DC37, 4 OCB2d 43 (BCB 2011)

(IP)(Docket No. BCB-2911-10).

Summary of Decision: Petitioner alleged that the City violated the duty to bargain by unilaterally reallocating parking spaces in a garage adjacent to the workplace which had been available on an "as available" basis to both Police Communication Technicians and Supervising Police Communication Technicians to SPCTs only. The City argued that the reallocation did not amount to more than a *de minimis* change, since the SPCTs were members of the same unit, and other spaces were available for the PCTS. The City further argued that the change fell within its right to maintain efficiency of government operations. The Board found that the change was to a mandatory subject of bargaining, and was not a *de minimis* change. The Board further found that the change did not fall within management's right to maintain efficient government services, and granted the instant improper practice petition. ***(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,
AND ITS AFFILIATED LOCAL 1549,

Petitioners,

- and -

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

Respondents.

DECISION AND ORDER

On November 23, 2010, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1549, (collectively, "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD") claiming that the 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"). Petitioner alleged that the City violated the duty to bargain by unilaterally reallocating parking spaces in a garage adjacent to the workplace, which had been available on an "as available" basis to both Police Communication Technicians ("PCT") and Supervising Police Communication Technicians ("SPCT"), to SPCTs only. The City argued that it the reallocation did not amount to more than a *de minimis* change, since the SPCTs were members of the same unit, and other spaces were available for the PCTS. The City further argued that the change fell within its right to maintain efficiency of government operations. The Board found that the change was to a mandatory subject of bargaining, and was not a *de minimis* change. The Board further found that the change did not fall within management's right to maintain efficient government services, and granted the instant improper practice petition.

BACKGROUND

During any given shift period, some 200 PCTs and some 30 SPCTs are assigned to work at 11 Metro Tech Center in Brooklyn, the location of NYPD's Communications Section. PCTs receive 911 emergency phone calls from the public and forward the information to dispatchers who deploy City personnel in response to the emergencies. The area surrounding 11 Metro Tech is a business district often congested with traffic entering Tillary Street from the Brooklyn and Manhattan Bridges and the Brooklyn-Queens Expressway, and with traffic coming from and going to several academic institutions in the area.

Prior to a construction project in the garage at 11 Metro Tech, twenty-five spaces in the garage were allocated exclusively to PCTs and SPCTs, and were available on a first-come, first-

served basis. By memorandum dated August 10, 2010, Vincent Guerriera, Commanding Officer of the Communications Section, notified employees of the Communications Section that effective August 11, 2010, only supervisory employees, including SPCTs, would be authorized to use the free parking spaces in the Metro Tech garage, designating the 25 spots previously available to both SPCTs and PCTs for SPCTs only.

The City asserts, based on an affidavit by Guerriera ("Guerriera Aff.") accompanying its Answer, that the change was occasioned by the impending installation of security barriers at various locations around the Metro Tech garage. The construction would limit access from Tillary Street to the garage and the designation of garage parking for supervisors-only was intended to prevent road blockage due to double-parking on Tillary Street as employees waited for available parking in the garage. (Guerriera Aff. ¶¶ 16-17).

The City further contends that the double-parking of their cars by PCTs and SPCTs became problematic especially during shift changes. In addition to causing congestion on Tillary Street, the double parking resulted in some employees taking breaks to attempt to park in one of the garage spaces. The City adduced testimony that some PCTs and SPCTs left their cars double-parked throughout the entire work day, despite what he said were up to four dozen parking spaces along the perimeter of 11 Metro Tech in "self-enforcement zones," *i.e.*, parking designated by the Department of Transportation ("DOT") as reserved specifically for use by NYPD personnel with permits. (Guerriera Aff., ¶¶ 9-10). According to the City, those self-enforcement areas were available at the time of the events at issue and continue to be available. In addition, the City asserts that there are 100 parking spaces within 1,000 feet of 11 Metro Tech, including spaces in the vicinity of the 84th

Police Precinct, which are also not open to the general public.[1] The Union contends that PCTs compete with public employees in other titles, such as Police Officers and Fire Alarm Dispatchers, for those same spaces.[2]

The City asserts that the decrease in the double-parking on Tillary Street has facilitated

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[1] In its attachment to a stipulation of disputed and undisputed facts in the instant proceeding, which the Trial Examiner requested at one of the conferences in the case, the City avers that PCTs are permitted to use the following self-enforced parking spaces:

Metro Tech Perimeter Parking	*Number of Parking Spaces*	*Distance from 11 Metro Tech*
Tech Place & Bridge Street	10	app. 266 ft
South of Tillary & Bridge Sts intersection	17	app. 528 ft
84th Precint-Area Parking	*Number of Parking Spaces*	*Distance from 11 Metro Tech*
Tillary St. & Flatbush Ave.	8	app. 2,112 ft.
Tillary St. & Gold St.	31	app. 2,112 ft.
Tillary St. & Prince St.	43	app. 2,640 ft.
North of Tillary & Prince Sts.	77	app. 2,640 to 3,000 ft.

Neither the number of spaces nor their distance from 11 Metro Tech was disputed in the Union's May 18, 2011, letter response to the City's May 13, 2011, letter in response to the Trial Examiner's request for clarification on, *inter alia*, this point. (*See* Mikhail letter, p.1). However, the actual number of parking spaces available to the PCTs and the distance of those parking spaces from 11 Metro Tech are not dispositive of the issue before the Board.

[2] In its May 13, 2011, letter to the Trial Examiner, the City asserts that "approximately 40 NYPD employees per shift" compete with PCTs for parking in those spaces, not the 122 Police Officers assigned to duty on any one of three daily shifts. (Kuyumjian letter, p. 2). The City's letter does not specify how many employees in other NYPD titles also compete for the spaces. The City lists those titles as Detectives, Police Administrative Aides, Senior Police Administrative Aides, and Custodians. The title of Fire Alarm Dispatcher is not included in the City's list of titles accessing the parking spaces at issue. However, here, too, the actual number of NYPD employees vying for the parking spaces which are also available to the PCTs is not dispositive of the issue before the Board.

traffic movement and safety measures associated with emergency response and overall public safety in the area around 11 Metro Tech. The City further alleges that PCTs and SPCTs no longer leave during work hours to move their double-parked cars into the garage.

By letter dated September 3, 2010, the Union's Assistant Director of Research and Negotiations objected to the change in garage parking and asked for a meeting about it. By letter dated September 13, 2010, The Deputy Commissioner of the New York City Office of Labor Relations replied, stating that there had been no change in the availability of parking for PCTs in the zone around 11 Metro Tech and that there was no reduction in the number of parking spaces available overall. The letter further stated that "there has never been a guarantee of free parking to any member of the bargaining unit," and that while NYPD did not agree with the Union's view on the matter, he had been informed that NYPD was willing to meet with the Union to discuss the matter. (Ans. Ex. 5).[3] There is no assertion by either party that any subsequent communications took place, and the City acknowledges that the Communications Section has continued to implement the policy. The instant proceeding followed.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the NYPD made a unilateral change to a mandatory term and condition of employment for PCTs and SPCTs in its bargaining unit, *i.e.*, the provision of free parking at 11 Metro Tech, their place of work. Although both PCTs and SPCTs are members of the same

[3] The Union asserts, in its Reply, that it has not ascertained as of the filing of the instant petition as to whether the Union received the September 13, 2010, letter.

bargaining unit, the Union asserts that the change, which authorizes only SPCTs to access 25 Metro Tech garage spaces, negatively affect PCTs by requiring them to utilize parking outside of the garage. The Union contends that the availability of free parking, even on a first come-first served basis, is a well-established mandatory subject of bargaining, and that the change is not *de miminis*. Rather, the Union argues, a "substantial and material change" has been made in PCTs' terms and conditions of employment as a result of the diminished availability of parking for those bargaining unit members.

The Union asserts that because free parking has long been recognized as a mandatory subject of bargaining the change cannot be exempted from bargaining as a measure intended to increase the efficiency of governmental operations under NYCCBL § 12-307(b). By failing to bargain with the Union over the prohibition against use by PCTs of the parking garage, the City has violated NYCCBL § 12-306(4). And by interfering with the members' rights to collectively bargain pursuant to NYCCBL § 12-305, the City also has violated NYCCBL § 12-306(1).[4]

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[4]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 activities. . . .

City's Position

The City does not dispute that the Board and Public Employment Relations Board ("PERB") have found circumstances in which the provision of free parking has been determined to be a mandatory subject of bargaining, and does not argue that such is generally the case. The City contends, however, that no terms or conditions of employment were changed for the bargaining unit as a whole since no parking spaces were reduced or eliminated by the memorandum. The City asserts that mere reallocation of parking to SPCTs, who are members of the same bargaining unit as PCTs, does not amount to a unilateral change under these circumstances. Moreover, the availability of other free parking outside of the garage means that any resulting inconvenience to the PCTs themselves is also *de minimis*. As there has been no such change, the City argues that no duty to bargain arises over the reallocation of parking spaces. Moreover, should the Board find that the reallocation of spaces within the bargaining unit constitutes a change, any such change is *de minimis*, as not being material, substantial or significant. Such *de minimis* change does not give rise to the duty to bargain, and therefore the petition should be denied.

Additionally, the City argues that the reallocation of parking spaces, even if deemed to constitute a non-*de minimis* change, falls within management's right to maintain the efficiency of governmental operations under § 12-307 (b) of the NYCCBL, and claims that the prior policy led to double parking near the worksite, creating heavy traffic and public safety concerns. Under § 435 of the City Charter, the City contends, the NYPD "has a duty. . . to regulate, direct, control the parking of vehicles and the movement and conduct of vehicles." (Ans., n. 8). Thus, the City has not violated NYCCBL § 12-306(4), or (1) either independently or derivatively.

DISCUSSION

Pursuant to NYCCBL § 12-307(a), "public employers and employee organizations have a duty to bargain in good faith concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *DC 37*, 3 OCB2d 5, at 7 (BCB 2010), citing *DC 37*, 75 OCB 8, at 6-7 (BCB 2005). Under NYCCBL § 12-306(a)(4), "an employer commits an improper practice when it refuses to bargain in good faith on matters within the scope of collective bargaining." *DC 37*, 3 OCB2d 5, at 7 (citing *DEA*, 2 OCB2d 9 (BCB 2009)). Therefore, under our law an employer commits an improper practice when it makes a unilateral change in a term and condition of employment. *Id.*; *see also Local 2507*, 63 OCB 35, at 12 (BCB 1999).

To "prove a claim sounding in an employer's refusal to bargain in good faith resulting in a unilateral change to a term or condition of employment, the Union must establish first that the matter sought to be negotiated is a mandatory subject of bargaining." *SSEU, L. 371*, 1 OCB2d 20, at 9-10 (BCB 2008) (citing, *inter alia*, *DC 37,* 75 OCB 14, at 12 (BCB 2005); *DeMelia*, 25 OCB 14, at 5 (BCB 1980)). The petitioner "further must 'demonstrate the existence of such a change from the existing policy or practice.'" *Id.* (quoting *UFOA*, 1 OCB2d 17, at 10 (BCB 2008)); *see also PBA*, 73 OCB 12, at 17 (BCB 2004); *SSEU*, 69 OCB 10 (BCB 2002).

In determining whether a unilateral change took place, we have distinguished between a "material" change and one which is *de minimis*–that is, a change in form only, which does not require increased participation on the part of the employee, or alter the substance of the benefit to the employee, does not suffice to establish an improper practice. *See, e.g., CEU, L. 237*, 2 OCB2d

37, at 12-13 (BCB 2009); *UFA*, 4 OCB2d 3, at 7 (BCB 2011).[5] Thus, in *DEA*, 2 OCB2d 11, at 16, a requirement that an employee seeking a parking permit complete a form eliciting the same information as was previously required to be submitted in writing was deemed *de minimis* and no improper practice established. *Id.; see also DC 37*, 77 OCB 34 (BCB 2006) (change requiring employee to submit a physician's certificate during a protracted illness "on the first day of the month" rather than "at the end of each month" was *de minimis*); *PBA*, 73 OCB 12, at 16-17 (BCB 2004), *affd, Matter of Patrolmen's Benev. Assn. v. NYC Board of Collective Bargaining,* No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd,* 38 A.D.3d 482 (1st Dept 2007) (change in a policy's language regarding employees' participation in interviews was *de minimis*).

Our cases, and those of PERB, have consistently held that "the availability of free parking, whether the employees use their personal vehicles in the performance of their duties or not, is a mandatory subject of bargaining." *DEA*, 2 OCB2d 11, at 13 (citing *DC 37*, 71 OCB 12, at 8 (BCB 2003); *SSEU*, 1 OCB 22, at 15 (BCB 1968)). In *DC 37*, 71 OCB12, the question of continued availability of such parking in the wake of construction which necessitated the destruction of spaces previously available to unit employees was held to be a mandatory subject of bargaining. *Id*. at 8

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[5] The City quotes the National Labor Relations Board's ("NLRB") use of the terms "material, substantial and significant" and suggests that these terms "outline[] the applicable standard." (Ans. ¶¶ 53, 54). We have not adopted, and do not adopt, this formulation. We have found changes deemed to be *de minimis* as "not sufficiently significant" to warrant bargaining when they do not affect the substance of the benefit or increase the employee's participation in procedures. *See DEA*, 2 OCB2d 11, at 17. In distinguishing between actionable unilateral changes and those which are merely *de minimis*, we note that under the Taylor Law, PERB has, as have we under the NYCCBL, used the term "material." *See, e.g., County of Chatauqua*, 22 PERB ¶ 3060 at 3137 (1989). Morever, under the Taylor Law, "the value of the benefit at issue is not judged by the Board; the only issue is whether it affects terms and conditions of employment." *Board of Education*, 42 PERB ¶ 4568, at 4760 (ALJ 2009), *affd*., 44 PERB ¶ 3003 (2011) (citing *County of Nassau*, 32 PERB ¶ 3034 (1999); *County of Nassau*, 25 PERB ¶ 4555 (1992)).

(citing *County of Nassau*, 14 PERB ¶ 3083 (1981), *affd.*, *Matter of County of Nassau v. Pub. Empl. Rel. Bd*., 15 PERB ¶ 7002 (Sup. Ct. Nassau Co.), *affd.,* 90 A.D.2d 693 (2d Dept.), *app denied*, 58 N.Y.2d 603 (1982)).

The City seeks to distinguish these cases on the grounds that in the instant matter employees never had a guarantee of a parking spot but only an opportunity to try to obtain one. However, PERB has found, on strikingly similar facts, that such an opportunity to obtain a space is a mandatory subject of bargaining:

> There is no evidence that any unit member lost his parking privileges; it is clear, however, that the new parking facility is less desirable than the old because of distance and that the curtailment of the original available space was occasioned by the County's decision to expand its building. Even though parking was permitted on a "space available" basis, it was nonetheless quantifiable and diminished in convenience. The subject matter being a term and condition of employment, the County's failure to negotiate the change was an improper practice.

County of Schenectady, 18 PERB ¶ 4550, at 4598 (ALJ), *affd*, 18 PERB ¶ 3038 (1985); *see also*, *Board of Education, City Sch. Dist. New York*, 42 PERB ¶ 4568 at 4759-4760 (ALJ 2009) (rejecting employer's argument that no change affecting a mandatory subject of bargaining took place as "there was no entitlement to a parking spot, but only the opportunity to get a spot"; following *County of Schenactady*), *affd*, 44 PERB ¶ 3003 (2011). We agree that "the entitlement to a parking space if one is located affects terms and conditions of employment and. . . is not *de minimis." Board of Education*, 42 PERB ¶ 4568 at 4760.

We also are not persuaded by the City's claim that the unilateral change to allow only the SPCTs to avail themselves of these spaces did not constitute a change, or, if it did, was *de minimis*. The fact that some employees retained access to the "immediately adjacent" parking lot does not

render the change non-existent or *de minimis*. A unilateral change which provides a benefit to some (but not all) unit members remains actionable by the union representing both the beneficiaries of the change as well as those who are not. *See, e.g., PBA*, 3 OCB 2d 18, at 31-32 (BCB 2010).

Likewise, we reject the City's contention that the continued availability of more distant parking somehow renders the change non-existent or *de minimis*. We agree with the Administrative Law Judge's decision upheld by PERB that "the value of the benefit at issue is not judged by the Board; the only issue is whether it affects terms and conditions of employment." *Board of Education*, 42 PERB ¶ 4568, at 4760; *see also City of Schenectady*, 18 PERB ¶ 4550, at 4599 (availability of more distant lot did not render loss of access to "immediately adjacent" lot non-actionable as *de mimimis*). In accordance with these PERB decisions, and with our own prior decisions, we find the change here was not *de minimis*, and to have constituted an improper practice in violation of NYCCBL § 12-307(a).

Finally, we reject the City's argument that the change falls within management's right to maintain the efficiency of governmental operations under § 12-307(b) of the NYCCBL. As we have explained:

> The NYCCBL reflects such a legislative "prebalancing" of interests. Section 12-307(a) enumerates certain subjects that the legislature has determined to be mandatorily bargainable (*e.g.*, wages, hours and working conditions), while § 12-307(b) identifies those subjects that the legislature has reserved for managerial discretion (*e.g.*, the right to direct its employees, to determine the methods, means, and personnel by which government operations are to be conducted). Certain of the reserved rights are described in specific terms, such as the right to determine the content of job classifications and the right to relieve employees because of lack of work, and other rights are stated in more general terms, such as the right to "maintain the efficiency of government operations."

DC 37, L. 1457, 1 OCB2d 32, at 28 (BCB 2008) (quoting *DC 37,* 75 OCB 13, at 8 (BCB 2005).

Both of these cases, relied upon by the City, involved "[t]he subject of searches of and seizures from DOT-provided storage facilities used by employees" which, we held, " is not among the rights expressly referred to in the NYCCBL" and thus required our balancing of the interests involved to determine the contours of bargainability. *DC 37,* 75 OCB 13, at 8; *DC 37, L. 1457*, 1 OCB2d 32, at 28-29, 33-35. By contrast, that the provision of free parking is a mandatory subject of bargaining has been long and authoritatively settled by our decisions and those of PERB. Accordingly, no resort to generalized balancing of interests is called for, or, indeed, appropriate.[6]

For the reasons stated above, we grant the instant improper practice petition and direct the City to negotiate the change in availability of parking spaces for PCTs and SPCTs, and we direct the City to rescind the memorandum dated August 10, 2010, by which employees of the NYPD Communications Section were notified that, effective August 11, 2010, only SPCTs would be authorized to use the 25 parking spaces in the Metro Tech garage which both PCTs and SPCTs previously had been authorized to use on a first-come, first-served basis regardless of civil service title. We further direct that the City post a Notice of this Decision and Order.[7]

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[6] Similarly, we reject the argument that the NYPD's performance of its duty under § 435 of the City Charter to "regulate, direct, control and restrict the movement of vehicular and pedestrian traffic" has any bearing on the issues before us here. Aside from the inconsistency between the City's contention that no change was made because PCTs are free to park in designated spots on the street and its claim that the change will reduce the traffic flow on the street, the question before the Board is not traffic regulation, but the unilateral change to the mandatory subject of free parking, whether in a garage or on the street. As we have often held, "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." *DC 37*, 3 OCB2d 12, at 9 (BCB 2010); *see also COBA*, 43 OCB 72, at 11 (BCB 1989).

[7] We decline to order the Union's requested remedy of directing the City to reimburse PCTs whom the Union alleges have purchased parking space since the issuance of the August 10, 2010,

ORDER

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

ORDERED, that the improper practice petition docketed as BCB-2911-10, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1549, against the City of New York and the New York City Police Department be, and the same hereby is, granted; and it is further

ORDERED, that the City rescind the memorandum dated August 10, 2010, by which employees of the New York City Police Department Communications Section were notified that, effective August 11, 2010, only Supervising Police Communication Technicians would be authorized to use the 25 parking spaces in the Metro Tech garage which both Police Communication Technicians and Supervising Police Communication Technicians previously had been authorized to use on a first-come, first-served basis regardless of civil service title; and it is further

DIRECTED, that the City post the attached Notice of this Decision and Order for no less than thirty (30) days at all locations used by the NYPD for written communications with employees represented by the Union.

Dated: August 18, 2011
New York, New York

MARLENE A. GOLD
CHAIR

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memo because there are no specific factual allegations about any resulting parking expenses incurred by PCTs due to any unavailability of the alternative parking provided for them.

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
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 43 (BCB 2011), in final determination of the improper practice petition between District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1549, and the City of New York and the New York City Police Department.

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

ORDERED, that the improper practice petition docketed as BCB-2911-10, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1549, against the City of New York and the New York City Police Department be, and the same hereby is, granted; and it is further

ORDERED, that the City rescind the memorandum dated August 10, 2010, by which employees of the New York City Police Department Communications Section were notified that, effective August 11, 2010, only Supervising Police Communication Technicians would be authorized to use the 25 parking spaces in the Metro Tech garage which both Police Communication Technicians and Supervising Police Communication Technicians previously had been authorized to use on a first-come, first-served basis regardless of civil service title; and it is further

DIRECTED, that the City post this Notice of Decision and Order for no less than thirty (30) days at all locations used by the NYPD for written communications with employees represented by the Union.

The City of New York
(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.