of NYCCBL § 12-306(a)(4) because the creation of the program at issue was not subject to bargaining but an exercise of management's statutory rights set forth in NYCCBL § 12-307(b). The Board found that the procedures for implementing such psychological evaluations are a mandatory subject of bargaining. Accordingly, the Board granted the Union's petition and ordered the City to bargain over the procedures. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE DETECTIVES' ENDOWMENT ASSOCIATION,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On August 1, 2008, the Detectives' Endowment Association ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). The Union, while not disputing the NYPD's right to investigate members

regarding their psychological suitability, alleges that the City and the NYPD violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(4) when the NYPD failed to bargain over the procedures to implement a new program requiring Union members in undercover capacities to undergo a psychological evaluation to determine their suitability to continue in those undercover positions regardless of whether the member has shown any indication of a psychological problem.[1] The City argues that the Union has failed to establish a violation of NYCCBL § 12-306(a)(4) and, accordingly, has also failed to establish a derivative claim of a violation of NYCCBL § 12-306(a)(1) because the creation of the program at issue is not subject to bargaining as it is an exercise of management's statutory rights under NYCCBL § 12-307(b). The Board finds that the procedures for implementing such psychological evaluations are a mandatory subject of bargaining. Accordingly, the Board grants the Union's petition and orders the City to bargain over the procedures.

BACKGROUND

On November 30, 2006, the NYPD announced that, in response to a fatal shooting by undercover officers on November 25, 2006, it had created the Committee for the Review of Undercover Procedures ("Committee"), whose mandate was to review all issues related to NYPD undercover operations. On May 18, 2007, the Committee announced 19 recommendations, including

[1] In its Reply, the Union narrowed its claim to NYCCBL § 12-306(a)(4), explicitly withdrawing all NYCCBL § 12-306(a)(1), (2), and (3) claims. (Rep. ¶ 1). Although the Union describes its petition as a "Scope of Bargaining/Improper Practice Petition" (Pet. ¶ 3; Rep. ¶ 1), for reasons explained *infra*, the instant claim sounds in refusal to bargain as no bargaining has taken place. As specific proposals have yet to be put forth, we, at this time, only address the refusal to bargain and will, if needed, address specific proposals when made.

to "[p]rovide periodic psychological screening and counseling for active undercover officers whose assignments are the most stressful in the [NYPD] and provide training for managing stress[.]" Press Release #022. In response to these recommendations, the Committee, along with NYPD psychologists, met with the New York Field Office of the Federal Bureau of Investigations ("FBI"), as well as the FBI's Undercover Safeguard Unit.

The NYPD's Medical Division was charged with formulating procedures to implement and administer psychological evaluations, and such psychological evaluations began in the Summer of 2008. According to the City, "the psychological evaluation of undercover detectives [] is consistent with FBI, CIA and U.S. Army protocols." (Ans. ¶ 25). Among these protocols are that the evaluation is administered by psychologists and is confidential: the undercover detective is assigned a six digit code, and no names are used.

The Union avers that it first learned of the new policy of requiring a psychological evaluation as a condition of officers continuing undercover assignments on or about July 3, 2008, when a Union member, a detective in the Internal Affairs Bureau ("IAB Detective"), was ordered to report to undertake a psychological evaluation. The NYPD informed the IAB Detective that the evaluation was mandatory but he refused to undergo it. As a result, the IAB Detective was removed from his assignment, had to turn in his NYPD issued vehicle, and was re-assigned. The City denies knowledge and information sufficient to form a belief as to when and how the Union first learned of the new program but admits that on or about July 22, 2008, the IAB Detective was removed from his assignment and re-assigned due to his refusal to take a psychological evaluation.

In July 2008, the Union contacted the NYPD's Director of Labor Relations, demanding to bargain the procedures to implement the new psychological evaluations requirement. The Union

avers that the NYPD refused to meet with the Union regarding its concerns and informed the Union that the program would continue. The City admits being contacted by the Union in July and informing the Union that the program would continue but denies refusing to meet with the Union. As of January 6, 2009, however, the parties have had no negotiations regarding the procedures for officers in undercover assignments to undergo psychological evaluations.

POSITIONS OF THE PARTIES

Union's Position

Although the Union initially described its claim as "seeking to prevent the NYPD from referring members assigned to work in undercover capacities . . . for psychological testing regardless of whether there is any indication of a problem," the Union, in its Reply, clarified that it "only seeks to bargain over the safeguards and procedures as outlined in the instant Petition." (Pet. ¶ 3; Rep. ¶ 21). The Union does not claim that the NYPD is "precluded from investigating members regarding their psychological suitability." (Rep. ¶ 5). Further, the Union admits that the NYPD has "a clear interest to ensure 'its officer's welfare.'" (Rep. ¶ 21) (quoting Ans. ¶ 39).

However, the Union argues that "referring members assigned to work in undercover capacities . . . for psychological testing regardless of whether there is any indication of a problem for the claimed purpose of ascertaining their suitability to continue in those positions" is a new program that constitutes a unilateral change in a term and condition of employment. (Pet. ¶ 3). The failure to bargain over the procedures to implement such a new program constitutes a violation of NYCCBL § 12-306(a)(4). Requiring the disclosure of "confidential information and health related statements is a mandatory subject of bargaining because the intrusion upon employees' terms and conditions

of employment and privacy interest outweighs the employer's interest in the integrity of the work force." (Pet. ¶ 12).[2]

The Union also argues that the NYPD's refusal to bargain over the procedures regarding the psychological evaluations is an improper practice since referring members to psychological evaluations without their consent constitutes a working condition and a mandatory subject of bargaining. To require members to undergo such psychological examinations prior to completion of bargaining violates NYCCBL § 12-306(a)(4).

For relief, the Union requests both that the Board order the NYPD to end the program and to cease and desist ordering its members to undertake the psychological evaluations until the NYPD has bargained over the following:

> A. Procedures to safeguard the right of a member who declines to be evaluated and seek the services of his or her own counselor;
> B. Procedures concerning the preservation of confidentiality of statements made to a [NYPD] counselor, and the use of those statements by the [NYPD], including where and for how long those statements are kept;
> C. The procedures to appeal [NYPD's] decisions caused by the evaluations;
> D. Procedures concerning the preservation of confidentiality of statements made to a [NYPD] counselor and their use in subsequent criminal court proceeding; and
> E. Review of any evaluation prepared by a [NYPD] counselor and the procedures for rebutting any counselor comments.

(Pet. at p. 3, ¶ 1).

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

City's Position

The City argues that requiring undercover officers to undergo psychological evaluations is not a mandatory subject of bargaining as it is within the management rights set forth in NYCCBL § 12-307(b).[3] The psychological evaluations address a basic goal and mission of the NYPD–ensuring police officers' fitness for duty. Undercover activities are inherently dangerous, and the NYPD has a clear interest in ensuring its officers' welfare as well as public safety. The psychological evaluations are the least intrusive method available to the NYPD to address its legitimate concerns and the "[p]rocedures for confidentiality are strictly adhered to." (Ans. ¶ 41). The City notes that the IAB Detective was not disciplined or otherwise adversely affected because of his refusal to take the psychological evaluation; he was merely reassigned. Therefore, on balance, the "NYPD's interest of ensuring that their undercover officers are psychologically capable of participating in an undercover operation outweighs the interest of the employees[,]" and there is no

[3] NYCCBL § 12-307(b) provides:

> 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 the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

NYCCBL § 12-306(a)(4) violation. (Ans. ¶ 40). Further, the City contends that no formal demand for bargaining was made by the Union because the power to bargain lies solely with New York City Office of Labor Relations ("OLR"). As the NYPD is not empowered to bargain or negotiate with the Union, the July 2008 contact between the NYPD and the Union does not constitute a demand for bargaining.

Since there is no NYCCBL § 12-306(a)(4) violation, the City argues, there can be no derivative NYCCBL § 12-306(a)(1) violation. There is no independent NYCCBL § 12-306(a)(1) violation as the NYPD has not interfered with, restrained, or coerced its employees. The Union does not allege any improper motive on the part of the NYPD, and no facts in the instant petition tend to demonstrate anti-union animus.

DISCUSSION

This case raises no material issue of disputed fact, only a legal question as to whether the NYPD is required to bargain over the procedures to implement a new program requiring officers in undercover capacities to undergo a psychological evaluation as a condition of maintaining those undercover assignments. The Union does not challenge the NYPD's right to assess the psychological suitability of members serving in undercover assignments.. For the reasons discussed *infra*, we find that the procedures involved in implementing the new program are a mandatory subject of bargaining. We further find that the that the NYPD has not bargained over the procedures and order them to do so. While the Union has identified broad areas it seeks to bargain over, to date specific proposals have not been made at the bargaining table. Therefore, this decision only addresses the refusal to bargain. We will, if needed, address specific proposals when made.

The Court of Appeals has recognized that determining whether a proposed policy, practice or procedure amounts to a mandatory subject of bargaining under the NYCCBL often requires "a balancing of interest involved" because while "terms and conditions of employment (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principle, the practical task of assigning a particular matter to one category or the other is often far more difficult." *Matter of Levitt v. Bd. of Collective Bargaining of City of N.Y.*, 79 N.Y.2d 120, 127 (1992). There is "[n]o litmus test . . . that automatically identifies a term or condition of employment." *Id.* Accordingly, both this Board and the Public Employment Relations Board ("PERB") "determine on a case-by-case basis the extent of the parties' duty to negotiate." *DC 37, Local 1457*, 77 OCB 26, at 12 (BCB 2006).

As PERB explained: "In a very real sense, the determination regarding the negotiability of all terms and conditions of employment is premised upon a balancing of employer-employee interests." *State of New York (Dept. of Transportation)*, 27 PERB ¶ 3056, at 3131 (1994); *see also State of New York (Dept. of Correction)*, 38 PERB ¶ 3008 (2005). Similarly, "the Board determines the negotiability of a subject which is asserted to be a working condition by weighing the interests of both the employer and the Union concerning that subject." *DC 37*, 1 OCB2d 32, at 29; *DC 37*, 75 OCB 13, at 7-8 (BCB 2005).

It is well established that procedures to implement non-mandatory subjects of bargaining may themselves be bargainable "if the procedures qualify as a 'term and condition' of employment.'" *City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 81 (2000); *see also Matter of City of N.Y. v. Patrolmen's Benev. Ass'n of the City of N.Y.*, 56 A.D.3d 70 (1st Dept. 2008) (reinstating Board decision in *DEA*, 77 OCB 37 (BCB 2006), which held that, while the decision to

test NYPD officers for drugs is not a mandatory subject of bargaining, "routine drug screening procedures are a mandatory subject of collective bargaining"); *Matter of Park v. Kapica*, 8 N.Y.3d 302, 311 (2007) (reaffirming the holding of *City of Watertown*); *DC 37, Local 1457*, 77 OCB 26, at 17 ("The law is now well-settled that even when management has a right to make a policy decision unilaterally, certain procedures implementing the policy are mandatorily negotiable.") (citations omitted).

We have frequently found that when balancing employer/employee interests, while intrusion upon employees' work conditions and their privacy may be insufficient to make the underlying program mandatorily bargainable, those same interests may be sufficient to make the procedures to implement those programs bargainable. *See DC 37*, 1 OCB2d 32, at 25; *DC 37*, 75 OCB 13, at 7 (same); *Civ. Serv. Bar Ass'n*, 3 OCB 9, at 7 (BCB 1969) ("procedures . . . are within the scope of collective bargaining"). In *DC 37*, 1 OCB2d 32, we addressed the right of the Department of Juvenile Justice ("DJJ") to search its employees and their belongings. We found that, among the intrusive effects of the DJJ's new policy, was "having employees remain in an unheated space for an extended period of time, their close proximity to canines, and minor contact therewith." *Id.* at 35. Nevertheless, we found "that the DJJ's interests in providing a safe environment for juveniles outweighs the interests of its employees and that the DJJ's decision to search its employees and their belongings is not bargainable." *Id.* at 34. However, we went on to hold that the procedures to implement the searches were bargainable. *See also DC 37*, 75 OCB 13, at 11 (finding that the decision to search employees and their belongings is a non-mandatory subject of bargaining, but the procedures involved with implementing such a policy are a mandatory subject of bargaining).

PERB reached a similar conclusion in *County of Nassau*, 27 PERB ¶ 3054 (1994), which concerned the drug testing of police officers. Employing a balancing test, PERB "concluded that the county's interests in deterring and preventing the impairment of police officers, which could jeopardize safety and compromise the delivery of police services, outweighed the employees' privacy and reputation interests with respect to the *decision* to conduct drug tests." *DEA*, 77 OCB 37, at 13 (explaining *County of Nassau*) (emphasis in original). PERB, however, found that the procedures to implement the decision to drug test were mandatorily bargainable because "the employer's managerial interests in deciding to drug test its employees did not outweigh the employees' privacy and reputation interests with respect to procedures for the implementation of testing, including matters of testing methodology." *Id.* (citing *County of Nassau*, 27 PERB ¶ 3054, at 3119-3120); *see also State of New York (Dept. of Correctional Servs.)*, 38 PERB ¶ 3008 (2005) (while not disputing employer's right to search employee food containers, PERB found that limitations on the size and number of food containers are mandatory negotiable as it "adversely impacts the comfort, convenience, and expenses of officers."); *Buffalo Sewer Auth.*, 27 PERB ¶ 3002, at 3006 (1994) ("[W]ork rules generally and security procedures which require employee participation specifically are mandatory subjects of negotiations"); *cf. City of Buffalo*, 23 PERB ¶ 4569 (1990) (ALJ decision finding bargainable a requirement that an officer who has killed someone in the line of duty must undergo a psychological evaluation prior to returning to active duty because the psychological evaluation in that case was a type of employee assistance program, not a job requirement).

In the instant case, the interest averred by the City is "ensuring its officer's welfare . . . and [to] provide a safe environment for the citizens." (Ans. ¶ 39). The Union avers that the "intrusion upon employees' terms and condition of employment and privacy interest outweighs the [NYPD's]

interest in integrity of the work force."[4] (Pet. ¶ 39). Here, as we found in *DC 37*, 1 OCB2d 32, and *DC 37*, 75 OCB 13, and PERB found in *County of Nassau*, 27 PERB ¶ 3054, and *State of New York (Dept. of Correctional Servs.)*, 38 PERB ¶ 3008, we find that, in regard to bargaining over procedures, the intrusion upon employees' work conditions and privacy interest outweighs the NYPD's interest in ensuring its officer's welfare and public safety. Therefore, the procedures to implement the new program requiring psychological evaluations for continuance in undercover assignments are mandatorily bargainable.

Although pled as a scope of bargaining claim, the Union's claim is actually a straight-forward refusal to bargain claim. While scope of bargaining claims do not require an actual dispute, in the instant case, as discussed *infra*, the parties have yet to put forth specific proposals. *See Local 621, SEIU*, 51 OCB 34 (BCB 1993) (finding that scope of bargaining claims can request, in effect, a declaratory ruling).

While it is undisputed that the City has not bargained with the Union over the requirement of psychological evaluations to continue in undercover assignments, and the City admits that the Union contacted the NYPD in July 2008 regarding the new requirement, the City contends that the direct contact between the NYPD and the City cannot constitute a formal demand for bargaining because the OLR has exclusive authority to negotiate. We have, however, long held that where, as here, "an employer takes a unilateral action on a mandatory subject of bargaining, a union is not

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[4] Although the Union frames its argument in terms of privacy, we do not engage in a constitutional analysis; rather, our inquiry is limited by our statutory grant of jurisdiction to improper practices as defined under the NYCCBL. *See DC 37*, 1 OCB2d 32, at 30; *DC 37*, 75 OCB 13, at 11, n.4; *Dimps*, 63 OCB 39, at 7 (BCB 1999); *Pruitt*, 55 OCB 11, at 10-11 (BCB 1995); *Trammel*, 39 OCB 38, at 7 (BCB 1987) ("The NYCCBL does not give this Board jurisdiction to consider and attempt to remedy every perceived wrong or inequity which may arise out of the employment relationship.").

required to make a formal demand to bargain on that subject." *DC 37*, 65 OCB 36, at 12 (BCB 2000) (citing *UPOA*, 37 OCB 44 (BCB 1986)), *see also CEA*, 75 OCB 16, at 10 (BCB 2005). *DC 37* concerned the New York City Human Resources Administration ("HRA") "unilaterally promulgating a method of deductions from the paychecks of employees who are issued fines as part of disciplinary procedures under the contractually provided grievance procedure." *Id.* at 1. The City admitted that the HRA Deputy Commissioner for Labor Relations received a letter from the union "requesting a labor-management meeting to discuss what [the union] described as a change in policy in the implementation of disciplinary pay fines." *Id.* at 2. The City argued the letter did not constitute a formal demand for bargaining because "Executive Order No. 13 . . . states the Commissioner has exclusive authority to negotiate on all matters within the scope of bargaining." *Id.* at 11. After restating the principle that a union need not make a formal demand for bargaining when there has been a unilateral change by the employer, we held that:

> We shall not require the Union to have made a formal demand to bargain over the method of implementing those deductions. The City does not deny it received [the Union's] letter of June 23, 1998. It was on notice, therefore, that the Union had an issue with the method of pay fine deductions. Moreover, there is no assertion by the City that it would have been willing to engage in such negotiations had it heard from the Union in a more formal manner.
>
> Following the reasoning set forth above, we hold, therefore, that the [new method of deductions] violates NYCCBL § 12-306a(4) as surely as if HRA had flatly refused a formal demand to bargain. We further find that, as a consequence of its refusal to confer with the Union concerning terms and conditions of employment of unit employees, HRA derivatively interfered with their exercise of rights protected under NYCCBL § 12-306a(1).

Id. at 13.

Similarly, in the instant case, we have found a unilateral change in a mandatory subject of bargaining–procedures to implement the new requirement of psychological evaluations to continue in undercover capacities. The failure to bargain over such procedures is a violation of NYCCBL § 12-306(a)(4) and, derivatively, a violation of NYCCBL §12-306(a)(1). *Id.*; *see also DC 37*, 75 OCB 13, at 12; *UFOA*, 71 OCB 6 (BCB 2003).

Accordingly, we order the City to bargain over the procedures to implement its new program of requiring psychological evaluations as a condition of an officer continuing an undercover assignment until either an agreement or an impasse is reached.

ORDER

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

ORDERED, that the improper practice petition, Docket No. BCB-2715-08, filed by the Detectives' Endowment Association against the City of New York and the New York City Police Department, be, and the same hereby is, granted with respect to violations of NYCCBL § 12-306(a)(1) and (4), to the extent that the procedures for implementing the New York City Police Department's program of requiring psychological evaluations as a condition of continuing undercover assignments are a mandatory subject of bargaining, and it is further

ORDERED, that the City bargain over the procedures for implementing the New York City Police Department's program of requiring psychological evaluations as a condition of continuing undercover assignments.

Dated: March 9, 2009
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

M. DAVID ZURNDORFER
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GABRIELLE SEMEL
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