DC 37, AFSCME, 3 OCB2d 12 (BCB 2010)

(IP) (Docket No. BCB-2748-09).

Summary of Decision: The Union alleged that the DOT violated § 12-306 (a)(1) and (4) of the NYCCBL by unilaterally implementing changes to the DOT drug testing policy for holders of a Commercial Driver's License in safety-sensitive positions. The City claimed that it revised the drug testing policy to reflect amendments to federal regulations and that a public employer has no duty to bargain over a subject preempted by an explicit federal regulatory mandate. The Board found that although the DOT's requirement that its employees comply with the new federal regulations was not subject to bargaining, the City must bargain over the implementation of those regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that constitute a change from the prior procedure. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

- and -

THE NEW YORK CITY OFFICE OF LABOR RELATIONS and THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On February 27, 2009, District Council 37, AFSCME, AFL-CIO ("Union"), filed a verified improper practice petition which alleges that the New York City Department of Transportation ("DOT") and the New York City Office of Labor Relations ("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") by unilaterally implementing a revised DOT drug testing policy. The City claims that it revised the drug testing policy to reflect amendments to the United States Department of Transportation ("USDOT") regulations and a public employer has no duty to bargain over a subject preempted by an explicit federal regulatory mandate. The Board finds that the DOT's requirement that its employees comply with the new federal regulations is not subject to bargaining, but the City must bargain over the implementation of those regulations to the extent that the regulations permit discretion regarding the way in which such compliance will be achieved and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

BACKGROUND

The Union represents City employees in various titles at the DOT, including DOT employees who are required to possess a Commercial Driver's License ("CDL") as a condition of employment. On September 23, 2004, the City promulgated the New York City Department of Transportation Controlled Substance and Alcohol Abuse Policy for Holders of a Commercial Driver's License ("Drug Policy"). The Drug Policy applies to DOT employees who are required to possess a CDL and perform safety-sensitive tasks and who are also subject to the drug and alcohol testing regulations of the USDOT. The Drug Policy applies to certain DOT employees represented by the Union, including the following titles: Area Supervisor Highway Maintenance, Assistant City Highway Repairer, Highway Repairer, Area Level Supervisors, Climber and Pruner, Supervisor Highway Repairer, and Traffic Device Maintainer.

The Drug Policy requires covered employees to participate in drug and alcohol testing as a condition of employment. Drug and alcohol use is tested using urine specimens and evidential breath-testing devices. The Drug Policy provides that the DOT will pursue disciplinary sanctions, up to and including termination, for employees who violate the policy.

On June 25, 2008, the USDOT published a notice of an upcoming amendment to the Procedures for Transportation Workplace and Alcohol Testing Programs, effective August 25, 2008, in the Federal Register. The rule changes were directed at insuring the integrity of test results and included two new provisions addressing "Specimen Validity Testing." Specifically, 49 CFR § 40.67(b) and (i) concerned the use of direct observation of specimen collections to reduce the possibility of cheating. The previous USDOT rule did not require direct observation for return to duty and follow-up tests, nor did it contain a delineated procedure on how observed collection should be conducted.

The proposed addition to 49 CFR § 40.67(b) made the use of direct observation of specimen collection mandatory in certain circumstances, where it had previously been discretionary. The revision reads, "[a]s an employer, you must direct a collection under direct observation of an employee if the drug test is a return-to-duty test or a follow-up test." The required procedure in a specimen collection involving direct observation is described in 49 CFR § 40.67(i), which reads:

> As the observer, you must request the employee to raise his or her shirt, blouse, or dress/skirt, as appropriate, above the waist; and lower clothing and underpants to show you, by turning around, that they do not have a prosthetic device. After you have determined that the employee does not have such a device, you may permit the employee to return clothing to its proper position for observed urination.

USDOT regulations mandate direct observation of specimen collection in certain circumstances

where there is heightened risk of cheating or where an attempt to cheat has already taken place. Employers must direct immediate collection under direct observation with no advance notice to the employee when the testing laboratory reports to the medical review officer that a specimen is invalid and without adequate medical explanation (49 CFR § 40.76(a)(1)) or if the medical review officer reports that a positive, adulterated, or substituted result had to be discarded when the split specimen could not be tested. (49 CFR § 40.67(a)(2)). Direct observation is required when collectors detect evidence indicating an attempt to tamper with a specimen (49 CFR § 40.67(c)(2)) or if a specimen is out of temperature range (49 CFR § 40.67(c)(3)).

As a result of the impending USDOT amendment, on August 15, 2008, the DOT notified the Union that effective August 25, 2008, the Drug Policy would be modified so to provide for direct observation of urine collection in certain circumstances, including for all return to duty and follow-up drug tests. The DOT also added a new section to the Drug Policy delineating the procedure to be used in direct observation cases.

The Union contends that prior to the implementation of the revised portion of the Drug Policy, the DOT's policy did not require direct observation of urine samples. Further, the Union asserts that, upon information and belief, prior to the implementation of the revised portion of the Drug Policy, the DOT had never performed any observed collections of drug tests. The City asserts that it had performed the tests and submitted documentary evidence of four specimens collected under direct observation, taken on February 14, 2006, and September 18, 2006.

On August 21, 2008, the Union notified the City that the proposed changes affected a mandatory subject of bargaining and the Union requested that the DOT delay the implementation of the changes until the parties could bargain over the matter. In the interim, the USDOT delayed

the implementation of the amendment from August 25, 2008, to November 1, 2008, to allow interested parties to submit comments. Similarly, the DOT delayed implementation of the revised portions of the Drug Policy.

On October 22, 2008, the USDOT issued a public notice stating that despite the comments received, the changes contemplated in 49 CFR § 40.67 were going to be implemented. On October 30, 2008, the DOT issued a memorandum stating that it would conduct direct observation specimen collections for all return-to-duty tests and follow-up tests and that it was adopting 49 CFR § 40.67 as its own policy, specifically, 49 CFR § 40.67(b).

In response to the USDOT's position, BNSF Railway Company, amongst other employers, sought and obtained a court order in the United States Court of Appeals for the District of Columbia Circuit staying implementation of 49 CFR § 40.67(b). *See BNSF Ry. Co. v. U.S. Dept. of Transp.*, No. 08-1265 (D.C. Circuit November 12, 2008). During the time that the stay was in effect, the DOT utilized the September 4, 2008 policy, which incorporated the changes to 49 CFR § 40.67(i).

On January 21, 2009, the Union requested that, in light of the Court's stay, the City rescind the revised portions of the Drug Policy, or, in the alternative, bargain with the Union over the revised portions of the Drug Policy. The DOT did not further amend the revised portions of the Drug Policy in accordance with the demands, and it did not bargain with the Union.

On May 15, 2009, the D.C. Circuit Court of Appeals upheld the validity of the USDOT's proposed amendment to 49 CFR § 40.67. *See BNSF Ry. Co. v. U.S. Dept. of Transp,* 566 F.3d 200 (D.C. Cir. 2009). The Court's stay of the implementation of the regulation was officially lifted on July 1, 2009, and on July 30, 2009, the USDOT re-implemented the change to 49 CFR § 40.67, to be effective August 31, 2009. The DOT promulgated a memorandum incorporating the changes into

its drug and alcohol testing policy on August 31, 2009.

The Trial Examiner in this matter, upon being informed that the D.C. Circuit had lifted the stay, directed the parties to submit letter briefs addressing the effect of the lifting of the stay on the parties' original positions.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DOT failed to bargain in good faith when it unilaterally implemented rules and policies concerning testing for drugs and alcohol. Drug testing procedures that are not compelled by law are mandatory subjects of bargaining. The DOT's arguments that it cannot bargain over the changes because the policies and procedures are compelled by law fails to acknowledge that there are discretionary components in the federal regulations with respect to procedures and consequences as they relate to chemical testing applicable to the Union's members. Any change in the DOT's policy where the federal regulations leave room for discretion is a mandatory subject of bargaining. Some areas where the DOT continues to exercise discretion include, but are not limited to: the disciplinary consequences that would flow from a positive test result; consequences in cases where non-prohibited medications caused the positive result; the type of collection sites that would be utilized; whether or not the Union could accompany the employee to the collection site; who would pay for so-called "split testing"; whether the same person would act as the collector, observer, and monitor; and the DOT position that any drug consumption, whether prescription or over-the-counter, precludes a person from performing safety-sensitive functions.

The DOT's changes to the procedures are an unprecedented intrusion into the privacy expectations and interests of Union members with respect to their own bodies, which results in a change in terms and conditions of employment. Because of this, and the fact that the August 2008 DOT amendments to the policy added three new paragraphs that enlarged the definition of what constitutes a refusal to test, the importance of having a Union representative at testing critical. In particular, in direct observation situations, the failure to follow the observer's instructions to raise clothes and lower clothes and turn around so that the genital and buttock areas could be inspected by the observer is now considered to be a refusal to take the test. In such a context, the choice of laboratory and collection site and the issue of whether a Union representative could be present are all discretionary and could have been bargained over.

The refusal to take the test or a positive result leads to termination under the DOT's policies, and, in light of that all-or-nothing approach, having a procedure for quickly obtaining Union representation for a test subject can mean the difference between loss of employment or continued employment. The Union also believes that a representative's presence would avoid or reduce any feelings of violation or humiliation that the employee may feel as a result of being subjected to a direct observation drug/alcohol test. The Union also claims that by promulgating the new drug/alcohol testing policy, the DOT also violated NYCCBL § 12-306(a)(1) independently by interfering with the rights of public employees in the exercise of self-organization.

In response to the City's argument that the DOT has used direct observation testing since 2000, and, thus, does not represent a unilateral change, the Union contends that the revised portions of the Drug Policy constitutes a significant change from the prior policy. Specifically, the Union maintains that the revised portions of the Drug Policy now requires that the employer utilize direct

observation of urine collection in all return to duty and follow-up testing situations and that the employer adhere to a detailed testing procedure to be used in direct-observation cases. The prior Drug Policy did not contain a delineated testing procedure nor did it require direct observation of urine collection in the new situations. In its papers, the City does not claim that it previously required direct observation testing for return to duty and follow-up testing.

In its letter brief addressing the lifting of the stay and the new policy, the Union briefly reiterates its above legal arguments and argues that "in response to the Federal Court ruling upholding direct observation testing for return-to-duty and follow-up testing, DOT issued a new policy requiring, for the first time, direct observation for return-to-duty and follow-up testing. DOT's failure to [bargain] over this policy violates the NYCCBL." (DC 37 letter brief, dated 9/11/2009).

City's Position

The City argues that the language of 49 CFR § 40.67(i) imposes an affirmative obligation on the City to implement a particular procedure under particular circumstances, affording the employer no discretion as to the procedures an observer must follow when conducting a direct observation collection. Under these circumstances, a new policy or procedure that was heretofore a mandatory subject of bargaining, like here, becomes a non-mandatory one. Based upon the explicit statutory mandates that govern the DOT's policy regarding drug and alcohol testing procedures for workers who are required to have a CDL, the City is under no obligation to negotiate the policy and, consequently, it did not violate NYCCBL § 12-306(a)(4), or § 12-306(a)(1), derivatively. Further, the DOT's amendment to the Drug Policy is not a unilateral change to a term or condition of employment, since the Union took part in the formation of the 2004 policy, which

includes provisions related to direct observation testing and adherence to federal regulations. The DOT has used direct observation testing since at least 2000, so continued use of direct observation when pursuant to federal mandates must not be considered a unilateral change to a term or condition of employment. The DOT has always used direct observation where required by federal law.

The City argues that, during the period in which the federal stay was in effect, the DOT had no obligation to bargain over the revised policy as it related to 49 CFR § 40.67(b), as that portion of the policy had been withdrawn to reflect the USDOT's own withdrawal of the amended sections, along with their federally-mandated changes. The City also argues that there is no independent violation of NYCCBL § 12-306(a)(1), as the Union did not allege any fact in support of that claim.

In its letter brief, the City withdraws its second defense, that the Union's claim was, in essence, not yet ripe, since it had withdrawn the policy during the pendency of the federal stay. It also argues that the recent developments do not substantially affect the City's other defenses. The City notes that the non-discretionary nature of the federal regulations were re-asserted by the USDOT in a recent statement that employers and employees do not have the authority to agree to avoid compliance with the requirements of federal law. Further, the City notes that previously the federal mandate gave employers the option to use direct observation testing on its employees for return to duty and follow-up drug testing, but that the DOT never exercised its option in these scenarios and has always maintained the least restrictive dug policy allowable under federal law.

DISCUSSION

The petition challenges the DOT's unilateral imposition of its own version of USDOT regulations regarding drug and alcohol testing on the Union's members. The DOT argues that the

application of the federal regulations is a matter fixed by law and may not be bargained. We hold that while compliance with the federal regulations is required of the DOT, the City must bargain with the Union over the implementation of the federal drug testing regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

As we held in *Local 333, United Marine Division, ILA*, 3 OCB2d XX (BCB 2010), a substantially similar matter, "while our authority does not extend to the administration of statutes other than the NYCCBL, a public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory law." *Id.*, at 9; *COBA*, 43 OCB 72, at 11 (BCB 1989).[1] Even if management action is taken pursuant to another statute, certain obligations–for example, bargaining over mandatory subjects–may arise under our law. *See DC 37*, 77 OCB 34, at 14-15 (BCB 2006) (procedures adopted pursuant to federal mandate nonetheless subject to bargaining where not specifically mandated by statute); *DC 37, L. 2507 & L. 3621*, 73 OCB 7, at 17-18 (BCB 2004); *PBA*, 39 OCB 41, at 6 (BCB 1987). In *Committee of Interns and Residents*, 35 OCB 25 (BCB 1985), although we refused to address the validity or applicability of § 822 of the New York City Charter to New York City Health and Hospitals Corporation ("HHC") employees, we found that HHC had certain bargaining obligations regarding implementation of that statute. Similarly, in *Doctors Council*, 69 OCB 31, at 10-11 (BCB 2002), while we found that the question of applicability of City Charter,

[1] Although the issues in *Local 333, United Marine Division*, 3 OCB2d XX are similar, the parties differ and the legal arguments asserted by the parties are sufficiently disparate as to warrant a separate decision.

Chapter 68, to the employees of HHC was beyond the Board's jurisdiction, we held that the union could seek bargaining over procedures for implementation of that statute to the extent that such negotiations were not inconsistent with the statute. *See LBA*, 63 OCB 23 (BCB 1999), *aff'd*, *City of New York v. Lieutenants Benev. Assn.*, 285 A.D.2d 329 (1st Dept. 2001) (City's procedure to process refunds of excess money paid by non-resident union members pursuant to New York City Charter § 1127 is a mandatory subject of collective bargaining).

In *Local 333, United Marine Division, ILA*, 3 OCB2d XX (BCB 2010), we decided that DOT's straightforward requirement that its employees comply with indisputably applicable new federal regulations governing drug testing was not, as a matter of law, subject to collective bargaining, but further held that the Union's demands to bargain over DOT's revised procedures adopted in order to implement such federal regulations related to mandatory subjects of bargaining, and are not forestalled by the federal mandate which occasioned them. *Id*. (citing *LBA*, 63 OCB 23, 14-15 (BCB 1999), *aff'd, City of New York v. Lieutenants Benev. Assn*., 285 A.D.2d 329 (1st Dept. 2001) (finding that, as New York City Charter § 1127 did not prescribe or bar the issue of refunds of excess moneys paid by non-resident, bargaining was required on that subject); *see City of Watertown*, 95 N.Y.2d at 80-81. It is beyond question that procedures applicable to drug testing are mandatory subjects of bargaining. Procedures themselves may include testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions of retesting, reporting and recording of test results, due process protections, and disciplinary consequences. *See DC 37*, 57 OCB 16 (BCB 1996); *see also DC 37*, 67 OCB 25 (BCB 2001) (employer's actions in unilateral broadening of the definition of "prohibited substances" under its drug policy, so as to encompass lawful commercially available products, eliminated the affirmative defense that a

positive result was the result of ingesting legally available products, altered the disciplinary procedures by precluding valid defenses, and was an improper practice because it impacted available defenses); *see CEA*, 77 OCB 38 (BCB 2006), *aff'd, Matter of City of New York v. Patrolmen's Benev. Assn.*, 56 A.D.3d 70 (1st Dept. 2008), *lv. granted on other grounds*, 12 N.Y.3d 707 (2009); *DEA*, 77 OCB 37 (BCB 2006); *see also CWA*, 67 OCB 26 (BCB 2001); *CWA*, 61 OCB 25 (BCB 1996).

It is uncontested that the policy is a unilateral change concerning the direct observation of the collection of specimens for drug testing, and the Union has shown that the implementation of the testing regulations directly relates to employees' terms and conditions of employment. Therefore, the Union had the right to request bargaining over the implementation of these and other requirements of the DOT drug testing regulations to the extent that the employer has discretion in implementing them. The regulations leave room for employer discretion in certain subject areas, such as the selection of "observers" (as opposed to "collectors") and the presence of Union representatives at the collection site, and are thus bargainable.[2] Therefore, as examples, the parties may bargain over: criteria and/or qualifications for the selection of the observer if one other than the collector is to be present; and whether a Union representative may accompany an employee summoned for direct observation urine testing and be present at the collection site in areas other than the urination facility.

The Union does not allege that any employee was subjected to testing involving direct

[2] The federal DOT regulations deal at length with the qualifications and training of "collectors," but CFR § 40.67(g) states that "the observer can be a different person from the collector and need not be a qualified collector." No criteria or training requirements are specified in the regulations for persons who are "observers." In addition, 49 CFR § 40.43(e)(1) provides that employee representatives authorized by the employer pursuant to a collective bargaining agreement are permitted in a collection site.

observation during the period that the stay was in effect, or for that matter, to the date that the letter briefs were submitted. Therefore, we order that the City bargain with the Union over the implementation of the federal drug testing regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure. Therefore, we grant the Union's petition as it relates to NYCCBL § 12-306(a)(4). We also find that the City violated derivatively, NYCCBL §12-306(a)(1). *See DEA*, 2 OCB2d 9, at 13 (BCB 2009); *see also DC 37*, 75 OCB 13, at 12 (BCB 2005); *UFOA*, 71 OCB 6 (BCB 2003). The Union, in its papers, alleges that the City violated § 12-306(a)(1) independently, but does not explain how the City has interfered, restrained, and coerced public employees in their exercise of self-organization rights. As a result, we dismiss that aspect of the Union's claims. Accordingly, we grant the Union's petition in part and deny it 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 petitions docketed as BCB-2748-09, and the same hereby are, granted as to all claims arising under NYCCBL § 12-306(a)(1) and (4), and it is further

ORDERED, that the improper practice petition docketed as BCB-2748-09, be and the same hereby is, dismissed as to any claim that the DOT violated NYCCBL § 12-306(a)(1) independently, and it is further

ORDERED, that the City bargain with the Union over the implementation of the federal drug testing regulations to the extent that compliance with the regulations permits discretion in how to achieve such compliance, and to the extent that the implementation procedures proposed to be bargained relate to the direct observation requirement that we find to constitute a change from the prior procedure.

Dated: New York, New York
February 25, 2010

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

I dissent. M. DAVID ZURNDORFER

MEMBER

I dissent. PAMELA S. SILVERBLATT
MEMBER