DC 37, Local 1759, 4 OCB2d 26 (BCB 2011)

(IP) (Docket No. BCB-2859-10).

Summary of Decision*:** The Union alleged that the New York City Business Integrity Commission violated NYCCBL § 12-306(a)(1) and (4) by unilaterally requiring that its employees wishing to engage in outside employment complete a new General Release in addition to providing information previously required. The Union argued that even if BIC did not have to bargain over its decision to require that employees grant BIC access to the requested information, BIC must bargain over related procedures. The City contended that it had no duty to bargain because its interest in the information, to ensure public and employee safety, outweighs an employee's privacy interest. The City also asserted that BIC had no duty to bargain because the change was *de minimis* and did not require increased employee participation. The Board held that the new requirement that employees provide the employer access to substantive information not previously required was not a *de minimis* change. Therefore, the Board found that BIC unilaterally changed a mandatory subject of bargaining. Accordingly, the Union's improper practice petition was granted. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 1759,

Petitioner,

-and-

THE CITY OF NEW YORK and
THE NEW YORK CITY BUSINESS INTEGRITY COMMISSION,

Respondents.

DECISION AND ORDER

On May 21, 2010, District Council 37, Local 1759 ("Union") filed an improper practice petition alleging that the City of New York ("City") and the New York City Business Integrity

Commission ("BIC") made unilateral changes to a mandatory subject of bargaining in violation of § 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 requiring employees wishing to engage in outside employment to complete a General Release, which would enable BIC to have greater access to employees' personal information. The Union further argues that even if BIC does not have a duty to bargain over its decision to require that employees grant BIC access to the requested information, BIC must bargain over related procedures. The City contends that it had no duty to bargain because its interest in the information, to ensure public and employee safety, outweighs the employee's privacy interest. The City also asserts that BIC had no duty to bargain over the procedures used to implement the General Release because the changes are *de minimis* and do not require increased employee participation. We hold that the new requirement that would require employees to grant the employer access to new substantive information is not a *de minimis* change. Therefore, we find that BIC unilaterally changed a mandatory subject of bargaining. Accordingly, we grant the Union's improper practice petition.

BACKGROUND

BIC is charged with enforcing and regulating the private carting, public wholesale markets, and shipboard gaming industries. BIC's mission is to eliminate organized crime, other corruption and criminal activity within these industries. The Union represents BIC employees in the titles Associate Market Agent, Market Agent, and Market Aide (collectively, "Market Agent"). Market Agents monitor and enforce market and trade waste laws and regulations under BIC's authority and applicable laws and regulations under the New York City Administrative Code and the Rules of the

City of New York. Market Agents may issue summonses for violations of these laws and regulations. Market Agents are considered Peace Officers pursuant to the New York City Administrative Code § 14-106 and Chapter 13 of Title 38 of the Rules of the City of New York. They also conduct inspections of markets and trade waste facilities, and prepare reports regarding unsafe conditions, property damage, crimes, accidents, and injuries.

In order to engage in outside employment, Market Agents have long been required to submit a Request for Outside Employment Form ("Outside Employment Form"), which requires that employees list the name of the proposed employer, the start date of the outside employment, the employer's address, whether the employee holds a proprietary interest in the business, the nature of the business, the job title, duties and responsibilities, and the proposed work schedule.[1] The City asserts that under the existing policy, Market Agents may not work at any outside firm within two hours of beginning or ending their tour with BIC in order to ensure that their outside employment does not interfere with their ability to perform their BIC duties.

In addition to the Outside Employment Form, on May 5, 2010, BIC issued a General Release, which employees are required to sign in order to apply for permission to engage in outside employment. By signing the General Release, the employee authorizes the outside employer to release certain information to BIC. In pertinent part, the General Release states:

> I . . . hereby acknowledge that I am employed by [BIC] and at the below-referenced company. I hereby grant permission for the below-referenced company to release to [BIC] copies of all time and leave records relating to my employment at the below-referenced company including, but not limited to, records indicating my attendance, hours

[1] The 2010 Outside Employment Form, issued on May 5, 2010, is substantially similar to the Outside Employment Forms issued in previous years.

> worked, annual leave used, disability leave used and sick leave used at the below-referenced company.

(Pet. Ex. B). Prior to the creation of the General Release, the City could request and obtain outside employment records by conducting a formal disciplinary investigation.

On May 12, 2010, the Union wrote to BIC objecting to the General Release and demanding that BIC cease and desist from requiring that employees submit it. On May 18, 2010, BIC responded to the Union's letter, reiterating that all BIC employees applying to engage in outside employment must sign the General Release.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that BIC's unilateral decision to require that Market Agents complete a General Release in order to receive permission to engage in outside employment violates NYCCBL § 12-306(a)(1) and (4).[2] The employees' interest in maintaining their privacy outweighs the

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[2] NYCCBL § 12-306 provides, in pertinent part:

> a. Improper public employer practices. 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:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively

employer's interest in obtaining the employees' personal time and leave records from other employers. Therefore, BIC's requirement that employees sign the General Release is a mandatory subject of bargaining.

Despite its bargaining obligation, BIC did not inform the Union before it issued the General Release. Even after BIC was notified of the Union's objection, it reiterated that employees would be required to submit the General Release or otherwise would be denied permission to hold outside employment. The Union notes that while BIC did not state a reason for requiring this information, the Union believes that BIC wishes to check that employees are not using sick leave to report to outside jobs.

The Union does not object to the Outside Employment Form, which BIC has required employees to submit for years. The Outside Employment Form contains information about the proposed outside employer, the job title, work schedule, and duties. It also requires that employees declare that they "will not engage in any business or transaction or private employment, direct or indirect, which will be in conflict with the proper discharge of [their] official duties at [BIC]." (Pet. Ex. A). Thus, the Union argues that the Outside Employment Form is sufficient to meet BIC's need for information.

In contrast to the Outside Employment Form, the General Release requires that employees give permission to release information from their outside employer without limit. The Union takes issue with the General Release's statement that records would be "not limited to" the referenced attendance, hours, and annual, disability and sick leave used by an employee. According to the

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> through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

Union, because the General Release is "not limited to" such information, it would likely authorize the release of private medical documentation related to disability and sick leave. Also, the General Release does not contain any time restrictions; therefore, the Union contends that employees may be required to authorize the release of past, present, and future records.

Moreover, the General Release requires the release of time and leave records, which contain private information, including records of off-duty conduct. In determining whether an employer's interest outweighs an employee's privacy interest, courts have considered whether the information at issue is public information. The time and leave records that BIC seeks are clearly not public information. Further, time and leave records from an outside employer should have no bearing on an employee's request to engage in outside employment. The relevant factors, as described on the Outside Employment Form, concern potential conflicts of interest. However, requiring time and leave records from an outside employer should relate only to a disciplinary investigation.

The General Release is overly broad; there are less intrusive methods to procure the same information. The employer should require only that employees sign a waiver like the General Release if the employer reasonably believes the employee has not provided truthful information. Further, this new requirement that employees sign the General Release is not a *de minimis* procedural change as the City argues; it is a significant change in procedure. Previously, employees were required only to list their outside work schedule and their employer's contact information. Now, they must sign a waiver authorizing the release of information that is personal and private.

Further, unilaterally requiring employees to sign the General Release creates a new mandatory task that employees must complete. Even if BIC is not required to bargain over the General Release, it must bargain over the procedures related to the information disclosure. This

Board has held that procedures must be bargained when they require employee participation in the disclosure of personal information.

City's Position

The City argues that it has no duty to bargain because the pertinent balancing test, which weighs the employer's interests against the employees' privacy interest, weighs in the City's favor. The General Release does not create an invasion of employee privacy such that it changes a term or condition of employment. The General Release is targeted at verifying only relevant information about an employee's actual schedule and attendance at outside employment.

Market Agents act as Peace Officers, combating organized crime and working to ensure public safety. They also operate vehicles, direct traffic and perform inspections. Therefore, their fitness for duty and trustworthiness are central to the mission of the agency. BIC has an interest in the information requested in the General Release because the agency is concerned with preventing fraud, maintaining efficient operations, and protecting its employees and the public. Further, Market Agents may not work at any outside firm within two hours of beginning or ending their tour with BIC. This policy exists to ensure that outside employment does not interfere with an employee's ability to perform BIC duties. BIC must be able to verify that employees are not working double shifts or otherwise performing work that would interfere with their BIC duties and would endanger the safety of employees and the public. Even if employees disclose their general outside employment schedule, this information is insufficient because schedules may change frequently. These factors weigh in favor of the employer's interest in having access to the information requested in the General Release.

According to the city, the Union illogically argues that BIC should pursue its interest through the disciplinary process because "becoming the subject of a full-blown disciplinary investigation would prove less destructive of an applicant's privacy interests than authorizing the prospective release of attendance information." (Ans. ¶ 44). Investigating an employee for discipline after an accident occurs, however, does not address BIC's interest in ensuring the health and safety of its employees and the public.

BIC has no duty to bargain over the procedures used to implement the General Release because the changes are *de minimis* and do not involve increased employee participation. In fact, the Union acknowledges that the information requested on the Outside Employment Form has not changed. Further, BIC has always required that its employees disclose information about attendance at outside employment, and it has been able to verify this information by obtaining records through a formal investigation and subpoena. Therefore, the General Release is simply a means to enable BIC to review information to which it already has access.

Finally, although the language at issue, "including but not limited to," may seem broad, when it is read in the context of the document, it is clearly focused on information related to attendance. These employees already disclose similar information about their outside work schedule on the Outside Employment Form. The General Release does not request personal information such as an employee's medical history, as the Union contends.

DISCUSSION

NYCCBL § 12-306(a)(4) prohibits a public employer from "refus[ing] to bargain in good faith on matters within the scope of collective bargaining with certified or designated representatives

of its public employees." *DC 37*, 77 OCB 8, at 7-8 (BCB 2006). Where management makes a unilateral change to a mandatory term and condition of employment, it accomplishes the same result as if it had refused to bargain in good faith, and likewise commits an improper practice. *See DC 37,* 75 OCB 14, at 13 (BCB 2005). Mandatory subjects of bargaining include wages, hours, and working conditions as well as any subject with a significant or material relationship to a condition of employment. *See* NYCCBL § 12-307; *LEEBA,* 3 OCB2d 29, at 5 (BCB 2010); *EMS Superior Officers Assn*, 75 OCB 15, at 5 (BCB 2005); *DC 37*, 73 OCB 7, at 15 (BCB 2004). As we explained in *CEU*, 2 OCB2d 37, at 14 (BCB 2009), "[s]ince neither the NYCCBL nor the Civil Service Law expressly delineates the nature of 'working conditions,' or 'conditions of employment,' both this Board and PERB determine on a case-by-case basis the extent of the parties' duty to negotiate." *Id*., quoting *DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006); *see also UFOA, L. 854*, 45 OCB 4, at 8 (BCB 1990); *DC 37*, 45 OCB 1, at 7-8 (BCB 1990). This case-by-case determination "takes the form of a balancing test which weighs the interests" of the public employer and those of the employees at issue with "respect to that subject under the circumstances of the particular case, an approach also employed by PERB under the cognate provisions of the Taylor Law." *Id.; citing DC 37*, 75 OCB 8, at 7-8; *see also State of New York (Dept. of Corr. Serv.)*, 38 PERB ¶ 3008 (2005).

This Board employs the balancing test articulated by the Court of Appeals in *Levitt*, which weighs the interests of the public employer against the interests of the employees. *See Matter of Levitt v. Bd. of Collective Bargaining*, 79 NY2d 120 (1992). As to information disclosure, generally, the balancing test weighs in favor of the employer's interest when the requested information is publicly available. *Id.* However, where the information sought is private and personal, the balancing

test weighs in favor of the employee. *Matter of Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Pub. Empl. Rel. Bd.*, 75 NY 2d 660 (1990).

There are circumstances where an employer may articulate an interest allowing it to make unilateral changes in terms and conditions of employment. *Local 2627, DC 37*, 2 OCB2d 37(BCB 2009) (finding that employer could unilaterally implement a new standard regulating visible tattoos where employer's interest in delivering services in a non-threatening atmosphere outweighed employees' interest in their appearance while on duty). However, "the mere fact that a work rule has a relationship to an employer's mission does not permit an employer to act unilaterally in any manner it deems appropriate." *City of Albany*, 42 PERB ¶ 3005 (2009). Establishing a violation of NYCCBL § 12-306(a)(4) in unilateral change cases requires a showing that the matter sought to be negotiated is a mandatory subject of bargaining and that the policy or practice was changed. *SSEU, L. 371,* 1 OCB2d 20, at 9 (BCB 2008) (citing *UFOA*, 1 OCB2d 17, at 9-10 (BCB 2008), and *DC 37,* 75 OCB 14, at 12 (BCB 2005).

In this case, there is no dispute that a change occurred; the parties agree that BIC has instituted a new requirement that employees complete the General Release in addition to the Outside Employment Form. The City contends that requiring that employees sign the General Release was merely a *de minimis* procedural change that does not require bargaining. We do not agree. While the requirement that employees sign a new form may itself be a minimal change in procedure, the effect of this change necessitates that employees waive substantive rights and diminishes the employees' right to privacy. *See Matter of Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Pub. Empl. Rel. Bd.*, 75 NY 2d 660 (1990) (finding that employer's unilaterally implemented financial and background disclosure requirements were subject to mandatory collective bargaining).

We find that BIC's decision to now require that employees wishing to engage in outside employment grant BIC unlimited access to records at another employer is a significant substantive change as it grants the employer access including but not limited to records of an employee's attendance, hours worked, annual leave, disability leave and sick leave. Since we have determined that the new requirement that employees sign the General Release in order to seek permission to engage in outside employment is not a *de minimis* change, we must balance the interests of the employer against the employees' privacy interest to determine whether the matter requires bargaining. We find that it does.

As the Appellate Division, Second Department, has recently stated "an employer's restriction on the use of nonworking time by employees is a term and condition of employment and, in general, constitutes a mandatory subject of negotiations." *N.Y. City Transit Auth. v. N.Y. State Pub. Empl. Rel. Bd.*, 78 A.D.3d 1184, 1185 (2d Dept. 2010) (upholding PERB's finding that an employer failed to bargain before implementing new standards governing off-duty employment); *see also UFA*, 37 OCB 43 (BCB 1986) (restrictions on outside employment are a mandatory subject of bargaining). The General Release requires that employees grant BIC access to private, personal information in order to engage in outside employment. The General Release is unclear as to the precise nature of the information to which employees are granting BIC unlimited access. Indeed, the General Release states that the employee grants BIC permission access to "all time and leave records relating to my employment at the below-referenced company *including, but not limited to*, records indicating my attendance, hours worked, annual leave used, disability leave used and sick leave" at the outside employer. (Pet. Ex. B) (emphasis added).

BIC made clear its concerns, including preventing fraud, maintaining efficient operations, and protecting its employees and the public. Still, given the broad language of the General Release, the fact that it does not limit the access employees are granting to BIC by signing the General Release, we find that the employees' privacy interest is more compelling. Therefore, we find that the balance weighs in favor of the employees. Accordingly, we grant the improper practice petition and direct the City to cease and desist from requiring employees to complete the General Release and to provide such other relief as specified in the Order.

ORDER

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

ORDERED, that the improper practice petition filed by District Council 37, Local 1759, docketed as BCB-2859-10, is hereby granted; and it is further

ORDERED, that the City of New York and the New York City Business Integrity Commission cease and desist from requiring that employees complete the General Release until such time as the parties bargain over any such changes; and it is further

ORDERED, that the City of New York and the New York City Business Integrity Commission provide the Union with a certification confirming that all General Release forms in its possession have been destroyed; and it is further

ORDERED, that the City of New York and the New York City Business Integrity Commission post the attached notices reflecting the Board's determination in this matter.

Dated: June 1, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 4 OCB2d 26 (BCB 2011), determining an improper practice petition between District Council 37, Local 1549, and the City of New York and the New York City Business Integrity Commission.

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

ORDERED, that the improper practice petition filed by District Council 37, Local 1759, docketed as BCB-2859-10, is hereby granted; and it is further

ORDERED, that the City of New York and the New York City Business Integrity Commission cease and desist from requiring that employees complete the General Release without negotiating with the Union; and it is further

ORDERED, that City of New York provide the Union with a certification confirming that all General Release forms in its possession have been destroyed; and it is further; and it is further

ORDERED, that City of New York this notice detailing the above-stated violations of the NYCCBL.

The New York City Police Department
(Department)

Dated:

(Posted By)

(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.