SBA, 5 OCB2d 35 (BCB 2012)

(IP) (Docket No. BCB 2654-07)

Summary of Decision*:** The Unions alleged that the City and the NYPD violated NYCCBL § 12-306(a)(1), (4), and (5) when the NYPD unilaterally implemented a requirement that all officers undergo breathalyzer testing in every case where their discharge of a firearm resulted in injury or death without bargaining. The City argued that the policy is a non-mandatory subject of bargaining since it involves discipline and criminal investigations. The Board found that pursuant to Court of Appeals precedent the new policy is related to discipline and excluded from bargaining. Accordingly, the Board denied the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SERGEANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.; PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.; DETECTIVES' ENDOWMENT ASSOCIATION, INC., POLICE DEPARTMENT, CITY OF NEW YORK; and LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On October 3, 2007, the Sergeants Benevolent Association of the City of New York, Inc. ("SBA"), the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), the Detectives' Endowment Association, Inc., Police Department, City of New York ("DEA"), and

the Lieutenants Benevolent Association of the City of New York, Inc. ("LBA") (collectively, "Unions") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD" or "Department").[1] The Unions allege that the City and the NYPD violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally implementing a requirement that all officers undergo breathalyzer testing in every case where their discharge of a firearm results in injury or death without bargaining. The Unions argue that the decision to test for alcohol, the use of the test results, and the procedures, protocols and methodologies related to the test are all mandatory subjects of bargaining. The City argues that the policy is a non-mandatory subject of bargaining because it involves discipline and criminal investigations. This Board finds that, pursuant to Court of Appeals precedent, the new policy is related to discipline and is excluded from bargaining. Accordingly, the Board denies the petition.

BACKGROUND

In September 2007, the NYPD issued Interim Order ("IO") 52, entitled "Alcohol Testing for Uniformed Members of the Service Involved in Firearms Discharges Resulting in Injury or Death of a Person."[2] (Ans., Ex. I) It is undisputed that the issuance of IO 52 constituted a unilateral change by requiring breathalyzer testing of all police officers whose discharge of their weapon results in injury or death, whether the officer was on or off duty when the shooting

[1] This matter was held in abeyance pending the outcome of related federal litigation which was dismissed on June 28, 2012. *See, infra,* p. 7 & n. 9.

[2] IO 52 was rescinded on February 25, 2011, and incorporated without substantive change into the NYPD's Patrol Guide as Patrol Guide Procedure ("PGP") 212-109.

occurred. Prior to the issuance of IO 52, the NYPD did not require automatic alcohol testing upon the discharge of a weapon resulting in injury or death, and this topic is not addressed in the parties' collective bargaining agreements.[3] However, prior to the issuance of IO 52, the NYPD had policies requiring the investigation of any discharge of a firearm by a member of service outside of the firing range, including discharges that resulted in injury or death. The NYPD also had, prior to the issuance of IO 52, policies regarding fitness for duty, the misuse of a firearm due to intoxication, and breathalyzer testing.

It is undisputed that members of service involved in shootings, both on and off duty, are subject to intensive scrutiny by high ranking officers who are required to assess, among other things, whether the members involved in the shooting are unfit for duty due to intoxication. PGP 212-29, entitled "Firearms Discharge by Uniformed Members of the Service," addresses the investigation of shooting incidents by NYPD members. (Ans., Ex. E) It requires that the desk officer "[n]otify [the] Internal Affairs Bureau [("IAB")], Command Center, immediately if an injury is involved." (*Id.*, Procedure 3a) (emphasis in original) PGP 212-29 also explicitly contemplates the criminal investigation of a shooting, requiring the patrol supervisor to "[e]stablish [a] crime scene, if necessary." (*Id.*, Procedure 2a)[4] Further, PGP 212-29 explicitly contemplates that an officer may be disciplined for the discharge of a firearm as it requires the investigating officer to make findings, which may include "[v]iolation of Department guidelines," and recommendations, which may include "Command Discipline, [and] Charges and Specifications." (*Id.*, Procedure 14b(1)(b) & (2)(e))

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[3] At the time the petition was filed, SBA, DEA, and LBA had current collective bargaining agreements, while PBA's collective bargaining agreement, which had expired, remained in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d).

[4] PGP 212-29 also requires the investigating officer to "[n]otify [the] District Attorney's Office in all shooting cases." (Ans., Ex. E, Procedure 8) (emphasis in original)

The misuse of a firearm due to intoxication is explicitly addressed in PGP 203-04, entitled "Fitness for Duty," which contemplates discipline, including possible termination, for "[a]ny misconduct involving a member's misuse of a firearm while unfit for duty due to excessive consumption of, and intoxication from, alcohol." (Ans., Ex. A, Additional Data) PGP 203-04 warns that "[m]embers of service **SHOULD NOT** be in possession of their firearms if there is any possibility that they may become unfit for duty due to the consumption of intoxicants" and requires that members "[d]o not consume intoxicants to the extent that [a] member becomes unfit for duty." (*Id.*) (emphasis in original) It notes that a member "who refuses to submit to chemical testing in connection with an alleged violation of [§] 1192 of the New York State Vehicle and Traffic Law (Driving While Intoxicated) will be charged with . . . 'Engaging in conduct prejudicial to the good order, efficiency, or discipline of the Department.'" (*Id.*) (quoting PGP 203-10, Procedure 4)

Possession of a firearm while intoxicated is also addressed in PGP 206-12, entitled "Removal of Firearms From Intoxicated Uniformed Member of the Service." (Ans., Ex. B) PGP 206-12 requires supervisors to investigate officers who appear to be intoxicated. In so doing, supervisors are explicitly instructed to consider "any available scientific evidence (Breathalyzer, blood test, etc.)." (*Id.*, Note to Procedure 5) If it is determined that the member is intoxicated, the member's firearm is to be removed and the member is to be placed "on modified assignment or suspended, as appropriate." (*Id.*, Procedure 7)

The NYPD's detailed procedures for conducting breathalyzer testing are found in IO 9-3, entitled "Conducting Ordered Breath Testing of Uniformed Members of the Service for the Presence of Alcohol." (Ans., Ex. D) IO 9-3 provides procedures for testing with two types of

breathalyzers—the Portable Breath Test ("PBT") device and the Intoxilyzer.[5] Under IO 9-3, an officer first will be tested with a PBT device. If the reading is .02 or higher, the officer will then be given an Intoxilyzer test administered by the NYPD's Highway Intoxicated Driver Testing Unit ("IDTU"). IO 9-3 sets an Intoxilyzer reading of .04 or greater "as the threshold for a presumption of lack of fitness for duty." (*Id.*, Procedure 22(b))

Issuance of IO 52

In November 2006, in response to a fatal shooting by undercover officers, the NYPD created the Committee for the Review of Undercover Procedures ("Committee"), whose mandate was to review all issues related to NYPD undercover operations. The Committee's recommendations "include[d] mandatory breathalyzer tests of all police officers, on duty or off duty, whose firearm discharge results in injury or death." (Pet., Ex. A) In the June 18, 2007 press release announcing the Committee's recommendations, the NYPD stated that the "proposed alcohol testing policy . . . does not have to be collectively bargained." (*Id.*)

Following the Committee's recommendation, the NYPD issued IO 52 in September 2007. IO 52, like PGP 212-29, which it references, requires that IAB be notified of any shooting by an officer that results in an injury.[6] It also states that, in order "to ensure the highest levels of integrity," all officers involved in firearms discharges which result in injury or death will be subject to breathalyzer testing. (Ans., Ex. I, Purpose) The testing procedures set forth in IO 52 are consistent with, but less detailed than, those set forth in IO 9-3. Both require that the initial breathalyzer testing is to be conducted using a PBT device "in a private setting." (*Compare*

[5] The City avers, and the Unions deny, that an Intoxilyzer "is a more sensitive instrument for the assessment of alcohol consumption" than a PBT device. (Ans. ¶ 81)

[6] IO 52 also references PGP 203-04, reminding officers to be aware of how it "relate[s] to alcohol and the possession of firearms while on duty." (Ans., Ex. I, Additional Data)

Ans., Ex. I, Procedure 10, *with* Ans., Ex. D, Procedure 12) However, IO 52 states that the PBT device testing is to be conducted by IAB.

IO 52 adopts from § 1192 of the Vehicle and Traffic Law, which proscribes and defines Driving While Intoxicated, .08 as the blood alcohol level indicating intoxication. If the PBT device reading is below .08, IO 52 requires no further testing. If the PBT device reading is .08 or greater, IO 52, like IO 9-3, requires that an Intoxilyzer test be performed by a Highway IDTU technician.[7] IO 52 states that the results of the PBT device, the Intoxilyzer, and any other related indicia of intoxication are to be taken into account in determining whether the member is fit for duty.[8] If a member is determined to be unfit for duty due to intoxication, IO 52, like PGP 206-12, instructs that the member's firearm is to be removed.

The City avers, and the Unions deny, that the results of the alcohol testing may be used in the discipline of an officer and in the criminal investigation of a shooting. IO 52 references PGPs that explicitly contemplate discipline. PGP 203-04 states that intoxication may result in termination; PGP 206-12 provides that discharging a firearm while intoxicated may result in an officer being suspended from duty; and PGP 212-29 states that it may lead to disciplinary action being recommended. (*See* Ans., Ex. A, Additional Data; Ans., Ex. C, Procedure 7; and Ans., Ex. E, Procedure 14b(2)(e))

On October 3, 2007, the Unions filed the instant petition requesting an order: (i) holding that the City and the NYPD violated NYCCBL § 12-306(a)(1), (4), and (5) and the New York Civil Service Law ("CSL"), Article 14 ("Taylor Law"), § 209-a(1)(d) and (e); (ii) enjoining the

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[7] IO 9-3 sets a much lower threshold—.02—to trigger an Intoxilyzer test but otherwise the procedures for an Intoxilyzer test set forth in IO 52 are identical to those set forth in IO 9-3. (*Compare* Ans., Ex. I, Note to Procedure 13, *with* Ans., Ex. D, Procedure 14a)

[8] The list of indicia of intoxication found in IO 52 is identical to that found in IO 9-3. (*Compare* Ans., Ex. I, Appendix A, *with* Ans., Ex. D, Additional Data)

City and the NYPD from unilaterally imposing a policy automatically requiring alcohol testing whenever weapons are discharged by police personnel; (iii) rescinding any directive of the City and/or the NYPD to commence such testing; (iv) enjoining the City and the NYPD from using the results of any such test; (v) making all affected employees whole; (vi) directing the posting of appropriate notices; and (vii) granting any other relief that the Board deems proper.

Shortly after filing the instant petition, the Unions filed suit in federal court challenging IO 52 as unconstitutional under the Fourth and Fourteenth Amendments.[9] The Trial Examiner granted the Unions' request that the Board enter into the record four sworn statements submitted to the federal court to demonstrate that members feel that it is demeaning and humiliating to be subject to mandatory breathalyzer tests.[10] One of these affidavits was from Detective Daniel Rivera, an officer involved in an October 2007 shooting who took, and passed, a mandatory breathalyzer test. Detective Rivera described the breathalyzer test as "dehumanizing, embarrassing, and stressful." (Rivera Affidavit, ¶ 4)

[9] On September 30, 2008, the United States District Court for the Southern District of New York denied the Unions' motion for a preliminary injunction. *See Palladino, et al., v. City of New York, et al.*, 2008 WL 4539503 (S.D.N.Y. Sept. 30, 2008), *affd., Lynch et al., v. City of New York, et al.*, 589 F.3d 94 (2d Cir. 2009), *cert. denied*, __ U.S. __, 131 S.Ct. 415 (2010). On June 28, 2012, the Court granted the City's motions to dismiss. *See Palladino, et al., v. City of New York, et al.*, 2012 WL 2497272 (S.D.N.Y. June 28, 2012).

[10] The statements were filed in *Palladino, et al. v. City of New York*, 07 CIV 9246 (GDB) (MHD) (S.D.N.Y. Oct. 16, 2007), and are the November 7, 2007 Declaration of Chief Charles V. Campisi and attachments thereto (ECF filing Documents 66, 66-1, and 66-2); the November 28, 2007 Affidavit of Michael Palladino (ECF filing Document 28); the October 7, 2007 Affidavit of Michael Palladino (ECF filing Document 28-2); and the October 9, 2007 Affidavit of Daniel Rivera (ECF filing Document 28-3) ("Rivera Affidavit").

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue that discharging a weapon, even if it results in injury or death, does not provide the basis to compel alcohol testing because it does not provide individualized reasonable suspicion that the officer was under the influence of alcohol when the weapon was discharged. Neither the City nor the NYPD negotiated with the Unions concerning the unilateral decision to implement IO 52, which the Unions argue concerned mandatory subjects of bargaining. Thus, the City's and the NYPD's refusal to bargain violates NYCCBL § 12-306(a)(1), (4), and (5).[11] The Unions demand bargaining over (i) the method of taking a sample; (ii) the administration of

[11] NYCCBL § 12-306(a) provides, in pertinent part, that:

> 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 [§] 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;
>
> (5) to unilaterally make any change as to any mandatory subject of collective bargaining . . . during a period of negotiations with a public employee organization as defined in [§ 12-311(d)].

NYCCBL § 12-305 provides, in pertinent part, that: "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."

NYCCBL § 12-311(d) provides, in pertinent part, that: "During the period of negotiations . . . concerning a collective bargaining agreement, . . . the public employer shall refrain from unilateral changes in . . . working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes . . ."

the test; (iii) the acceptable levels of alcohol; (iv) the method for affording the member the right to independently evaluate the sample; and (v) the use of the test results.[12]

The Unions argue that *Matter of City of New York v. Patrolmen's Benevolent Association of City of New York, Inc.*, 14 N.Y.3d 46 (2009) ("*City v. PBA*") is not controlling as that decision was limited to whether "drug **testing** methodologies and **testing** triggers" are excluded from bargaining as encompassed in the disciplinary powers of the NYPD's Police Commissioner ("Commissioner"). (Unions' May 25, 2012 Submission, p. 2) (quoting *City v. PBA*, 14 N.Y.3d at 58) (emphasis supplied by the Unions) The Unions note that the Court of Appeals explicitly stated that it was "not saying that every step that the Commissioner takes or every decision that he makes to implement drug **testing** is excluded from bargaining." (*Id.*) (quoting *City v. PBA*, 14 N.Y.3d at 59-60) (emphasis supplied by the Unions) According to the Unions, the instant case is distinguishable because the alcohol testing of IO 52 is completely new, while *City v. PBA* involved a change to a pre-existing drug testing policy. Further, unlike the testing at issue in *City v. PBA*, IO 52 involves neither reasonable suspicion nor random testing. Finally, IO 52 is not part of a disciplinary program as the "City [has] candidly admitted that the real reason for the program was to respond to public comments that inevitably follow police action." (*Id.*, p. 3)

Thus, the Unions argue, since *City v. PBA* is not controlling, the Board must "balance the competing interests to determine [the] negotiability of [IO 52]." (*Id.*) The Unions assert that there is no history of alcohol use in any case involving the misuse of a firearm by their members and that the procedures in existence prior to IO 52—which are based upon reasonable suspicion—are more than adequate to fully investigate the conduct of officers and their fitness

[12] The Unions also argued that the City and the NYPD violated the Taylor Law. We do not address the alleged CSL violations as they are outside of our jurisdiction. *See Holmes*, 3 OCB2d 51, at 13, n. 6 (BCB 2010); *Green*, 65 OCB 34, at 9 (BCB 2000).

for duty. According to the Unions, the required breathalyzer testing of IO 52 is a suspicionless search that serves only to humiliate and demean its members, treating them as criminal suspects when there is absolutely no reasonable suspicion of intoxication. IO 52 has no deterrent effect since, prior to its issuance, officers were aware that the discharge of their firearms would subject them to the most intensive scrutiny and that a member would face severe disciplinary action for discharging a firearm while intoxicated. Concerns over the integrity of, and public confidence in, the police, while important, do not relieve the City and the NYPD from their duty to bargain nor permit them to unilaterally impose new terms and conditions of employment.

City's Position

The City argues that, because IO 52 relates to the Commissioner's statutory disciplinary authority, "it is a non mandatory subject of bargaining under the clear and binding precedent" of *City v. PBA*. (City's May 23, 2012 Submission, ¶ 17) According to the City, *City v. PBA* holds that the Commissioner's authority pursuant to § 434 of the New York City Charter ("City Charter") and § 14-115(a) of the New York City Administrative Code ("Admin. Code") to maintain discipline includes the drug testing of uniformed officers. The City also argues that matters that can be considered "ancillary or tangentially" related to discipline are prohibited subjects. (Ans. ¶ 121) (quoting *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. N.Y.S. Pub. Empl. Relations Bd.*, 13 A.D.3d 879, 881 (3rd Dept. 2004), *affd.*, 6 N.Y.3d 563 (2006)) (internal quotation marks omitted). Thus, the City argues that alcohol testing is an investigatory component of the discipline process within the Commissioner's discretion and it is inconsequential that alcohol testing may occur before a basis for discipline is established.

Further, the City argues that New York courts have held that investigatory procedures are outside of the scope of collective bargaining where bargaining could compromise criminal

investigations. The City notes the New York State Public Employment Relations Board ("PERB") has rejected demands for bargaining that encompassed investigations into misconduct, including demands to bargain over breathalyzer testing. Since all shootings are treated as criminal investigations, the City argues that IO 52 is non-bargainable.

The City also argues that the Court of Appeals has found that the NYPD's interest in maintaining the integrity of, and preserving the public's confidence in, the police outweighs any nominal employee interest in not being subject to a minimally intrusive test. Officers have diminished privacy expectations, IO 52 applies to limited circumstances, and the NYPD's procedures ensure that the testing is accurate. Thus, the City argues that the NYPD's needs to ensure the integrity of and the public confidence in it outweigh any employee interest.

Regarding the Unions' NYCCBL § 12-306(a)(5) claim, the City argues that an employer does not violate NYCCBL § 12-306(a)(5) by making a change pursuant to its managerial prerogative during a *status quo* period. Further, SBA, LBA, and DEA were not in *status quo* periods when IO 52 was issued. Finally, the City argues that the Board does not have jurisdiction over the Unions' CSL claim.

DISCUSSION

We recognize the Unions' legitimate concern that officers may find it demeaning and humiliating to be subject to a mandatory breathalyzer test in the immediate and often traumatic aftermath of the proper discharge of their firearms. However, based upon *City v. PBA*, we are

constrained to find that IO 52 is related to discipline and that the new trigger of breathalyzer testing of officers is not mandatorily bargainable.[13]

NYCCBL § 12-306(a)(4) makes it an improper practice for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Thus, NYCCBL § 12-306(c) requires public employers and employee organizations "bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009). It is well-established that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012). To establish that a unilateral change constitutes an improper practice, "[t]he petitioner must 'demonstrate the existence of such a change from the existing policy or practice' [and establish] . . . that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *DC 37*, 4 OCB2d 19, at 22 (BCB 2011) (quoting *SSEU*, 1 OCB2d 20, at 9 (BCB 2008)).

In the instant matter, it is undisputed that the issuance of IO 52 constituted a unilateral change. The Unions argue that IO 52 impacts upon numerous areas, including the decision to test for alcohol, the use of the test results, and the procedures, protocols and methodologies related to such testing. However, we find that the only material unilateral change resulting from IO 52 concerned the decision to test for alcohol after the discharge of a firearm resulting in

[13] Moreover, we note that that IO 52 "is directly related to the NYPD's role as an investigator of crimes" (*Lynch*, 589 F.3d at 100) and it is well established that policies and procedures that may "impermissibly interfere with criminal investigations" are non-mandatory subjects of bargaining. *SBA*, 61 OCB 22, at 22 & n. 18; *see also Matter of City of New York v. Uniformed Fire Officers Assn.*, 95 N.Y.2d 273, 283 (2000); *City of Rochester*, 12 PERB ¶ 3010 (1979); *City of Schenectady*, 21 PERB ¶ 3022 (1988).

injury or death. That is, IO 52 established new "circumstances prompting testing; *i.e.*, so-called testing triggers." *City v. PBA*, 14 N.Y.3d at 49.[14]

Further, we find that IO 52 is related to discipline. The Court of Appeals in *City v. PBA* found testing triggers to be related to discipline. *See* 14 N.Y.3d at 59. IO 52's stated purpose is "to ensure[] the highest levels of integrity" and it requires that IAB be notified in every case where the discharge of a firearm by an officer results in death or injury. (Ans., Ex. I, Purpose) IO 52 references several PGPs which explicitly contemplate discipline, including PGP 203-04 ("excessive consumption of, and intoxication from, alcohol will result in that member's termination from the Department") (Ans., Ex. A, Additional Data); PGP 206-12 (member found to be intoxicated is to be placed "on modified assignment or suspended, as appropriate") (Ans., Ex. B, Procedure 7); and PGP 212-29 (investigating officer required to make recommendations that may include "Command Discipline, [and] Charges and Specifications") (Ans., Ex. E, Procedure 14b(2)(e)). We note that our finding that IO 52 is related to discipline is consistent with that of the federal courts. *See Lynch*, 589 F.3d at 104 (finding that IO 52 is related to discipline); *Palladino*, 2012 WL 2497272, * 5 (same).

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[14] The Unions demand bargaining in five areas: (i) the method of taking a sample; (ii) administering the test; (iii) the acceptable levels of alcohol; (iv) the method for affording the member the right to independently evaluate the sample; and (v) the use of the test results. We find that no material changes were occasioned by IO 52 in these areas. As to the first two demands, IO 52 did not alter the method of taking or testing a sample. Testing by PBT devices, Intoxilyzers, and the Highway IDTU all preceded the issuance of IO 52. We find IO 52's requirement that an IAB officer conduct the PBT device test to be a *de minimis* change from the pre-existing procedures of IO 9-3 because it is undisputed that, prior to the issuance of IO 52, IAB was involved in all shootings that resulted in an injury. As to the third demand, the record does not establish that the level indicating intoxication has changed, but we note that the pre-existing IO 9-3 level for being found unfit for duty—.04—is much lower than IO 52's level for intoxication—.08. As to the fourth demand, IO 52 does not address a member's right to independently evaluate a sample or the method to do so. Thus, to the extent such a right exists, IO 52 did not alter it. Finally, as to the fifth demand, all the uses of evidence of intoxication addressed by IO 52, including discipline, pre-existed its issuance.

Some matters related to discipline are "excluded from bargaining" (*City v. PBA*, 14 N.Y.3d at 60), as the Court of Appeals has found that the Commissioner's statutory authority over discipline may "limit the scope of collective bargaining." *Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. N.Y.S. Pub. Employ. Relations Bd.*, 6 N.Y.3d 563, 576 (2006) ("PBA v. PERB").[15] Nevertheless, the Court of Appeals has also explicitly noted that it has not decided the "full extent or the limits of [the Commissioner's] unilateral disciplinary authority" and cautioned that it was "not saying that every step that the Commissioner takes or every decision that he makes" related to discipline is excluded from bargaining. *City v. PBA*, 14 N.Y.3d at 59-60.[16]

However, we are constrained by *City v. PBA* to hold that "testing triggers are encompassed within the [] Commissioner's disciplinary authority and therefore are excluded from collective bargaining as a matter of policy." 14 N.Y.3d at 59. The Court of Appeals found that "the detection and deterrence of wrongdoing within the NYPD . . . is a crucial component of the [] Commissioner's responsibility to maintain discipline within the force." *Id.*; *see also*

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[15] In *PBA v. PERB*, the Court of Appeals recognized both that public policy favors collective bargaining and that statutes vest the Commissioner with "control of the . . . discipline of the [D]epartment," including the power "to punish [an] offending party." 6 N.Y.3d at 576 (quoting City Charter § 434(a) & Admin. Code § 14-115(a)). However, it held that the public policy of vesting discipline in the Commissioner is "so important that the policy considerations favoring collective bargaining should give way" such that "[t]hese legislative commands are to be obeyed even where the result is to limit the scope of collective bargaining." *Id.*

[16] *City v. PBA* concerned the NYPD's random drug testing procedures and its decision to phase out urine analysis in favor of hair analysis and addressed only the following discrete question: "whether drug testing methodology and testing triggers are encompassed within the [Commissioner's] disciplinary authority and therefore are excluded from collective bargaining as a matter of policy." 14 N.Y.3d at 59. The Court of Appeals found that the "Commissioner's disciplinary authority . . . is not limited to the formal disciplinary process; *i.e.*, situations where allegations of misconduct have been made or are being adjudicated against identified officers." *Id.* Thus, it held that the testing methodology and testing triggers at issue were within the Commissioner's disciplinary power and excluded from bargaining.

Lynch, 589 F.3d at 101 (finding deterrence to be a primary goal of IO 52); *Palladino*, 2012 WL 2497272, * 5 (same). Thus, the Court of Appeals did not limit the Commissioner's "discretion to select the investigatory measures that he deems most effective . . . by requiring collective bargaining over testing methodology and testing triggers." *Id.* The Unions argue that *City v. PBA* is not controlling because that decision involved a change to a pre-existing testing policy while the testing policy of IO 52 is completely new and because *City v. PBA* involved reasonable suspicion and random testing, neither of which are present in IO 52. The holding in *City v. PBA*, however, did not turn on these factors. To the contrary, the Court of Appeals stated that "the only issue properly before" it concerned testing methodology and testing triggers. *Id.*, at 58.[17]

Accordingly, we find that, under the circumstances presented here, IO 52's mandatory breathalyzer testing upon the discharge of a firearm resulting in injury or death is excluded from bargaining. As the only material change occasioned by the issuance of IO 52 was the above described new testing trigger, we find that the unilateral implementation of IO 52 is not a violation of the City's duty to bargain.[18]

[17] We also note that while IO 52 created a new testing trigger, breathalyzer testing itself is not new to the NYPD. Further, both the random testing at issue in *City v. PBA* and the suspicionless testing of IO 52 require testing independent of any individualized suspicion that the officer being tested has violated any NYPD policy regarding drugs or alcohol.

[18] As we find IO 52 is excluded from bargaining, we find no NYCCBL § 12-306(a)(5) violation. *See DC37, L.2021*, 51 OCB 36 (BCB 1993) (*status quo* provision does not prevent changes to subjects outside the scope of mandatory collective bargaining).

ORDER

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

ORDERED, that the improper practice petition, Docket No. BCB-2654-07, filed by the Sergeants Benevolent Association of the City of New York, Inc., the Patrolmen's Benevolent Association of the City of New York, Inc., the Detectives' Endowment Association, Inc., Police Department, City of New York, and the Lieutenants Benevolent Association of the City of New York, Inc., against the City of New York and the New York City Police Department, be, and the same hereby is, dismissed in its entirety.

Dated: November 13, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

CHARLES G. MOERDLER
MEMBER