PBA, 6 OCB2d 36 (BCB 2013)

(IP) (Docket No. BCB-3004-12)

Summary of Decision: The PBA claimed that the City violated NYCCBL § 12-306(a)(1), (4), and (5), by failing to bargain over the NYPD's changes to performance evaluation procedures for police officers on patrol duty. The City argued that it had no duty to bargain over the changes because the NYPD had the authority to unilaterally adopt the new procedures pursuant to NYCCBL § 12-307(b). The City further argued that the changes to the evaluation procedures were, at most, *de minimis*. The Board found that the NYPD unilaterally changed the performance evaluation procedures for police officers, a mandatory bargaining subject, by increasing the frequency by which police officers were required to submit performance reports and attend meetings to discuss their performance, and by introducing a new requirement that they sign a monthly performance report. The Board dismissed the remainder of the PBA's failure to bargain claims because they concerned non-mandatory subjects of bargaining. Accordingly, the petition was granted, in part, and denied, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On February 17, 2012, the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA") filed a verified improper practice petition against the City of New York ("City") and

the New York City Police Department ("NYPD" or "Department"). The PBA alleges that the City and the NYPD violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to bargain over new performance evaluation procedures for police officers on patrol duty. The PBA asserts that the new requirements implemented by the NYPD are procedural changes to the performance evaluation process, and therefore are mandatory subjects of bargaining. The City argues that it had no duty to bargain over these changes because the NYPD has the authority, pursuant to NYCCBL § 12-307(b), to unilaterally adopt the new requirements. The City further argues that the changes to the evaluation procedures were, at most, *de minimis*. This Board finds that the NYPD unilaterally changed the performance evaluation procedures for police officers, a mandatory subject of bargaining, by increasing the frequency in which police officers are required to submit performance reports and attend meetings to discuss their performance, and by introducing a new requirement that police officers sign a monthly performance report. The Board dismisses the remainder of the PBA's claims related to the performance evaluation procedures because they concern non-mandatory subjects of bargaining. Accordingly, the petition is granted, in part, and denied, in part.

BACKGROUND

The PBA is the duly certified collective bargaining agent for all members of the NYPD holding the rank of police officer. The PBA and the NYPD are parties to a collective bargaining agreement ("Agreement") covering the period of August 1, 2006 through July 31, 2010, which remains in *status quo* pursuant to NYCCBL § 12-311(d).

The NYPD has conducted performance evaluations of its uniformed members for approximately forty years. The procedures for conducting the evaluations have been modified on various occasions throughout that period. The NYPD Patrol Guide ("Patrol Guide") sets forth the procedures by which police officers assigned to patrol duties are regularly evaluated by their supervisors. Patrol Guide Procedure No. 205-57, entitled "Police Officer's Monthly/Quarterly Performance Review and Rating System" ("PG 205-57"), was the primary source for the NYPD's evaluation procedures for police officers on patrol duty from its effective date of June 20, 2008 until October 2011.[1]

PG 205-57

The stated purpose of PG 205-57 was "[t]o evaluate the performance of police officers assigned to patrol duties, and to identify and reward officers involved in enforcement activity . . . by providing them with up to four (4) career path points on an annual basis." (Pet., Ex. D) By earning points, police officers worked towards eligibility for investigative assignments and other "commands of choice," and thus advanced in the Department's ranks. (Pet., Ex. G)

Pursuant to PG 205-57, the Department mandated that police officers complete a Monthly Performance Report ("MPR") as part of the performance evaluation process. The MPR is a two-page form on which police officers were required to record the number of enforcement actions, such as arrests, summonses, and responses to radio runs, that they performed over a monthly

[1] The City contends that PG 205-57 "does not represent a complete and final list of the procedures" for police officer evaluations. (Ans. ¶ 12)

period, as well as applicable "conditions" and significant achievements.[2] (Pet., Ex. D) PG 205-57 mandated that police officers sign and date the MPR and submit it to a designated sergeant on a monthly basis by the third day of the following month. Police officers were not required to carry the MPR on their person during their tours, nor were they required to record enforcement actions or conditions contemporaneously with their occurrence. However, the City contends that police officers were required to record this information in their memo books, which they carried with them during their tours.

PG 205-57 also required that a sergeant review the MPR each month and conduct a Quarterly Performance Review ("QPR") with his assigned police officer at the beginning of January, April, July, and October. As part of the QPR, the sergeant was required to privately interview the police officer and discuss his or her specific activity and overall performance for the quarter, based on the MPR. The sergeant then assigned a numerical rating to the police officer's performance for the quarter. Under PG 205-57, the police officer was not required to sign the QPR. If the QPR was substandard for two consecutive quarters, the police officer's subsequent interview would be conducted by a commanding officer. The MPRs and QPRs, in conjunction with the rating system, formed the "primary basis and documentation" for a police officer's annual evaluation. (Pet., Ex. D) The annual evaluation, in turn, affected the officer's promotion opportunities within the NYPD.

[2] The MPR lists two applicable conditions: "General Enforcement Against Crime, Quality of Life and Traffic Violations" and "Declared Condition," which is "mutually agreed upon by [a] police officer and supervisor." (Pet., Ex. E)

The Quest for Excellence Program, Operations Order 52, and Interim Order 49

In late 2010, the NYPD formed a committee to "more clearly define police officer performance objectives," and consequently created the "Quest for Excellence" program ("Quest for Excellence"). (Ans., Ex. 2) Quest for Excellence was initially implemented as a pilot program; it became operational citywide on June 27, 2011. Its stated objective is to "assist commands in monitoring and addressing chronic or significant conditions and to disseminate timely information to uniformed members of the service on patrol and supervisors in these commands." (Ans., Ex. 2) The intent of Quest for Excellence is to shift the focus of enforcement and evaluations away from simply tracking the number of summonses, arrests and other enforcement actions in favor of determining whether crime and other conditions present in a precinct are being appropriately addressed. According to the Department, in order to effectively address the community's crime and quality of life conditions, "daily activities of police officers must be designed and coordinated to impact on the identified issues." (Pet., Ex. B) (emphasis in original).

To facilitate the shift to Quest for Excellence, the NYPD uses an electronic "folder management system" in which commanding officers create "Command Conditions Reports." (Pet., Ex. I) The Command Conditions Report provides information about current crime conditions, patterns, and trends for each sector or post and can be viewed from any command via the Department's internal computer system. According to the Department, these Command Conditions Reports are intended to assist police officers and supervisors in identifying locations where patrol activity may most effectively address a community's crime and quality of life conditions. Each precinct's commanding officer prepares a Command Conditions Report on a

weekly basis and enters it into the electronic application. The Command Conditions Report is subsequently disseminated to police officers and supervisors.

In conjunction with Quest for Excellence, the NYPD issued Operations Order 52 ("OO 52") and Interim Order 49 ("IO 49") on October 17, 2011 and October 24, 2011, respectively. IO 49 suspends and replaces PG 205-57. Together, OO 52 and IO 49 modify the performance evaluation procedures for police officers assigned to patrol duties.

Pursuant to OO 52, effective November 1, 2011, the NYPD revoked the MPR and replaced it with a new form, entitled "Police Officers Monthly Conditions Impact Measurement Report" ("POMCIMR"). (Pet., Ex. B) According to IO 49, the POMCIMR is used to measure police officers' performance levels by requiring them to identify two primary conditions prior to commencing their patrol and then to address those conditions throughout their tour. (Pet., Ex. C) In contrast to PG 205-57, under which police officers were not required to record information on the MPR on a daily basis, IO 49 mandates that police officers must document, on a daily basis, the following information on the POMCIMR: (a) his or her assignment; (b) the two identified conditions to be addressed; and (c) the activity performed. (Pet., Ex. C) Additionally, the POMCIMR must be completed contemporaneously with any activity performed during the tour related to the stated conditions. IO 49 explicitly requires police officers to carry the POMCIMR inside their memo book and present it to any supervisor upon request.

In contrast to the procedure under PG 205-57, which required the submission of the MPR only once per month, OO 52 provides that police officers must submit the POMCIMR to their supervisor on the 7th, 14th, and 21st day of each month. Following each weekly submission, police officers must also participate in a meeting to "provide the supervisor with a weekly opportunity to

evaluate the member's performance in proactively addressing sector/post conditions." (Pet., Ex. B)

At the end of every month, police officers must complete the captions at the back of the POMCIMR indicating their total monthly activity, and must list any additional comments relevant to actions they have taken to address the declared conditions. They then must submit the POMCIMR to their supervisor by the second day of the following month. The supervisor indicates on the POMCIMR whether the police officer was "effective" or "ineffective" in addressing the referenced conditions, discusses the POMCIMR with the police officer, and forwards it to be saved electronically in the Quest for Excellence computer program.

Pursuant to IO 49, supervisors must conduct QPRs every January, April, July, and October within seven days following the end of the quarter for which the review is due. Supervisors must privately interview the police officers, discuss their specific activity and overall performance for the quarter, and numerically rate their performance. The supervisor must fill out a section on the back of the POMCIMR contained in a fully enclosed box labeled "Supervisor's Quarterly Performance Review." (Pet., Ex. H) Inside the box is the following list of six criteria on which the supervisor must numerically rate the police officer:

1. Officer took initiative in correcting conditions
2. Officer's enforcement activity addressed declared conditions
3. Officer took appropriate follow-up steps to properly address conditions
4. Officer's administrative reports were accurate
5. Officer related well during community interactions
6. Officer presented an overall professional image

(Pet., Ex. H) Below the list, there is a space for "additional comments" by the supervisor. Beneath that, without any further text, there are spaces for the signatures of the supervisor and the

police officer. In contrast to the procedure under PG 205-57, which did not require police officers to sign the QPR, police officers must now place their signature inside the fully enclosed box. During a conference, the parties agreed that IO 49 explicitly provides that police officers must "[s]ign reverse side of [POMCIMR] acknowledging that the Supervisor's [QPR] was discussed." (Pet., Ex. C) As in the past, IO 49 states that a police officer's POMCIMRs and QPRs, in conjunction with the rating system, should be the "primary basis and documentation for members' annual evaluation." (*Id.*)

On March 21, 2011, NYPD labor relations staff members and PBA representatives met to discuss the Quest for Excellence pilot program. During the meeting, the NYPD informed the PBA for the first time of its interest in replacing the MPR with the POMCIMR. However, the PBA alleges, and the NYPD does not deny, that the NYPD never disclosed to the PBA the various changes to the performance evaluation procedures mandated by OO 52 and IO 49 prior to their publication.

POSITIONS OF THE PARTIES

PBA's Position

The PBA argues that the NYPD unilaterally changed the procedures for evaluating police officers during a *status quo* period, in violation of NYCCBL § 12-306(a)(1), (4), and (5).[3]

[3] 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;
>
> ***

Specifically, the PBA claims that the NYPD implemented the following procedural modifications for police officers, all of which it contends are mandatory subjects of bargaining: (1) the new requirements that members submit the POMCIMR to supervisors and participate in performance reviews on the 7th, 14th, and 21st of each month as part of their evaluation process; (2) the new requirements that police officers meet with a supervisor and participate in a monthly evaluation; (3) the new requirement that members carry the POMCIMR upon which they will be evaluated on their person during their tour, and present the POMCIMR to any supervisor upon request; and (4) the new requirement that member provide a signature on the QPR following their quarterly evaluation.

Citing decisions of this Board and the New York State Public Employment Relations Board ("PERB"), the PBA contends that procedural aspects of an evaluation system are mandatory subjects of bargaining, particularly where the evaluation system involves employee participation. It further contends that changes to the evaluation process which require additional acts by an employee are deemed procedural and thus do not fall within managerial prerogative.

The PBA asserts that, pursuant to OO 52 and IO 49, police officers must now participate in supervisory reviews and submit reports on a weekly basis when formerly they were only required to submit reports on a monthly basis and meet on a quarterly basis. In addition to the

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> (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 or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization . . . .

weekly meetings, they must also meet with a supervisor on a monthly basis for an evaluation of their performance. The PBA contends that both requirements are, on their face, changes to the previous evaluation procedures which require additional participation by police officers. Therefore, they are mandatory subjects of bargaining. The PBA asserts that this Board has held that procedural revisions to performance evaluations, such as "timing issues," are mandatory bargaining subjects unless they pertain only to supervisory functions. (Pet. ¶ 30)

The PBA argues that the new requirements that police officers keep the POMCIMR on their person while on duty and present it to any supervisor upon request are also material changes to the evaluation procedures because they require additional employee participation. Therefore, they are mandatory subjects of bargaining.

Furthermore, the PBA alleges that, for the first time, a police officer is now required to sign the fully enclosed box on the POMCIMR designated for the QPR. The PBA contends that this new signature requirement is a mandatory subject of bargaining, even if it was intended merely as an acknowledgment of the police officer's presence at the evaluation. It argues that the requirement is a change on its face to the evaluation procedures because it requires additional participation by the police officer being evaluated. The PBA argues that both the Board and PERB have held that requiring an employee's signature on a performance evaluation form constitutes "bargainable employee participation." (Pet. ¶ 40) Therefore, this procedural change also concerns a mandatory subject of bargaining.

In response to the City's argument that NYCCBL § 12-307(b) permits the NYPD to implement new performance evaluation procedures, the PBA argues that these procedures are not specifically enumerated in NYCCBL § 12-307(b), nor can it be inferred from the statute that

performance evaluation procedures should be deemed a non-mandatory subject of bargaining.[4] Moreover, the PBA contends that the fact that the referenced procedures bear some relation to the NYPD's central mission of combatting and preventing crime does not entitle the Department to unilaterally implement new work rules. Finally, the PBA argues that the changes to the evaluation procedures are not *de minimis* because each change involves substantial participation by police officers, a circumstance which the Board has previously held triggers a bargaining obligation.

City's Position

The City argues that the petition must be dismissed because the PBA's claims relate to issues that fall within the NYPD's express managerial rights under NYCCBL § 12-307(b). The City contends that NYCCBL § 12-307(b) guarantees the NYPD's right to direct its employees and to determine the "methods, means and personnel by which government operations are to be conducted." (Ans. ¶ 65) It contends that this statutory provision also provides the NYPD with the managerial authority to act unilaterally in certain areas that fall outside the scope of mandatory bargaining. The City asserts that this Board, as well as PERB, has restricted the scope

[4] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and technology of performing its work.

of bargaining when it "intrudes into those areas that primarily involve a basic goal or mission of the employer." (Ans. ¶ 67)

According to the City, the NYPD is responsible for enhancing the quality of life in the City by preserving the peace, reducing fear, and providing for a safe environment. It is therefore "beyond question" that the NYPD has a "fundamental interest" in ensuring that police officers are addressing crime and quality of life conditions in the City. (Ans. ¶ 68) The City argues that OO 52 and IO 49 go to the heart of the NYPD's mission by providing management with the most effective means to ensure the protection of the public and its property. Accordingly, the NYPD's issuance of OO 52 and IO 49 were permissible exercises of its management rights and the City has no duty to bargain over them.

Next, the City argues that there is a strong public policy interest in allowing the NYPD to create and implement policies to carry out its central mission to, among other things, prevent crime and protect individual and property rights. To this end, the NYPD must be permitted to take the steps necessary to ensure that its officers are working safely and effectively. OO 52 and IO 49, in conjunction with Quest for Excellence, are the means by which it achieves this goal.

The City denies that the changes implemented by OO 52 and IO 49 address conditions of employment. Rather, it contends that they "expand the criteria upon which employees are evaluated (by incorporating crime conditions)." (Ans. ¶ 69) According to the City, changes in evaluation criteria are a non-mandatory subject of bargaining. The City argues that, to the extent the Board determines that OO 52 and IO 49 incorporate procedural changes, the requirement that police officers submit their POMCIMR on a weekly basis creates an additional obligation only on the part of supervisors, not the police officers. It distinguishes the new requirements by asserting

that police officers are not numerically rated at the weekly meetings, do not sign the POMCIMR on a weekly basis, and receive no overall rating. Rather, they are simply "discussing crime conditions" with their supervisor. (Ans. ¶ 70)

Finally, the City asserts that assuming, *arguendo*, the Board finds that the City had a duty to bargain over the changes, any changes that the NYPD made to the performance evaluation procedures were *de minimis*.[5] The City contends that the Board has held that a change is considered *de minimis* where an employer's actions do not "materially, substantially, or significantly" change a term or condition of employment, or are a "mere change in procedure." (Ans. ¶ 79) Here, the City argues that OO 52 and IO 49 do not abolish or substantially change the performance evaluation process. Rather, they make minor adjustments to that process. The City explains that, under OO 52 and IO 49, police officers still have to undergo monthly and quarterly reviews, submit and sign monthly reports, and review their activity individually with their supervisor. The fact that police officers must now carry the POMCIMR on their person should not affect the analysis because they should already have been doing this.

DISCUSSION

The PBA contends that the NYPD unilaterally changed the procedures pursuant to which police officer performance is evaluated, in violation of NYCCBL § 12-306(a)(1), (4), and (5). Specifically, the PBA alleges that the NYPD modified the existing performance evaluation procedures by requiring police officers to: submit the POMCIMR to supervisors on a more frequent basis; participate in weekly and monthly performance evaluation meetings with a

[5] The City also argues that, because there is no violation of NYCCBL § 12-306(a)(4), there can be no derivative violation of NYCCBL § 12-306(a)(1).

supervisor; carry the POMCIMR at all times while on duty; record "conditions" on the POMCIMR on a daily basis; present the POMCIMR to any supervisor upon request; and provide a signature on the QPR following their quarterly performance evaluation. These actions either were previously not required or were required on a less frequent basis.

A public employer may not unilaterally implement a change in a mandatory subject before bargaining on the subject has been exhausted. *See DC 37, L. 3631*, 4 OCB2d 34, at 12 (BCB 2011) (citing *UMD, L. 333*, 2 OCB2d 44, at 24 (BCB 2009); *DC 37*, 77 OCB 34, at 18 (BCB 2006); *COBA*, 63 OCB 26, at 9 (BCB 1999)). When a petitioner asserts that an employer's failure or refusal to bargain in good faith has resulted in a unilateral change to a term or condition of employment, the petitioner must first demonstrate that the matter over which it seeks to negotiate is or relates to a mandatory subject of bargaining. *See UFOA*, 1 OCB2d 17, at 9 (BCB 2008). Under NYCCBL § 12-307(a), mandatory subjects of bargaining generally include 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 8 (BCB 2009). The petitioner must then demonstrate a change from an existing policy or practice. *See UFOA*, 1 OCB2d 17, at 9 (BCB 2008). If a unilateral change is found to have occurred in a term or condition of employment that is a mandatory subject of bargaining, the Board will find that the change constitutes a refusal to bargain in good faith and, therefore, an improper practice. *Id.*; *see DC 37*, 79 OCB 20, at 9 (BCB 2007); *see also Local 1182, CWA*, 26 OCB 26, at 4 (BCB 2001).

It is well-established that the procedural aspects of employee performance evaluations are mandatory subjects of bargaining. *See DC 37*, 75 OCB 13 (BCB 2005), at 11; *DC 37, L. 1508*, 79

OCB 21, at 22-23 (BCB 2007); *PBA*, 63 OCB 2, at 13 (BCB 1999). *See also City of Yonkers*, 39 PERB ¶ 4580, at 4660 (2006) (Maier, ALJ) ("it has long been held that procedures for the evaluation of employees are mandatory subjects of bargaining"), *affd.*, 40 PERB ¶ 3001 (2007). On the other hand, the imposition of criteria used for evaluation, and substantive changes to that criteria, are not mandatory subjects of bargaining because they fall within an employer's rights under NYCCBL § 12-307(b) to determine the "methods, means and personnel" by which government operations are to be conducted. *See DC 37, L. 1508*, 79 OCB 21, at 25 (BCB 2007) (citing *Matter of Patrolmen's Benevolent Assn. of the City of N.Y. v. N. Y. City Bd. of Collective Bargaining*, Index No. 112687/04, at 4 (Sup. Ct. N.Y. Co. Aug. 17, 2005) (Friedman, J.), *affd.*, 38 A.D.3d 482 (1st Dept. 2007) ("imposition of criteria used for evaluation, and substantive changes in that criteria, are areas of managerial prerogative which need not be bargained with an employee organization").

Here, it is undisputed that the NYPD adopted OO 52 and IO 49, and hence the changes to certain aspects of police officer performance evaluations, without first negotiating with the PBA. The paramount remaining issue, therefore, is whether these changes are procedural and thus a mandatory subject of bargaining, or substantive and a non-mandatory subject of bargaining. *See DC 37, L. 1508*, 79 OCB 21, at 25.

We have held that changes to a performance evaluation which require an employee to take additional actions or which implicate an expectation or action on the part of the employee are deemed procedural and hence do not fall within the managerial prerogative. *See DC 37, L. 1508*, 79 OCB 21, at 23 (citing *Matter of Patrolmen's Benevolent Assn., supra*, at 6) ("where an employer imposes a new requirement that an employee meet with a supervisor as part of an

evaluation process, this requirement is a procedure that is subject to mandatory bargaining") (emphasis in original); *see also DC 37, L. 3631*, 4 OCB2d 34, at 13 ("Changes which require additional acts of an employee are deemed 'procedural' in the sense that they do not fall within the managerial prerogative."); *City of Yonkers*, 39 PERB ¶ 4580, at 4660 (holding that procedures requiring officers to meet with their supervisor, sign and date a form, and complete a "performance enhancement agreement" are all elements of evaluation procedures and mandatory subjects of bargaining); *Suffolk Cty. Bd. of Coop. Educ. Serv.*, 17 PERB ¶ 3043 (1984) (requirement that teacher participate in pre-observation conference as part of evaluation procedure is unilateral change in procedure and a mandatory subject of bargaining).

We find that, by increasing the frequency in which police officers must participate in performance evaluations, the NYPD made procedural changes to the evaluation process. In contrast to the procedures under PG 205-57, the new mandate requires police officers to submit the POMCIMR to their supervisor on a weekly basis and thereafter meet with their supervisor, also on a weekly basis, to discuss each submission. Pursuant to PG 205-57, police officers were only required to complete the MPR on a monthly basis and to meet with their supervisor on a quarterly basis to discuss their performance. In addition, police officers must now participate in a monthly meeting with a supervisor to discuss the contents of the POMCIMR, something that was not previously required of them under PG 205-57. These modifications to the performance evaluation process constitute procedural changes because they require police officers to submit performance reports and participate in performance evaluation meetings with a supervisor on a more frequent basis than under the prior policies. Because the NYPD implemented these procedural modifications without any negotiation, they constitute unilateral changes to a

mandatory subject of bargaining, in violation of NYCCBL § 12-306(a)(4) and (5). When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37*, 77 OCB 34, at 18 (BCB 2006).

For similar reasons, we find that the NYPD violated NYCCBL 12-306(a)(4) and (5) by requiring police officers to sign their name in the fully enclosed box on the back of the POMCIMR following their quarterly performance review. In determining whether an alleged change is substantive or procedural, we have held that a change which requires increased employee participation is procedural in nature. *See DC 37, L. 3631*, 4 OCB2d 34, at 13-14. Here, in contrast to the procedure under PG 205-57, which did not require police officers to sign the QPR, police officers must now sign the form immediately below their supervisors' ratings and comments. When a police officer signs the form following his QPR, it has the effect of "acknowledging that the Supervisor's [QPR] was discussed."[6] (Pet., Ex. C) Such a requirement constitutes increased participation by the police officer and is a procedural matter requiring collective bargaining. *See City of Yonkers*, 39 PERB ¶ 4580, at 4660 (2006) (Maier, ALJ), *affd.*, 40 PERB ¶ 3001 (2007) (requiring an employee to sign an evaluation form as part of a performance evaluation is an element of an evaluation procedure, and employee evaluation procedures are a mandatory subject of bargaining); *County of Nassau*, 35 PERB ¶ 4566, at 4721

[6] Our dissenting colleagues misstate our finding on this issue by erroneously asserting that the Majority held that the NYPD cannot require an officer to sign a form "acknowledging that the officer has met with his or her supervisor" without first bargaining with the PBA. As we discuss in the body of our Decision, an officer's signature on the QPR connotes more than the mere acknowledgment that a meeting took place. We further take issue with the dissent's contention that such an erroneous finding "is clear from the pleadings," and that the City "admitted" as much in its answer. To the contrary, the City's answer reflects an inconsistency as to the significance of the officer's signature, and consequently created a factual dispute on the issue. (*Compare* Ans. ¶ 24 *with* ¶ 25) As a result, we looked to IO 49, which explicitly directs the officer to sign the QPR "acknowledging that the Supervisor's [QPR] was discussed." (Pet., Ex. C)

(2002) (Blassman, ALJ) (finding an improper unilateral change where a new requirement mandated that, following a performance-related meeting, employees must sign and date a training ledger used by supervisors to record employee performance). Accordingly, we find this unilateral procedural change to constitute a mandatory subject of bargaining.

Respondents offer a number of reasons why these new requirements should not be considered modifications to the performance evaluation procedures, all of which we reject.[7] First, they argue that the additional reports which police officers must now submit and the increased number of meetings they must now attend cannot be considered unilateral changes because neither concerns performance evaluations. Respondents assert that at the weekly review, police officers are simply discussing crime conditions with a supervisor. (*See* Ans. ¶ 70) However, IO 49 explicitly states that the purpose of the weekly review is to "provide the supervisor with a weekly opportunity to evaluate the member's performance in proactively addressing sector conditions." (Pet., Ex. C) Thus, there is clearly a significant evaluation component to these meetings.

Respondents similarly argue that the supervisor is not required to issue a formal, numeric rating to the police officer following a meeting regarding his monthly submission of the POMCIMR. However, IO 49 directs supervisors to check a box indicating whether the police officer received an effective or ineffective rating and provide a justification for that rating. We find no factual or legal support for the premise that the absence of a numeric rating requirement removes a police officer's evaluation from the performance evaluation process.

[7] The PBA contends that Respondents also attempt to state a waiver defense by asserting that the NYPD made changes to evaluation procedures in the past without bargaining with the PBA. (Rep. ¶ 43 fn. 2) We find no evidence that Respondents intended to raise such a defense and therefore do not address the issue.

Respondents further contend that the requirement that police officers submit their POMCIMR on a weekly basis does not create any additional obligation but merely requires that they make their submissions on a more frequent basis. We have never held that an additional obligation must necessarily be an entirely new one. Hence, in *DC 37, L. 3631*, 4 OCB2d 34, we held that increasing the frequency by which an employee was required to submit to a performance evaluation was an additional obligation on the part of the employee and constituted an improper practice, even though it was not an entirely new obligation. *Id.*, at 13.

Having found that the NYPD's unilateral actions constitute changes to mandatory subjects of bargaining, we cannot accept the City's defense that the NYPD had an express managerial prerogative to adopt these particular procedural changes. We likewise dismiss the NYPD's argument that it should be permitted to implement these changes without bargaining because they are tied closely to the heart of the NYPD's mission.

In *City of Yonkers*, an ALJ held that where the employer's managerial prerogative to establish evaluation criteria is not in dispute because the union challenged only the unilateral implementation of the evaluation procedures, managerial prerogative is not a defense to its action. 39 PERB ¶ 4580, at 4660 ("If a subject is a mandatory subject of bargaining, the fact that a party has a legitimate reason for its action does not alter its obligation to bargain. The reason such an action is taken goes to the merits of the position, not to the negotiability of the subject matter at issue."). Here, the PBA does not dispute the NYPD's prerogative to unilaterally determine the methods, means and personnel at its disposal to reduce crime and improve the quality of life. Thus, it does not challenge the Department's right to institute Quest for Excellence or the criteria for evaluating the performance of police officers pursuant to it. Instead, it seeks to bargain solely

over the procedures used to evaluate the performance of police officers. Thus, the fact that these changes are closely tied to the Department's mission is not a defense to its failure to bargain over them.

Notwithstanding our findings that the NYPD made unilateral changes to the performance evaluation procedures discussed above, we reach a different conclusion with regard to the requirements that police officers carry the POMCIMR on their person at all times, present it to any supervisor upon request, and record specific conditions on the POMCIMR on a daily basis. We are unpersuaded by the PBA's characterization of these requirements as performance evaluation procedures. Unlike the changes to the frequency of report submissions and supervisory meetings, there is nothing in the record to indicate that the new obligations to carry the POMCIMR, record conditions contemporaneously on it, and/or present it to a supervisor, play a direct role in a police officer's performance evaluation. For example, although a police officer must present the POMCIMR to a supervisor upon request, there is no evidence that the supervisor who receives it also evaluates that police officer's performance. Similarly, there is nothing in the record to indicate that carrying the POMCIMR on a police officer's person encompasses an evaluatory component.

Therefore, we find that these requirements are not terms and conditions of employment. They are best characterized as additional tasks or responsibilities, which are within the NYPD's managerial right to determine. In reaching this conclusion, we understand that these new tasks or responsibilities are closely linked to the performance evaluation process. Indeed, by mandating that police officers carry the POMCIMR on their person and record conditions contemporaneously, the NYPD is requiring them to gather information that will be utilized in the

performance evaluation process. Yet, they are also gathering the same information for the purpose of facilitating the Quest for Excellence program. Indeed, the record reflects that Quest for Excellence and the performance evaluation process for police officers are closely intertwined. However, these particular requirements can be distinguished from those which are performance evaluation procedures because these requirements are managerial directives which have only an indirect impact on the performance evaluation process. We agree with the First Department's statement that "managerial decisions which impinge only indirectly or tangentially upon the employment condition, will generally be treated as exempt from mandatory collective bargaining." *Matter of Levitt v. Bd. of Collective Bargaining of City of N. Y.*, 140 Misc.2d 727, 731 (1988), *affd.*, 171 A.D.2d 545 (1st Dept. 1991), *revd. in part, affd. in part*, 79 N.Y.2d 120 (1992).

Finally, having found that the NYPD made unilateral changes to mandatory subjects of bargaining, we must address the City's argument that the changes are nonetheless *de minimis*. 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. . . ." *DC 37*, 4 OCB2d 43, at 9-10 (BCB 2011) (citations omitted). We have held that the latter does not suffice to establish an improper practice. Thus, in *DEA*, 2 OCB2d 11 (BCB 2009), we deemed *de minimis* a requirement that an employee seeking a parking permit complete

a form eliciting the same information as was previously required to be submitted, albeit not in written form.[8] *Id.* at 16.

We are not persuaded by the City's argument that all of the NYPD's modifications to the performance evaluation procedures are *de minimis*. The procedural changes which we deemed to be unilateral modifications to performance evaluation procedures clearly require additional acts-and thus increased participation-on the part of the employee. Consequently, they alter a condition of employment. *See DC 37*, 4 OCB2d 43, at 9-10. Thus, by definition, they are not *de minimis* changes. [9]

[8] The City quotes the National Labor Relations Board's use of the phrase "material, substantial and significant" and suggests that this is the applicable standard used by this Board for determining whether a change is *de minimis*. (*See* Ans. ¶¶ 79-80) We have not adopted, and do not adopt, this formulation. *See DC 37*, 4 OCB2d 43, at 10 fn. 5. However, as discussed above, we note that this Board has deemed changes to be "not sufficiently significant" to warrant bargaining, and hence *de minimis*, 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 addition, in distinguishing between actionable versus *de minimis* unilateral changes, we note that under the Taylor Law, PERB has, as we have under the NYCCBL, used the term "material." *See, e.g.*, *County of Chatauqua*, 22 PERB ¶ 3060, at 3137 (1989).

[9] We disagree with our dissenting colleagues' contention that such increased participation is "immaterial," and therefore insufficient to establish an improper practice. As stated above, we find, on this record, that an officer's participation involves more than signing a form to acknowledge presence. Further, we note again that such procedures have been found by PERB to be mandatorily negotiable. *See City of Yonkers*, 39 PERB ¶ 4580, at 4660.

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-3004-12, filed by the Patrolmen's 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, granted, in part, and denied, in part; and it is hereby

ORDERED, that the New York City Police Department cease and desist from enforcing the provisions of Operations Order 52 and Interim Order 49 that require police officers to (1) submit the Police Officers Monthly Conditions Impact Measurement Report on a weekly basis and participate in a weekly performance review on the 7th, 14th, and 21st of each month as part of the evaluation process; (2) participate in monthly evaluations; and (3) sign the fully enclosed box on the back of the Police Officers Monthly Conditions Impact Measurement Report in which the supervisor must numerically rate the police officer following a quarterly evaluation meeting; and it is further

ORDERED, that the New York City Police Department refrain from making any further change to such provisions unless or until such time as the parties negotiate either to agreement or the dispute is resolved; and it is hereby

ORDERED, that the New York City Police Department restore the *status quo* under PG 205-57 with regard to the changes to the performance evaluation procedures referenced above; and it is hereby

DIRECTED, that the New York City Police Department post a notice of the violations in a location within all precincts and commands that is accessible to all employees represented by the Patrolmen's Benevolent Association of the City of New York, Inc., and commonly used to post messages to its members.

Dated: December 19, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

Dissenting in part in separate opinion. M. DAVID ZURNDORFER
MEMBER

Dissenting in part in separate opinion. PAMELA SILVERBLATT
MEMBER

Concurring in judgment; dissenting in part in separate opinion. 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 6 OCB2d 36 (BCB 2013), in final determination of the improper practice petition between the Patrolmen's Benevolent Association of the City of New York, Inc., 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-3004-12, filed by Patrolmen's 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, granted, in part, and denied, in part; and it is further

ORDERED, that the New York City Police Department cease and desist from enforcing the provisions of Operations Order 52 and Interim Order 49 that require police officers to (1) submit the Police Officers Monthly Conditions Impact Measurement Report on a weekly basis and participate in a weekly performance review on the 7th, 14th, and 21st of each month as part of the evaluation process; (2) participate in monthly evaluations; and (3) sign the fully enclosed box on the back of the Police Officers Monthly Conditions Impact Measurement Report in which the supervisor must

numerically rate the police officer following a quarterly evaluation meeting; and it is further

ORDERED, that the New York City Police Department refrain from making any further change to such provisions unless or until such time as the parties negotiate either to agreement or the dispute is resolved; and it is further

ORDERED, that the New York City Police Department restore the *status quo* under PG 205-57 with regard to the changes to the performance evaluation procedures referenced above; and it is hereby

DIRECTED, that the City post this Notice of Decision and Order for no less than thirty (30) days at all locations used by the New York City Police Department for written communications with employees represented by the Patrolmen's Benevolent Association of the City of New York, Inc.

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.

Partial Dissent of M. David Zurndorfer and Pamela Silverblatt
In Docket No. BCB-3004-12

We dissent from the portion of the Board's decision that holds in effect that the New York City Police Department cannot require an officer to sign a form acknowledging that the officer has met with his or her supervisor without first bargaining over whether it has the right to do so with the PBA.

Under the Department's Quest For Excellence Program which became operational citywide in June 2011, officers on patrol duty are evaluated quarterly. That evaluation consists of a supervisor interviewing the officer, discussing the officer's specific activity and overall performance for the quarter, and numerically rating the officer's performance. The supervisor inserts that numerical rating on a form which also has room for any "additional comments" that the supervisor might wish to make. Finally the police officer is asked to sign the form acknowledging that the meeting with the supervisor has taken place.*

This procedure for conducting quarterly reviews under the Quest program was essentially unchanged from what had been done in prior years. The only difference is that under the new program the officer is asked to affix his or her signature to the form acknowledging that the meeting had occurred.

Shortly after the Department introduced the Quest program, the PBA filed a charge alleging, inter alia, that the Department had committed an improper practice by imposing on officers a "new requirement" to sign the form without first bargaining with the Union. The Board's decision sustains the Union position and rules "that the NYPD violated NYCCBL 12-306(a)(4) and (5) by requiring police officers to sign their name" on the back of the form because it required "increased participation" by the police officer. (Decision at 17.)

It is fundamental to the operation of the New York City Police Department that management be free to require its officers to sign a form that merely acknowledges that a meeting has taken place. It does not make sense to us to say -- as does the Majority's decision in this case -- that the Department may do so only with the PBA's approval. We respectfully submit that NYCCBL 12-306(a)(4) and (5) cannot -- and should not -- be

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* Although the form is silent as to what the officer is attesting to when he or she signs the form, it is clear from the pleadings that the signature merely acknowledges that a meeting had taken place. PBA Petition Sec. 2 (d) ("provide a signature ... recording that a meeting between the police officer and a supervisor regarding the evaluation had taken place"); Sec. 24 ("police officers must now sign the section of the Conditions Report indicating that the ... interview had taken place"); Sec. 25(4) ("provide a signature ... to acknowledge that a meeting with a supervisor regarding their quarterly evaluation took place"); Argument D ("sign ... to acknowledge that a meeting with a supervisor was conducted"); and Sec. 39 ("sign ... to acknowledge that an interview with a supervisor has taken place"). The City admitted this assertion in its Answer to the Petition (see Sec. 24).

stretched so far as to justify this result. This is instead one of those cases of "managerial decisions which impinge only indirectly or tangentially upon the employment condition" and therefore should "be treated as exempt from mandatory collective bargaining." (See Decision at 21 and cases cited therein.)

Certainly the meager case law cited to support the Majority's conclusion does not require such an anomalous result. The decision cites to only two cases, both under the Taylor Law. The first, City of Yonkers, involved the employer's introduction of an entirely new employee evaluation procedure that included numerous aspects that had to be bargained. One such aspect was the requirement that the officer enter into and sign an agreement "setting forth areas that need improvement" together with how the officer proposes to accomplish that improvement. City of Yonkers, 39 PERB ¶4580 (2006) (Maier, ALJ), affd., 40 PERB ¶3001 (2007). Plainly City of Yonkers is distinguishable on its facts and is inapposite.

The other case cited, County of Nassau -- an ALJ's decision that was not reviewed by PERB and so should be given no precedential weight here -- is also inapposite in that it did not even involve an employee evaluation procedure. Instead the case concerned the employer's procedure for documenting those occasions on which a supervisor spoke to an employee about shortcomings in the employee's performance. In addition, it is unclear exactly what purpose was served by the signature at issue in that case. County of Nassau, 35 PERB ¶4566 (2002) (Blassman, ALJ).

Finally, given that the finding of an improper practice in this case turned on the characterization that the signature at issue constituted "employee participation", it is worth noting what that participation amounted to. The only employee participation occurring here is that on four occasions over the course of a year, an officer is required – following a meeting with the officer's supervisor -- to affix his or her signature to a form attesting to the fact that the meeting had occurred. As such even if the Department made a unilateral change, it was immaterial and, therefore, insufficient to establish an improper practice in any event.