

DC 37, 5 OCB2d 21 (BCB 2012)
(IP) (Docket No. BCB-2949-11)

Summary of Decision: The Union claimed that the NYPD violated its duty to bargain in good faith by unilaterally requiring employees to disclose private information regarding their location during absence and related contact information when requesting leave. The City argued that the claim was time-barred and that, even if the claim was found to be timely, there was no duty to bargain because the NYPD's managerial interests in maintaining the efficiency of its operations and taking necessary action during emergencies outweigh employees' privacy interests in the information requested. The City further argued that the alleged change was, at most, *de minimis*. The Board found that the petition was timely and that the NYPD made a unilateral change to a mandatory subject of bargaining with respect to employees who are not necessary to carry out the NYPD's mission in the event of an emergency. However, the Board found that the change concerned a non-mandatory subject of bargaining with respect to those employees who are necessary to carry out the NYPD's mission in the event of an emergency. Accordingly, the Board granted the petition in part and directed the parties to appear at a hearing to determine the appropriate remedy. (*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 CITY OF NEW YORK and
THE NEW YORK CITY POLICE DEPARTMENT,**

Respondents.

INTERIM DECISION AND ORDER

On April 15, 2011, District Council 37, AFSCME, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police

Department (“NYPD” or “Department”). The Union claims that the City and the NYPD violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by unilaterally changing the procedure and practice regarding employee leave requests to require employees to complete the “Location During Absence” section of the NYPD’s Leave of Absence Report. The Union asserts that the requirement of employees to disclose private information regarding their location and related contact information while on authorized leave infringes upon employees’ privacy interests, which outweigh the NYPD’s interest in being able to contact its employees in the event of an emergency. The City argues that the claim is time-barred because the substantive and procedural requirements for preparing the leave of absence request form have not changed and for at least 17 years the Union has had constructive knowledge of the requirement for employees to provide information about their location during absence. Notwithstanding its timeliness defense, the City argues that, even if a unilateral change is found, it has no duty to bargain because the NYPD’s managerial interests in maintaining the efficiency of its operations and taking necessary action during emergencies outweigh employees’ privacy interests in the information requested. The City further argues that the NYPD’s revision to the Patrol Guide merely reiterates and clarifies a longstanding policy and that the alleged change is, at most, *de minimis* because it has not increased employee participation in the process of requesting leave. This Board finds that the petition is timely, that the NYPD made a non-*de minimis* unilateral change, and that, with respect to those employees who are not necessary to carry out the NYPD’s mission in the event of an emergency, the requirement of employees to complete the Location During Absence section of the Leave of Absence Report is a mandatory subject of bargaining. However, with respect to those employees who are necessary to carry out the NYPD’s mission in the event of an

emergency, the requirement of employees to complete the Location During Absence section of the Leave of Absence Report is a non-mandatory subject of bargaining. Because the record does not provide this Board with the information necessary to make a determination regarding which employees may be required to complete the Location During Absence section of the Leave of Absence Report, the Board directs the parties to appear before the Trial Examiner for an additional hearing to create a record that will assist the Board in fashioning an appropriate remedy. Accordingly, the Union's improper practice petition is granted in part and the Board orders further proceedings consistent with this interim decision.

BACKGROUND

The Trial Examiner held two days of hearings and found that the totality of the record established the following relevant facts. The NYPD is a law enforcement organization whose mission is "to enhance the quality of life in our City by working in partnership with the community and in accordance with constitutional rights to enforce the laws, preserve the peace, reduce fear, and provide for a safe environment." (City's Brief at 15) The Union represents several thousand NYPD civilian employees who comprise multiple bargaining units. These employees hold numerous job titles and perform various services, including but not limited to "clerical work, information and technology work, communications work, laborer work[,] traffic enforcement [work,] and motor vehicle operations work." (Pet. ¶ 5)

This improper practice proceeding concerns the preparation and submission of a two-sided form known as a Leave of Absence Report, which NYPD employees are required to complete when requesting authorized leave. *See* Appendix. The front side of the Leave of Absence Report seeks information such as the type of leave being requested, the length of the

leave, and the dates of the leave. It is undisputed that employees requesting authorized leave have long been required to provide this information.¹ At the bottom of the front side of the Leave of Absence Report are the words “FOR CLERICAL USE ONLY.” (Joint Ex. 3) Below this header is a short section that is completed by the NYPD’s timekeeping staff. At the top of the reverse side of the form is a section entitled Location During Absence, which seeks detailed information concerning employees’ intended whereabouts. (*Id.*) The parties dispute whether employees were required to complete this section of the Leave of Absence Report prior to the events that gave rise to this proceeding.²

The Leave of Absence Report was last revised in October 2005. The City provided copies of the last seven versions of the Leave of Absence Report, which cover the period from 1975 to the present. (Joint Exs. 3, 5-10) All versions of the Leave of Absence Report since 1975 have included the Location During Absence section as it exists in its present form.

¹ Notwithstanding the requirement of employees requesting leave to prepare and submit the Leave of Absence Report, employees are required to provide the NYPD with a telephone number at which they can be reached at all times, including when they are off duty and, for example, on vacation.

² The Police Commissioner has the authority to terminate an employee’s authorized leave. The Patrol Guide has long stated that “[l]eaves may be terminated at the discretion of Police Commissioner.” (Joint Exs. 11, 12) Similarly, the Citywide Agreement provides:

. . . Once a leave request has been approved, the approval may not be rescinded except in writing by the . . . Chief of Personnel in the Police Department.

If . . . [the] Chief of Personnel in the Police Department calls upon an employee to forego the employee’s requested annual leave or any part thereof in any year, it must be in writing and that portion shall be carried over until such time as it can be liquidated.

(Union Ex. 1) Regarding this provision, the NYPD’s Deputy Commissioner of Labor Relations testified that “in emergency situations . . . if [an] employee’s services are required, the employee’s . . . leave . . . can be cancelled and [] the employee can be called in to work” (Tr. 85)

At the crux of this improper practice proceeding is an interim order, which was issued by the NYPD on December 16, 2010, and is entitled “Revision to Patrol Guide 203-20, ‘Authorized Leave’” (“Interim Order”).³ The Interim Order directs employees to complete the Location During Absence section of the Leave of Absence Report. It specifically states:

All leave of absence requests which include remaining at residence, domestic or foreign travel, require members of the service to complete all captions in the “Location During Absence” section on the **LEAVE OF ABSENCE REPORT (PD433-041)** before submitting it to their commanding officer/supervisory head. Operations coordinators will ensure that each country, with the city/town or province where the member will be staying, date(s) of departure and date of return are entered in the Location During Absence section of the form.

(Joint Ex. 2) (emphasis in original) The Interim Order revised Patrol Guide Procedure No. 203-20 by, among other things, adding the following provisions:

- a. Uniformed and civilian members of the service must complete the “Location During Absence” section on the LEAVE OF ABSENCE REPORT including each country, with the city/town or province where the member will be staying, date(s) of departure and date of return, unless on military leave or leave of absence without pay thirty (30) calendar days or more[.]
- b. If member will remain at their residence, member will enter “residence” and include location and dates[.]
- c. Prior to approving recommendation for leave, commanding officer/supervisory head will ensure that each country, with the city/town or province where the member will be staying is entered in Location During Absence section of LEAVE OF ABSENCE REPORT.

(Joint Ex. 2)

³ According to the NYPD’s Deputy Commissioner of Labor Relations, “[i]nterim orders are orders that the department issues to change existing guide procedures.” (Tr. 75-76) The portion of the Interim Order concerning authorized leave was incorporated into Patrol Guide Procedure No. 203-20 on May 6, 2011.

Prior to the issuance of the Interim Order, Patrol Guide Procedure No. 203-20 only directed employees requesting authorized leave to:

1. Prepare **LEAVE OF ABSENCE REPORT (PD433-041)** and submit to commanding officer/supervisory head, for approval, at least five (5) days before leave commences except in emergency.

(Joint Ex. 11) (emphasis in original) The former Patrol Guide Procedure No. 203-20 had been effective since January 1, 2000, and its predecessor Patrol Guide Procedure No. 104-01 had been effective since April 29, 1994. Patrol Guide Procedure No. 104-01 contained the same language set forth above. The Civilian Employee Handbook, which was last revised in 1994, similarly states that, when planning to use annual leave, employees are to “[c]omplete a LEAVE OF ABSENCE REPORT (PD433-041).” (City Ex. 1)

Three NYPD civilian employees in the Management Information Systems Division (“MISD”) testified that, prior to the issuance of the Interim Order, they routinely prepared and submitted the Leave of Absence Report without completing the Location During Absence section of the form.⁴ The first employee has worked at the NYPD for approximately 28 years and has requested leave about five to ten times per year. The second employee has worked at the NYPD for over 19 years and has requested leave about three to four times per year. The third employee has worked at the NYPD for over 18 years and has requested leave about four to nine times per year. Over the course of their employment at the NYPD, the employees testified that they were never asked by their supervisors to complete the Location During Absence section of

⁴ All of the employees testified that they never completed the Location During Absence section of the Leave of Absence Report prior to the issuance of the Interim Order, with the exception of a single occasion where one of the employees completed the section approximately 18 years ago. That employee never completed the Location During Absence section again because the principal administrative associate at the 46th Precinct told him “don’t worry about it” when he informed the principal administrative associate that he would be at a location where he could not be reached. (Tr. 41)

the Leave of Absence Report prior to the issuance of the Interim Order. Accordingly, the employees testified that they never were denied leave for not having completed that section of the form.

According to the NYPD's Deputy Commissioner of Labor Relations, employees requesting leave have always been required to complete the Location During Absence section of the Leave of Absence Report, and the NYPD has never directed any supervisors that employees are not required to complete that section of the form. If a supervisor had, in fact, told an employee that he or she did not have to complete the Location During Absence section, then that supervisor "misspoke" because "he or she was not authorized to make such a statement." (Tr. 72) The NYPD's Deputy Commissioner of Labor Relations testified that, while the Interim Order amended several sections of the Patrol Guide, it did not require employees to do anything more with respect to the Leave of Absence Report than they were required to do prior to its issuance. Thus, according to NYPD's Deputy Commissioner of Labor Relations, the Interim Order did not require employees to provide any additional information than they were previously required to provide.⁵

As a remedy, the Union requests that the Board order the NYPD to cease and desist from requiring employees to complete the Leave of Absence Report, to return any Leave of Absence Reports completed by employees, and to rescind any disciplinary or adverse action taken against employees as a result of their failure to complete the Leave of Absence Report. The Union also requests that the Board order the NYPD to engage in good faith bargaining over the Interim

⁵ The NYPD's Deputy Commissioner of Labor Relations testified that, although the Interim Order "did not in any way change the procedures" for employees requesting leave, "it did require others to take some action." (Tr. 90-91) For example, "it required the operations coordinator in each command, the time records person, [and] the timekeeper . . . when an employee was traveling outside of the country, to enter that information in a new database . . ." (Tr. 90)

Order, to post appropriate notices regarding the Board's findings, and to order any other and further relief as may be just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union maintains that the petition is timely because it was filed within four months of the unilateral change to longstanding procedures and practices regarding employee leave requests. According to the Union, the unilateral change occurred on December 16, 2010, when the NYPD issued the Interim Order and made it explicit that, for the first time, employees would be required to complete the Location During Absence section of the Leave of Absence Report.

The Union argues that the NYPD breached its duty to bargain in good faith and interfered with, restrained, and coerced public employees in the exercise of their statutory rights by unilaterally changing longstanding procedures and practices regarding leave requests.⁶ Specifically, the Union alleges that prior to the issuance of the Interim Order employees were not required to complete the Location During Absence section of the Leave of Absence Report and did not do so because it is within the "FOR CLERICAL USE ONLY" portion of the form. The Union contends that the City's assertions to the contrary were contradicted by the City's inability

⁶ 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[.]

to produce a single Leave of Absence Report in which an employee completed the Location During Absence section. The Union maintains that the NYPD now is requiring employees to submit their location during absence, including if they are to remain at their residence, at the time that they request leave.⁷ The Union argues that this disclosure requirement is a mandatory subject of bargaining because: (1) it is a change in the documentation required for the use of leave; and (2) it requires employees to disclose personal information when they request leave.

The Union argues that the disclosure of employees' whereabouts while off-duty is a mandatory subject of bargaining because it infringes upon employees' privacy interests, which outweigh the NYPD's asserted interest in knowing employees' locations in order to contact them in the event of an emergency. According to the Union, a detailed accounting of addresses, countries, and towns is unnecessary and unduly intrusive, as an employee simply can provide a phone number where he or she can be reached in the event of an emergency. Thus, the Union maintains that there is no need for the requested information if the NYPD's only interest is being able to contact employees in the event of an emergency because employees are already required to provide a telephone number where they can be contacted at any time. The Union contends that it is significant that the disclosure at issue concerns private information, as the disclosure of private health information was found to be a mandatory subject of bargaining.

The Union asserts that the change in procedure is not *de minimis* because requiring the disclosure of an employee's whereabouts while off-duty increases employee participation in the process of requesting leave. The Union argues that the disclosure of an employee's whereabouts while on leave was never previously required, and, accordingly, the NYPD is now requiring the

⁷ The Union presumes that the location and/or availability of the employee while on leave will impact the NYPD's decision to grant his or her leave request because disclosure is required prior to the approval or disapproval of an employee's leave request.

submission of information that is distinct and different from that which was previously required when an employee requested leave. The Union further contends that the requirement to complete the Location During Absence section of the Leave of Absence Report constitutes a change in the documentation required for the use of leave. For these reasons, the change concerns a mandatory subject of bargaining.

Even if the NYPD is not obligated to bargain over the decision to require employees to disclose their whereabouts while on leave, the Union argues that the NYPD is required to bargain over the procedures related to how employees are required to participate in the disclosure. The Union maintains that procedures requiring employee participation in the disclosure of personal, confidential information are a mandatory subject of bargaining. The Union argues that the disclosure requirement is more invasive than a residency verification form, which the Board found to be a mandatory subject of bargaining. Significantly, the Union notes that the residency verification was required to ensure compliance with the City's residency law whereas, here, the information sought by the NYPD is not required by statute.

City's Position

The City argues that the Union's claim is time-barred under NYCCBL § 12-306(e) because the substantive and procedural requirements for preparing and completing the Leave of Absence Report have not changed in at least 17 years and the statute of limitations for an improper practice claim is four months. The requirement that NYPD employees prepare the Leave of Absence Report has been in existence since at least April 29, 1994, and the Leave of Absence Report has included the Location During Absence section for at least 35 years. Accordingly, the City maintains that the Union has had constructive knowledge of this requirement for at least 17 years, and, as such, the claim is grossly untimely.

The City argues that it does not have a duty to bargain over the requirement that employees complete the Location During Absence section of the Leave of Absence Report because the requirement has not so intruded on the personal privacy of employees that it may be found to have altered their terms and conditions of employment. The City contends that the requested information is merely a list of addresses and phone numbers where an employee on leave can be contacted in the event of an emergency, which is highly analogous to the emergency contact information that employees already provide to the NYPD as a condition of their employment. According to the City, knowledge of an employee's location is crucial when determining whether to contact a particular employee because the NYPD needs to know whether that employee will be able to return to work in time to meet the NYPD's needs.

The City maintains that the NYPD has a substantial interest in being able to contact its employees when they are on leave because the NYPD is a law enforcement organization that plays a central role in emergency response. According to the City, all NYPD employees are "indispensable" to the NYPD's operation, and, thus, both civilian and uniformed employees are needed to carry out the NYPD's mission and to maintain the efficiency of the NYPD's 24-hour, seven-day-per-week operations. (City's Brief at 16) The City asserts that this need is greatest during an emergency situation, and, accordingly, the City maintains that it is essential that the NYPD has reliable emergency contact information for its employees.⁸ According to the City, advance knowledge of an employee's location is "crucial" in order to determine whether a particular employee will be able to return to work in time to meet the NYPD's needs. (City's

⁸ For example, the City alleges that the NYPD cancelled the authorized leave of MISD employees and called them in to work in order to restore the NYPD's computer systems following a major failure of the NYPD's server on December 23, 2011. "[T]he failure impacted all of [the NYPD's] information systems, the on-line booking system, the Sprint system which controls [] 911 calls, the time records system, the crime complaint system, [and the] system that the detective bureau uses to catalogue investigations." (Tr. 82)

Brief at 14) The NYPD's inability to contact its employees in the event of an emergency and order them to return to work would "substantially compromise and disrupt the [NYPD's] operation, resulting in significant implications on public safety." (*Id.* at 15) Therefore, the NYPD's managerial interests in maintaining the efficiency of its operations and taking necessary action during emergencies outweigh any privacy interests that employees may have in their contact information while on authorized leave.⁹

Further, the City argues that no unilateral change has taken place. The City alleges that it is the NYPD's longstanding policy to require civilian and uniformed employees to fill out the Leave of Absence Report, including the Location During Absence section, prior to going on vacation or taking a leave of absence of less than 30 days. Accordingly, the City maintains that the Interim Order merely reiterates and clarifies the NYPD's existing policy that employees prepare all sections of the Leave of Absence Report.¹⁰ Therefore, the City argues that there was no violation of the duty to bargain.

The City contends that, if the Board finds that there was a change in procedure, any such procedural change is *de minimis* because it has not materially increased employee participation in the process of requesting leave. The City asserts that the alleged change is the difference between requiring employees to prepare the entire Leave of Absence Report and requiring employees to prepare all sections of the form. According to the City, the longstanding requirement that employees complete the Leave of Absence Report always implied a

⁹ The City argues that there is no evidence to support the Union's speculative and conclusory assertion that the location and availability of employees while on leave will impact the NYPD's decision regarding whether to grant employees' leave requests. The City contends that such allegations are pure surmise and conjecture, and, accordingly, they must be disregarded.

¹⁰ According to the City, the Patrol Guide formerly required employees to "prepare" the Leave of Absence Report, but did not explicitly state that the term "prepare" meant that employees had to prepare all sections of the form.

requirement to complete the form in its entirety. Because the basic requirements for employee participation have not changed, there was no unilateral change in policy or procedure and, therefore, no violation of the duty to bargain in good faith.

Lastly, the City asserts that the Union has not alleged any facts that would support an independent claim under NYCCBL § 12-306(a)(1). The City argues that it also has not committed a derivative violation of this provision because it has not violated NYCCBL § 12-306(a)(4).

DISCUSSION

As a preliminary matter, we find that the petition is timely because it was filed within four months of the date that the disputed action occurred. *See* NYCCBL § 12-306(e); OCB Rules §§ 1-07(b)(4) and 1-12(f); *DC 37*, 4 OCB2d 47, at 14 (BCB 2011) (rejecting an employer's assertion that the claims were time-barred because the memorandum at issue allegedly restated and clarified existing policies). The Union asserts that the NYPD's issuance of the Interim Order on December 16, 2010, constituted a unilateral change to the procedure and practice regarding employee leave requests. Accordingly, the Union's claims accrued on December 16, 2010. Since the petition was filed on April 15, 2010, within four months of the issuance of the Interim Order, the Union's claims were timely filed. *See Morris*, 3 OCB2d 19, at 13 (BCB 2010); *CSTG, L. 375*, 3 OCB2d 14, at 11 (BCB 2010).

Pursuant to NYCCBL § 12-306(a)(4), a public employer commits an improper practice if it fails or refuses to bargain over matters within the scope of mandatory bargaining.¹¹ *See DC 37, L. 1457*, 1 OCB2d 32, at 26 (BCB 2008). NYCCBL § 12-307(a) requires public employers

¹¹ A unilateral change to a mandatory subject of bargaining amounts to a refusal to bargain in good faith. *See DC 37, L. 1457*, 77 OCB 26, at 12 (BCB 2006).

and employee organizations to bargain in good faith over wages, hours, and working conditions, as well as “any subject with a significant or material relationship to a condition of employment.” *Municipal Highway Inspectors L. Union 1042*, 2 OCB2d 12, at 7 (BCB 2009); *see also* NYSNA, 51 OCB 37, at 8 (BCB 1993). The NYCCBL does not expressly delineate the nature of “working conditions” or “conditions of employment,” and, therefore, we “determine on a case-by-case basis the extent of the parties’ duty to negotiate.” *DC 37*, 4 OCB2d 19, at 27 (BCB 2011); *DC 37*, 45 OCB 1, at 7-8 (1990). To make such determinations, we conduct a balancing test that weighs the interests of the public employer and its employees.¹² *See DC 37*, 4 OCB2d 47, at 15; *DEA*, 2 OCB2d 9, at 8 (BCB 2009); *Matter of Bd. of Educ. of the City Sch. Dist. of the City of N.Y. v. Pub. Empl. Relations Bd.*, 75 N.Y.2d 660, 670-71 (1990) (upholding the use of the balancing test).

The mandatory disclosure of information concerning employees’ locations and contact information while on authorized leave is not among the rights specifically referenced in the NYCCBL. Therefore, to determine whether the alleged change concerns a mandatory subject of bargaining, we must examine the interests of the NYPD and its employees. Here, the City argues that the NYPD has a substantial interest in being able to contact its employees in the event of an emergency because it is a 24-hour, seven-day-per-week operation. The City contends that, in certain situations, employees’ services may be required because the NYPD is a law enforcement organization that plays a central role in emergency response. On the other hand, the Union argues that the disclosure of employees’ whereabouts while off-duty infringes

¹² We balance the respective interests 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. Indeed, in many instances a matter may partake of both categories” *Matter of Levitt v. Bd. of Collective Bargaining of the City of N.Y.*, 79 N.Y.2d 120, 127 (1992).

upon employees' privacy interests. Because the civilian employees at issue in this proceeding are not directly involved in law enforcement and are already required to provide a telephone number where they can be contacted at any time, the Union contends that the detailed accounting required by the NYPD is unnecessary and unduly intrusive.

We conclude that, with respect to NYPD employees who, in the event of an emergency, are necessary to carry out the NYPD's mission, the requirement of such employees to disclose their location during absence and provide related contact information is a non-mandatory subject of bargaining. *See* NYCCBL § 12-307(b) ("It is the right of the city . . . acting through its agencies, to . . . maintain the efficiency or governmental operations . . . [and] take all necessary actions to carry out its mission in emergencies . . ."). In so ruling, we find that the NYPD's interest in being able to contact such employees in the event of an emergency outweighs these employees' privacy interests. For example, the NYPD's Deputy Commissioner of Labor Relations testified that, on December 23, 2011, in response to a major failure in the NYPD's server that impacted all of the NYPD's information systems, the NYPD called MISD employees on leave to work during the holidays in order to restore the NYPD's computer systems. The work of these employees was necessary to carry out the NYPD's mission, and, therefore, the NYPD's interest in being able to contact them outweighed any privacy interests that the employees may have had in their off-duty whereabouts. *See DC 37, 75 OCB 13, at 10 (BCB 2005)* (finding that the Department of Transportation's interest in maintaining safe and efficient operations outweighed employees' privacy interests in utilizing employer-provided storage facilities).

Despite the fact that some employees are necessary to carry out the NYPD's mission in the event of an emergency, the Union represents thousands of NYPD civilian employees who

hold numerous job titles and perform a wide range of services, including clerical responsibilities. The City has not established the necessity of the requested information with respect to all categories of employees. Thus, notwithstanding our ruling above, with respect to those employees who, in the event of an emergency, are not necessary to carry out the NYPD's mission, the requirement to disclose their location during absence and provide related contact information *is* a mandatory subject of bargaining. We find that the NYPD does not have as significant a managerial interest in private information concerning these employees' whereabouts while on authorized leave. Therefore, the privacy interests of employees who are not necessary to carry out the NYPD's mission in the event of an emergency outweigh any interests that the NYPD may have in requiring these employees to complete the Location During Absence section of the form. This result is particularly appropriate because the NYPD already requires its employees to provide a telephone number at which they can be reached at all times. *See DC 37, 75 OCB 8, at 10 (BCB 2005)* (finding that the NYPD's approval policy concerning civilian employees' off-duty visits with incarcerated individuals is subject to mandatory bargaining).

Having found that, with regard to some employees, the NYPD's requirement that employees complete the Location During Absence section of the Leave of Absence Report is a mandatory subject of bargaining, we must determine whether a unilateral change has occurred. The Union has the burden of demonstrating the existence of a change in the NYPD's policy in order to establish a breach of the City's duty to bargain in good faith. *See DC 37, 4 OCB2d 47, at 17*. If, indeed, there was a unilateral change, then we must determine whether the change was sufficiently material to constitute a violation of the NYCCBL or merely *de minimis*. *See id.*; *PBA, 73 OCB 12, at 16-17 (BCB 2004), affd., Matter of Patrolmen's Benevolent Assn., 38 A.D.3d 482 (1st Dept. 2007)*.

For the following reasons, we find that the Union established that the NYPD made a unilateral change when it directed its employees, *via* the Interim Order, to complete the Location During Absence section of the Leave of Absence Report. All three Union witnesses testified that, as NYPD employees who collectively requested leave on hundreds of occasions, they never were required to complete the Location During Absence section of the Leave of Absence Report prior to the issuance of the Interim Order. The City did not adequately rebut this testimony. The Trial Examiner provided the City with the opportunity to submit completed Leave of Absence Reports to demonstrate whether the Location During Absence section was completed by employees. Although these forms presumably are in the care, custody, and control of the NYPD, the City chose not to produce them. Rather, the City relied solely upon the testimony of the NYPD's Deputy Commissioner of Labor Relations. However, no evidence was presented establishing that the City's sole witness has any direct, personal knowledge regarding whether employees actually completed the Location During Absence section of the Leave of Absence Report. Consequently, the mere existence of the Location During Absence section on the Leave of Absence Report prior to the issuance of the Interim Order coupled with the allegation that employees have long been required to complete it is not dispositive. *See COBA*, 2 OCB2d 7, at 55-56 (BCB 2009); *DC 37, L. 376*, 1 OCB2d 40, at 19 (BCB 2008); *Colella*, 79 OCB 27, at 63 (BCB 2007); *CWA, L. 180*, 77 OCB 20, at 16 (BCB 2006).

Having found a unilateral change, we must address the City's argument that the change is *de minimis*. In assessing whether a unilateral change to a mandatory subject of bargaining constitutes an improper practice, "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 . . .

.” *DC 37*, 4 OCB2d 43, at 8-9 (BCB 2011). Unlike a material change, a *de minimis* change does not suffice to establish an improper practice. *See id.* Here, we find that the change is not *de minimis* because employees are now required to provide private information that they were not previously required to disclose. *Contra DEA*, 2 OCB2d 11 (BCB 2009) (finding a unilateral change *de minimis* because employees were previously required to supply similar information).

Because the unilateral change encompasses both mandatory and non-mandatory subjects, the policy sweeps more broadly than is required to serve the NYPD’s asserted managerial interest. Therefore, the NYPD’s requirement that all employees complete the Location During Absence section of the Leave of Absence Report, including those employees as to whom the NYPD has a duty to bargain over the disclosure of this information, violates NYCCBL § 12-306(a)(4). We also find a derivative violation of NYCCBL § 12-306(a)(1) because this provision forbids an employer from interfering with employees’ rights to bargain collectively. *See Municipal Highway Inspectors L. Union 1042*, 2 OCB2d 12, at 7; *DC 37, L. 2021*, 51 OCB 36, at 17.¹³

The record does not provide this Board with the information necessary to make a determination regarding which employees, among the many titles represented by the Union, may be required to complete the Location During Absence section of the Leave of Absence Report. Accordingly, in order to fashion the appropriate remedy, we direct the parties to appear before the Trial Examiner for an additional hearing to create a record that will assist the Board in determining which NYPD civilian employees are necessary to carry out the NYPD’s mission in the event of an emergency.

¹³ In so ruling, we note that the promulgation of a more narrowly tailored policy limited solely to employees who are necessary to carry out the NYPD’s mission in the event of an emergency is within the NYPD’s managerial prerogative.

Although we find that the NYPD does not have a duty to bargain over the disclosure requirement with respect to at least some employees, the Union argues that the NYPD nevertheless is required to bargain over the procedures related to the employees' disclosure. The Union cites several cases supporting the general principles of law that procedures requiring employee participation in the disclosure of personal information and procedures governing the use of sick leave are mandatory subjects of bargaining. The Union, however, has not established the applicability of these cases to the present matter. Here, there exists a longstanding procedure that employees are required to follow when requesting authorized leave. This procedure includes the completion of the Leave of Absence Report. The Union is not challenging this procedure as a whole. Rather, the Union is only challenging the new requirement that employees complete one additional section of the Leave of Absence Report.

To the extent that the disclosure requirement is a non-mandatory subject of bargaining, we find that requiring employees to complete the additional section of the Leave of Absence Report does not trigger any procedural bargaining obligation. Significantly, the requirement to provide dates, addresses, and telephone numbers does not materially increase employee participation in the process of requesting leave because employees are already obligated to complete several other sections of the Leave of Absence Report. *See Local 371, SSEU*, 69 OCB 10, at 5 (BCB 2002) (finding that the addition of a social security number requirement to employees' timecards was a "mechanical" change that did not affect an existing term and condition of employment); *DEA*, 2 OCB2d 11, at 16 (finding that a new requirement that employees complete a portion of a one-page application for a parking permit did not increase employee participation to an extent that it would affect a term and condition of employment because employees were already required to provide similar information to their commanding

officer). Consequently, the NYPD's requirement that employees complete the Location During Absence section of the Leave of Absence Report does not affect employees' terms and conditions of employment to any degree that would require procedural bargaining.

For the reasons stated above, we grant the Union's petition in part and order further proceedings consistent with this interim decision.

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 verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, docketed as BCB-2949-11, is granted in part to the extent indicated in the decision; and it is further

ORDERED, that the parties participate in an additional hearing to create a record that will assist the Board of Collective Bargaining in determining which employees are necessary to carry out the New York City Police Department's mission in the event of an emergency.

Dated: May 29, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

PETER B. PEPPER
MEMBER

APPENDIX



LEAVE OF ABSENCE REPORT

PD 433-041 (Rev. 10-05)

UNIFORM MEMBER
 CIVILIAN MEMBER

Date _____

Rank/Title _____ Name Printed (Last, First, M.I.) _____

Signature _____ Shield No. _____

Tax Registry No. _____ Squad No. _____

Chart No. _____ Command _____

TYPE OF LEAVE VACATION MILITARY OTHER EXPLAIN UNDER "REASONS"

ON THE JOB INJURY INDICATE VAC OR OTHER

FOR _____ DAY(S) _____ HOURS _____ MINUTES

FROM _____ HOURS _____ TO _____ HOURS _____

REASONS:

MILITARY LEAVE			
ATTACH COMPETENT ORDERS IN THE FORMAT ILLUSTRATED IN P.G. 120-28. ALL ORDERS AND SUBSEQUENT CERTIFICATES OF ATTENDANCE FOR 1, 2, OR 3 DAY LEAVES MUST BE SIGNED BY MEMBER'S MILITARY COMMANDING OFFICER OR OTHER COMMISSIONED OFFICER DESIGNATED BY THE MILITARY COMMANDING OFFICER.			
COMPLETE FOR ALL MILITARY LEAVE APPLICATIONS			Service Rank _____
Leave requested under provisions of Sec. 242/243 State Military for training with _____			
at _____			
List RDO's during period of annual training _____			
COMPLETE FOR 1, 2 or 3 DAYS MILITARY LEAVE APPLICATIONS ONLY			
Actual hours of drill		Police Duty (include RDO'S) scheduled to be performed during leave.	
Date(s)	Time(s)	Date(s)	Time(s)

Court or other appearances scheduled during above period? YES NO

COURT OR AGENCY _____ DATE _____ TIME _____ PRINCIPALS _____

FOR CLERICAL USE ONLY

EMPLOYEE TIME RECORD	DIARY DATE	BY	
RECORD WEEK NO(s): _____			

LOCATION DURING ABSENCE CITY, STATE AND COUNTRY OF VISIT
(If Residence, so state)

APPROXIMATE DATE OF DEPARTURE	APPROXIMATE DATE OF RETURN
Addresses where applicant can be communicated with during absence	
Dates	Telephone Nos.

RECOMMENDATIONS

DATE	COMMANDING OFFICER OR SUPERVISORY HEAD	<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED	RANK/TITLE	SIGNATURE
		<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED		
		<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED		
		<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED		
		<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED		
	CHIEF OF PERSONNEL	<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED		
	C.O. MILITARY AND EXTENDED LEAVE DESK	<input type="checkbox"/> APPROVED <input type="checkbox"/> DISAPPROVED		

FINAL ACTION

APPROVED
 DISAPPROVED

POLICE COMMISSIONER Date

NO. DAYS	pay have been/will be deducted from payroll ending	DATE	PAYROLL CLERK
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Reasons for any recommendation made:

INSTRUCTIONS:

1. An application for leave of absence, except in exceptional circumstances, shall be submitted sufficiently in advance of the desired period of leave to allow action to be completed thereon.
2. Commanding officers approving leaves of absence without pay shall be guided by current provisions of appropriate department manuals.