SBA v. City, 61 OCB 22 (BCB 1998) [Decision No. B-22-98 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition	:	
-between-	:	
SERGEANTS BENEVOLENT ASSOCIATION	:	
	:	Decision No. B-22-98
Petitioner,	:	Docket No. BCB-1968-98
-and-	:	
CITY OF NEW YORK,	:	
Respondent.	:	

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In the matter of the Improper Practice Petition	:	
-between-	:	
LIEUTENANTS BENEVOLENT ASSOCIATION	:	
Petitioner,	:	Docket No. BCB-1976-98
-and-	:	
CITY OF NEW YORK,	:	
Respondent.	:	

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DECISION AND ORDER

On March 27, 1998, the Sergeants Benevolent Association (hereinafter "the SBA") filed a verified improper practice petition with the Office of Collective Bargaining ("OCB") requesting that the Board of Collective Bargaining ("Board") issue an order directing the City of New York ("the City" or "Respondent") to bargain in good faith for any changes to the Bill of Rights /Guidelines for Interrogation of Members of the Department. The City filed an answer to the SBA's petition on

April 16, 1998. The SBA filed its reply on April 24, 1998.

On April 20, 1198, the Lieutenants Benevolent Association (hereinafter “the LBA”) filed a verified improper practice petition with the OCB requesting that the Board issue an order directing the City to bargain in good faith for any changes to the Bill of Rights. The City filed an answer to the LBA’s petition on May 5, 1998. The LBA filed its reply on May 13, 1998.

CONSOLIDATION

On May 4, 1998, the LBA filed a motion to consolidate its improper practice petition, docketed as BCB-1976-98, with that of the SBA, docketed as BCB-1968-98. The SBA filed a motion to consolidate its petition on May 6, 1998,[1] with that of the LBA and with another improper practice petition concerning the same issue that was filed by the Captains Endowment Association (“CEA”), docketed as BCB-1982-98.[2] On May 12, 1998, the City submitted papers in opposition to consolidation of the petitions filed by the SBA and the LBA. In a letter dated May 13, 1998, the City reserved its right to address the CEA’s request for consolidation until after it files an answer to the CEA’s petition and brief. On May 18, 1998, the City filed an answer to the CEA’s petition and on May 28, 1998, a letter in opposition to the CEA’s request for consolidation. On June 1, 1998, the CEA filed a reply to the City’s answer.

The SBA, LBA and CEA requested consolidation on the grounds that the issues are identical,

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[1] A procedural defect in the SBA’s motion to consolidate was cured on May 13, 1998.

[2] The CEA’s improper practice petition had been filed on May 4, 1998. In the cover letter that was filed with the petition and brief, the CEA requested consolidation with the SBA’s petition. Subsequently, in a letter dated May 12, 1998, the CEA requested consolidation with both the SBA’s and the LBA’s petitions.

the relief sought is identical, the respondent is identical, the petitioners are all supervisors of the same uniformed police officers, and consolidation would be economically and administratively efficient. The City opposed consolidation primarily because it would result in delaying a decision on the issue and, thus, the conclusion of negotiations with the SBA, the only union whose case was ripe for determination at the time. The City pointed out that the parties have been without a contract for almost three years. The City also opposed consolidation on the ground that consolidation of an issue that has arisen in bargaining with each unit is not appropriate where the parties are not bargaining on a coalition basis. Finally, the City argued that unless two or more matters have in common one or more of the same petitioners, consolidation is not appropriate.

The Board has dealt with the question of consolidation on a case by case basis. In its first decision on this issue, Decision No. B-18-71, and in every decision that follows, the Board applied the following test:

> Consolidation is proper where there is a plain identity between the issues involved in two or more controversies and a substantial right of one of the parties is not prejudiced by consolidation [citations omitted]. Decision No. B-18-71, at 2.[3]

The question of whether to consolidate similar cases for decision "usually rests solely within the discretion of the decision-making body, whether an administrative agency or a court." Decision No. B-45-93, at 19. Section 1-13 of the Rules of the City of New York, which empowers the Board of Collective Bargaining to consolidate proceedings, provides:

> **Consolidation or Severance.** Two or more proceedings may be consolidated or severed by the board on notice stating the reasons therefor, with an opportunity to the

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[3] See also, Decision Nos. B-8-74; B-10-79; B-7-81; B-25-81, B-2-83; B-6-85; B-11-85; B-6-91; B-45-93; and B-16-94.

> parties to make known their positions. For purposes of this subdivision the term "proceedings" shall include but not be limited to representation, arbitrability, arbitration, mediation and impasse and improper practice proceedings.

Inasmuch as the pleadings in the petitions filed by the SBA and the LBA were completed in sufficient time to permit full and careful consideration of all the issues raised by the parties, there are no material factual disputes warranting hearings, the issues are the same, the respondent is the same, there is no prejudice apparent from consolidation, both matters are ripe for determination without further delay and administrative economy will be served, the improper practice petitions docketed as BCB-1968-98 and BCB-1976-98 shall be consolidated for purposes of decision. We shall not, however, consolidate the improper practice petition filed by the CEA, inasmuch as the pleadings were not completed until June 1, 1998, and consolidation would delay a determination in the other unions' cases.

BACKGROUND

During separate negotiations for the 1995 through 2000 collective bargaining agreements between the unions and the Office of Labor Relations ("OLR"), OLR Commissioner James F. Hanley presented the SBA and LBA, individually, with letters informing each of them that "it is the intent of the City not to continue non-mandatory provisions in the next collective bargaining agreement. Specifically, the above agreement will not contain [the Bill of Rights] . . . This letter will constitute official notice that [the Bill of Rights] will be deleted in the 1995-2000 Agreement." The unions each responded to the City's stance by stating that it was their position that the Bill of Rights was a mandatory subject of bargaining and, thus, could not be removed unilaterally. According to each of the unions, in subsequent collective bargaining sessions, the City repeatedly refused to

discuss or negotiate the Bill of Rights.

Consequently, on March 27, 1998, the SBA filed an improper practice petition with the OCB, alleging that the City has engaged in and is engaging in improper practices within the meaning of the New York City Collective Bargaining Law ("NYCCBL") §12-306. The petition stated that the nature of the controversy was that the Bill of Rights "is a significant working condition . . . As a significant working condition, the notice period comes under the scope of collective bargaining, and the City's attempt to unilaterally delete it is an improper practice and in violation of good faith bargaining as set out in section 12-306, sub-section (4), of the New York City Collective Bargaining Law." The SBA also stated that the Bill of Rights had been part of the SBA's collective bargaining agreements for more than twenty years and the Bill of Rights refers to Patrol Guide 118-9, entitled "Guidelines for Interrogation of Members of the Department," which specifically sets out a two day notice period in which a member of the Police Department may obtain representation and report to a specific location to answer work-related questions. Soon after, on April 20, 1998, the LBA filed its verified improper practice petition, making similar allegations.

RELEVANT PROVISIONS

Bill of Rights

> The Guidelines for Interrogation of Members of the Department in force at the execution date of this Agreement will not be altered during the term of this Agreement, except to reflect subsequent changes in law or final decisions of the Supreme Court of the United States and the Court of Appeals of the State of New York regarding the procedures and conditions to be followed in the interrogation of a member of the Department. No less than two (2) weeks' written notice of such a proposed alteration of the said Guidelines shall be given to the Union. The parties shall discuss and may mutually agree upon other amendments to these Guidelines at any time.

Patrol Guide 118-9: Interrogation of Members of the Service

Purpose:

To protect the rights of the member of the service (uniformed or civilian) in an official department investigation.

Procedure:

INTERROGATING OFFICER

1. Permit member to obtain counsel if:
    a. A serious violation is alleged OR
    b. Sufficient justification is presented although the alleged violation is minor.
2. Notify member concerned two (2) business days prior to date of hearing to permit member to obtain and confer with counsel.

> NOTE: A uniformed member of the service in the rank of police officer who is the subject of an official investigation will be given two 2 business days prior to the date of a hearing, if a serious violation is alleged or sufficient justification is presented even though the alleged violation is minor, to obtain and confer with counsel. In addition, a police officer who is **witness** in an official investigation is entitled to a period of time, up to four (4) hours, to confer with counsel.

3. Inform member concerned of:
    a. Rank, name and command of person in charge of investigation.
    b. Rank, name and command of interrogating officer.
    c. Identify all persons present
    d. Whether he is subject or witness in the investigation, if known.
    e. Nature of the accusation.
    f. Identities of witnesses or complaints (address need not be revealed) except those of confidential source or field associate unless they are witnesses to the incident.
    g. Information concerning all allegations.
4. Permit representative of department line organization to be present at all times during interrogation.
5. Conduct interrogation at reasonable hour, preferably when member is on duty during daytime hours.
6. Insure that interrogation is recorded either mechanically or by a department stenographer.
    a. The Department Advocate will determine if a transcript is required in non-criminal or minor violation cases.

7. DO NOT use:
   a. "Off the record" questions.
   b. Offensive language or threats (transfer, dismissal or other disciplinary punishment).
   c. Promises of reward for answering questions.
8. Regulate duration of question periods with breaks for meal, personal necessity, telephone call, etc.
9. Record all recesses.

> NOTE: Interrogations may be conducted before or after CHARGES AND SPECIFICATIONS (PD 468-121) have been served. An interrogation conducted after service of charges must be completed at least 10 days prior to the date of department trial except as directed by the Deputy Commissioner-Trials.

10. Conduct interrogation within a reasonable time after disposition of criminal matter, when member was arrested, indicted or under criminal investigation.

DEPARTMENT ADVOCATE

11. Furnish member with copy of tape of interrogation no later than twenty (20) days after service of charges.
   a. If interrogation was conducted after service of charges tape must be furnished to member no later than five (5) days after interrogation.
   b. Furnish transcript, if one was prepared, by 1000 hours on trial date, in all cases.

> NOTE: When the department trial date is scheduled immediately after CHARGES AND SPECIFICATIONS are served, the Deputy Commissioner-Trials will grant the department reasonable time to conduct an interrogations. In any event, a copy of the tape and a copy of the transcript must be furnished as indicated above, if appropriate.

COMMANDING OFFICER OF MEMBER

12. Assign member to 2nd Platoon, if possible.

MEMBER OF THE SERVICE

13. Answer questions specifically directed and narrowly related to official duties. (Refusal shall result in suspension from duty).

14. Submit OVERTIME REPORT (PD 138-064) if lost time accrues as a result of investigation.

SUPERVISOR IN CHARGE OF INVESTIGATION

15. Notify the desk officer immediately when member of the service is directed to leave his post or assignment to report for an official investigation.

16. Insure that notifications concerning official investigations are properly recorded in appropriate department records when made to or recorded from:

a. Complainants
b. Witnesses
c. Lawyers
d. Respondents
e. Other interested parties.

New York State Civil Service Law

§ 75 Removal and other disciplinary action. 1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c) or paragraph (d) or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

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2. Procedure. An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified, in advance, in writing, of such right. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable time was not afforded then any and all statements obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter...

§ 76(4) Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class

of the civil service of the state or any civil action. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter...

Unconsolidated Laws: § 891

A policeman serving in the competitive class of civil services in a city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provision of article seventy-eight of the civil practice act. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

New York City Charter, Chapter 18 - Police Department

§ 434. Commissioner; powers and duties.

a. The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.

b. The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department.

New York City Administrative Code

Title 12, Chapter 54-New York City Collective Bargaining Law

§12-306: Improper practices; good faith bargaining. a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

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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.

Title 14, Chapter 1 - Police Department

§ 14-115 Discipline of Members.

a. The commissioner shall have power, in his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days' salary shall be forfeited or deducted for any offense. All such forfeitures shall be paid forthwith into the police pension fund.

b. Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard, and investigated by the commissioner or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.

c. The commissioner is also authorized and empowered in his or her discretion, to deduct and withhold salary from any member or members of the force, for or on account of absence for any cause without leave, lost time, sickness or other disability, physical or mental; provided, however, that the salary so deducted and withheld shall not, except in case of absence without leave, exceed one-half thereof for the period of such absence; and provided, further, that not more than one-half pay for three days shall be deducted on account of absence caused by sickness.

d. Upon having found a member of the force guilty of the charges preferred against him or her, either upon such member's plea of guilty or after trial, the commissioner or the deputy examining, hearing and investigating the charges, in his or her discretion, may suspend judgment and place the member of the force so found guilty upon probation, for period not exceeding one year; and the commissioner may impose punishment at any time during such period.

POSITIONS OF THE PARTIES

The Unions' Positions

The unions state that the Bill of Rights refers to the Guidelines for the Interrogation of

Members of the Service ("Guidelines"), which are set forth in New York City Police Patrol Guide Section 118-9. According to the SBA, the Guidelines have three major components: the first component sets forth the constitutional and legal protections afforded sergeants during questioning involving work related matters; the second affirms the sergeants' right to have representation during questioning; and the third establishes a two business day notice period prior to the questioning date to permit the sergeant to obtain and confer with a representative ("two business day rule"). The SBA states that the removal by OLR of the first two components is inconsequential on its face and in its impact because they are rights already guaranteed by the United States Constitution, the Constitution of the State of New York, United States Supreme Court Decisions, the New York State Civil Service Law and the Administrative Code of the City of New York. The SBA argues that the "apparent target" of the OLR's intended unilateral deletion is the third provision, the two business day rule. The LBA also argues that the City's objective is to remove the notice period.

In support of their contention that the City's actions constitute an improper practice, the unions argue that according to cases decided by the Public Employment Relations Board ("PERB"), it is well established that procedures for implementation of statutory rights are mandatory items of collective bargaining.[4] They contend that the long standing negotiated procedure guaranteeing two business days to obtain representation implements the intent of the New York State Civil Service Law, § 75 (2) Procedure, particularly the language that mandates an employee be given a reasonable

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[4] The SBA cites *Schenectady Fire Fighters Union, Local 28, IAFF, AFL-CIO and City of Schenectady*, 24 PERB ¶ 3016 (1991), 25 PERB ¶ 3022 (1992); *Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Greene County Local 820 and County of Greene and Greene County Sheriff*, 25 PERB ¶ 3045(1992).

period of time to obtain representation. They also refer to the provision of the Civil Service Law that provides, "...this subdivision shall not modify or replace any written collective bargaining agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter."[5] As such, Petitioners assert, the Bill of Rights provision is a mandatory subject of bargaining.

The SBA also claims that the two business day notice period incorporated into the Bill of Rights meets the three criteria established by PERB for a matter to be a mandatory subject of negotiation. It asserts that PERB has held that three circumstances are necessary for a matter to be a mandatory subject of negotiation.[6] The matter must be a term or condition of employment, it must be within the employer's discretion to negotiate, and it should not involve the mission of the employer. They assert that the two business day rule is a "term or condition of employment" because the NYCCBL, § 12-307 includes "working conditions" within the scope of collective bargaining. The two business day rule is within the employer's discretion to negotiate, they claim, as evidenced by a change that was negotiated in the 1987-1990 agreement to amend PG-118-9, the identical provision involved in the instant dispute. They also contend that the two business day rule in no way impacts on the mission of the City of New York or the New York City Police Department, or delivery of services to the public, as it is a discrete scheduling procedure, narrowly drawn to exclude violating "employer mission" type rules. Furthermore, the SBA stresses the policy favoring the

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[5] New York State Civil Service Law, § 75 (2): Procedure.

[6] *City of Rochester and Rochester Police Locust Club, Inc.*, 12 PERB ¶ 3010 (1979).

broad scope of compulsory collective bargaining in the public sector.[7]

The unions further assert that, while inclusion of the two business day provision in collective bargaining over the last twenty years does not make the matter a mandatory subject of collective bargaining, it is persuasive evidence that the City did not, in the last twenty years, consider it a prohibited subject of collective bargaining. They also contend that this shows that the City considered the collective bargaining process the appropriate forum for changing the two business day provision.

The SBA points out that an identical Bill of Rights provision was changed in a prior collective bargaining agreement, clearly indicating the City's policy of negotiating procedural and scheduling matters. They state that in the 1987-1990 PBA Economic Agreement and Memorandum of Interim Understanding, OLR negotiated a change in the two business day rule, and that the change had also been incorporated into the Guidelines in Patrol Guide 118-9.

The unions also assert that the two business day rule, within the Bill of Rights, is not a component of the disciplinary process. They state that it is a notice and scheduling function, implemented to provide their members with a reasonable period of time to obtain and consult with representation prior to questioning in a work related matter. It precedes the formal disciplinary process, they argue, and thus is not encompassed by the provisions of the New York City Administrative Code vesting the Police Commissioner with complete discretion in matters of

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[7] The SBA cites two Court of Appeals decisions in support of this proposition: *City of New York v. PERB,* 75 N.Y.2d. 619, 555 N.Y.S.2d. 245; *Webster Central School District v. PERB,* 75 N.Y.2d 619, 555 N.Y.S.2d. 245 (Ct.App. 1990).

discipline of members of the force.[8]

Finally, the SBA argues that even assuming that the City's decision concerns a non-mandatory subject of negotiation, the employer, upon request, is required to bargain concerning the impact of such decision on all affected employees.[9] Therefore, such a demand is a mandatory subject of negotiation. In addition, an employer cannot avoid its duty to negotiate the impact simply by making a unilateral determination that the decision has no impact upon the terms and conditions of employees.[10] The SBA states that this notice period is used in excess of 1,000 times each year, and, as such, is a significant working condition, and a term or condition of employment affecting over 25% of the SBA's membership each year.

The City's Position

The City, in its Statement of Facts, attempts to refute the contention by the unions that the Bill of Rights somehow incorporates the Guidelines into the text of the parties' collective bargaining agreement. The City asserts that the Bill of Rights provision merely states that the Guidelines for Interrogation will not be amended without the parties bargaining over such amendments. They argue

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[8] In their replies, the unions dispute the application of *City of New York v. MacDonald*, N.Y. Co. Supreme Court 4/14/92, *modified*, 201 A.D.2d 258, 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dept. 1994), *leave to appeal denied*, 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994).

[9] The SBA cites *Burke v. Bowen,* 49 A.D.2d 904, 373 N.Y.S.2d 387 (2d Dept. 1975), *aff'd* 40 N.Y.2d 264, 386 N.Y.S.2d 654 (1976).

[10] The SBA cites *City of Watertown* and *Watertown Fire Fighters' Association, IAFF, Local 191,* 10 PERB ¶ 3008 (1977); *North Babylon Union Free School District and Local 237,* IBT, 7 PERB ¶ 3027 (1974).

that the Bill of Rights does not contain any specific rules pertaining to interrogation of members of the Department, nor does it specifically refer to the Patrol Guide.

The City argues that the Petitioners have failed to state a *prima facie* case and to allege facts sufficient to maintain a charge that Respondent has refused to bargain collectively in good faith on matters within the scope of bargaining in violation of § 12-306(a)(4) of the NYCCBL. They state that, in cases where it is alleged that an employer has committed an improper practice within the meaning of § 12-306(a)(4), it must first be established that the matter at issue is within the scope of bargaining pursuant to § 12-307 of the NYCCBL. The City argues that Petitioners mistakenly state that the Bill of Rights provision sets out the a two business day rule, making it a mandatory subject, when it is actually the Rules for Interrogation that outline the two business day rule. They assert that the contract provision the City seeks to remove merely expresses an obligation to bargain over an issue, and, as the NYCCBL covers bargaining obligations, the restatement of statutory rights in a contract is non-mandatory. In support of this contention, the City cites several PERB decisions where contractual provisions that duplicate statutory rights were found to be non-mandatory.[11]

Furthermore, the City argues, even if the issue were otherwise deemed mandatory, the Board has previously noted PERB holdings that state that procedural restrictions relating to criminal investigations are nonmandatory subjects because mandatory collective bargaining cannot reach police department investigations of criminal conduct even if that criminal conduct is related to

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[11] The City cites *City of New Rochelle and Uniformed Fire Fighters Association, Inc., Local 273, IAFF*, 8 PERB ¶ 3071 (1975); *Somers Faculty Association and Somers Central School District*, 9 PERB ¶ 3014 (1976); *City of Saratoga Springs and Saratoga Springs Fire Fighters Local 343, IAFF, AFL-CIO*, 16 PERB ¶ 3058 (1983).

internal police discipline.[12] The City notes that, in B-4-89, the Board recognized cases where it has been held that the negotiation of "Bill of Rights" procedures relating to investigations are mandatory subjects of bargaining, but the City argues that those cases find that interrogation is a mandatory subject because it involves the subject of discipline which is mandatory. The City contends that those cases do not apply to the procedures of the New York City Police Department (NYPD) because it has been held that the issue of discipline within the NYPD is a non-mandatory subject of bargaining and left exclusively in the control of the Police Commissioner.[13] As such, they contend that Petitioners have failed to make out a *prima facie* case that the City has failed to bargain in good faith on a matter within the scope of bargaining as the subject of interrogation of members of the Police Department is a non-mandatory subject of bargaining.

Second, the City contends that the mere fact that they have chosen to negotiate over the Bill of Rights provision in the past does not transform the provision into a mandatory subject of bargaining, and the City has no obligation to bargain over it in this round of negotiations. They note two previous Board decisions, B-4-89 and B-34-93, that held that it is well established that the fact that a public employer negotiates over permissive subjects of bargaining in the past does not transform the subject into a mandatory subject, nor does it obligate the employer to continue to negotiate that subject in the future.

Third, the City argues that while most, if not all permanent civil service employees are

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[12] Decision No. B-4-89 at 264-265.

[13] The City cites *City of New York v. MacDonald*, N.Y. Co. Supreme Court 4/14/92, *modified*, 201 A.D.2d 258, 607 N.Y.S.2d 24, 145 LRRM 2894 (1st Dept. 1994), *leave to appeal denied*, 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994).

subject to disciplinary action under Civil Service Law § 75, members of the police force are subject to disciplinary action under § 14-115 of the Administrative Code, which confers great authority on the Police Commissioner. Whereas § 76(4) of the Civil Service Law permits collective bargaining to supplement, modify or replace the provisions of §§ 75 and 76, the City asserts that § 14-115 contains no such language. They argue that, as the Appellate Division, Second Department has held that discipline is a prohibited subject of bargaining where collective bargaining would repeal or modify any general, special or local law,[14] and that § 14-115 is such a law. Additionally, the City cites §891 of the Unconsolidated Laws and § 434 of the New York City Charter to support its contention that the entire realm of Police Officer discipline belongs to the Police Commissioner. The City states that, as the Legislature has acted expansively in the area of discipline and has not provided for the supplementation, modification or replacement of its statutes by collective bargaining, and as the courts have recognized the preemptive, broad-sweeping powers the Legislature has conferred on the Police Department, the Bill of Rights provisions are a prohibited subject of bargaining. Consequently, they argue, it is a non-mandatory subject of bargaining.

Fourth, the City contends that it is well settled that a non-mandatory provision in a contract may be removed where one party does not consent to its continuation. As the City states that the subject matter of Bill of Rights is a non-mandatory subject of bargaining which the City is not obligated to continue in the next contract, they are under no obligation to provide the Union notice that it does not consent to the continuation of a non-mandatory provision. They contend that it was

[14] The City cites *Matter of the Town of Greenburgh*, 94 A.D.2d 771, 462 N.Y.S. 718 (1983).

in the spirit of good labor relations that the City did provide such notice to the Union in this case.

In response to the SBA's impact argument, the City contends that the union has not made any assertion of an actual impact on a term or condition of employment: they have only stated that the provision is "used" by its members, which does not equal an impact. The City states that the proper procedure for the declaration of an impact is that the union must present factual evidence of the presence of an impact and the BCB then must declare that based on that evidence a practical impact does in fact exist. They refer to BCB Decision Nos. B-4-89, B-59-89 and B-2-76 and state that the evidence must consist of more than a conclusory statement that such an impact exists or that prospectively one will result if a particular City plan or procedure is actually implemented. Even if there has been a showing, the City states, and the Board declares that there has been an impact, the City is then afforded the opportunity to unilaterally correct or minimize the impact.[15]

DISCUSSION

As a preliminary issue, the Board must determine whether the Guidelines for Interrogation are incorporated by reference in the parties' agreement. The unions assert that the Guidelines are incorporated by reference in the parties' agreements, and by removing the Bill of Rights, the two day business rule is automatically removed as well. The City argues that the Bill of Rights provision does not incorporate the Guidelines, and merely states an agreement to bargain over a particular issue.

In the Bill of Rights article of their collective bargaining agreements, the City and the unions have agreed that the Guidelines in force at the execution date of the Agreement will not be altered

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[15] The City cites Decision No. B-9-68.

during the term of the Agreements, subject to specified exceptions. On its face, this constitutes more than just an agreement to negotiate. Therefore, we find that the Bill of Rights evinces more than an agreement "to bargain over an issue." Rather, it is clear that the Guidelines, in their entirety, are incorporated by specific reference in the Bill of Rights. However, as the two business day rule is the only element of the Guidelines to which the parties have directed their arguments, the Board will limit its consideration to the negotiability of the two business day rule, and not the other provisions of the Guidelines.

The unions, relying on past decisions of this Board and PERB, put forth various arguments as to why disciplinary procedures are traditionally mandatory subjects of discipline. The unions further argue that the two business day rule implements the intent of New York State Civil Service Law, § 75(2), which mandates that an employee be given a reasonable period of time to obtain representation. In response, the City argues that although most civil service employees are covered by the disciplinary procedures of § 75 of the Civil Service Law, in the case of members of the Police force, § 14-115 of the Administrative Code confers the authority to discipline officers to the Police Commissioner. It states that the Administrative Code provision differs from § 75, in that the Administrative Code does not authorize collective bargaining to supplement, modify or replace its provisions. Moreover, the City argues that §76(4) of the Civil Service Law renders both the provisions of §75 (including the notice provisions of subdivision (2) thereof) and any collective bargaining rights incident thereto inapplicable where there is a local law that provides for employee discipline. It notes that the Appellate Division, Second Department in *Matter of the Town of Greenburgh*, 94 A.D.2d 771, 462 N.Y.S.2d 718 (1983), *lv. to appeal denied*, 60 N.Y. 2d 551, 467

N.Y.S.2d 1025 (1983), held that discipline is a prohibited subject of bargaining where it would repeal or modify any general, special or local law, and it submits that § 14-115 is such a law. We agree that §14-115 of the Administrative Code is such a local law,[16] and that, as a consequence of §76(4) of the Civil Service Law, as that section has been interpreted by the courts, bargaining over disciplinary procedures for members of the Police force is a non-mandatory subject.

In *Greenburgh*, the court recognized that § 76(4) of the Civil Service Law generally permits collective bargaining modification of the statutory procedures regarding discipline. However, the Court held that the Taylor Law did not apply to the Westchester County Police because the Westchester County Police Act mandated procedures for hearings involving disciplinary matters, and was a special act that, through its language, replaces the procedures, in their entirety, as described in §§ 75 and 76 under § 76(4). The Appellate Division's decision in *Rockland County Patrolmen's Benevolent Association v. Town of Clarkstown*, 149 A.D.2d 516, 539 N.Y.S.2d 993 (2nd Dept. 1989), is to the same effect.

The Court of Appeals' decision in *Webster Central School District*, 75 N.Y.2d 619, 555 N.Y.S.2d 245 (Ct.App. 1990), also is instructive in determining this issue. In *Webster*, a statute permitting BOCES to offer academic summer school programs neither explicitly mandated nor explicitly prohibited collective bargaining. The court stated,

> [w]hile legislative expression is the best evidence of legislative intent, it is not the only evidence; legislative intent may also be implied from the words of the enactment. It should be apparent, however, that in order to overcome the strong

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[16] *See*, *City of New York v. MacDonald*, N.Y. Co. Supreme Court 4/14/92, *modified*, 201 A.D.2d 258, 607 N.Y.S.2d 24, (1st Dept. 1994), *lv. to appeal denied*, 83 N.Y.2d 759, 615 N.Y.S.2d 876 (1994).

> State policy favoring the bargaining of terms and conditions of employment, any implied intention that there not be mandatory negotiation must be 'plain and clear' (*Syracuse Teachers Assn. v. Board of Educ.*, 35 N.Y.2d 743, 744, 361 N.Y.S.2d 912, 320 N.E.2d 646), or 'inescapably implicit' in the statute (*Matter of Cohoes City School Dist. v. Cohoes Teachers Assn.*, 40 N.Y.2d 774, 778, 390 N.Y.S.2d 53, 358 N.E.2d 878; *see also Matter of City School Dist. v. PERB*, 74 N.Y.2d 395, 547 N.Y.S.2d 820, 547 N.E.2d 75). Anything less threatens to erode and eviscerate the mandate for collective bargaining.

In the instant matter, the Administrative Code, § 14-115 reads, in pertinent part:

> b. Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard, and investigated by the commissioner or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.

As in *Webster*, the Administrative Code neither explicitly mandates nor explicitly prohibits collective bargaining. Thus, according to *Webster*, we must look to the language of the Code and determine if the legislative intent regarding bargaining is either plain and clear or inescapably implicit in the statute. The unions argue that the notice provisions of the Guidelines are not a component of the disciplinary process, as they involve a notice and scheduling function that precedes the formal disciplinary process. However, a reading of the general language of the Code provision, the above paragraph in particular, clearly evinces the intent of the legislature, which is to leave the subject of discipline, including procedural issues, to the discretion of the Police Commissioner and therefore not subject to bargaining. If that is not "plain and clear," it is undoubtedly "inescapably implicit."

The Unions' attempt to distinguish the subject of pre-discipline interrogations from the disciplinary process is not supported by the caselaw on this issue. The PERB cases that have considered demands relating to procedures for investigations or interrogations have dealt with them in the context of disciplinary procedures.[17] A demand relating to interrogations not connected to the disciplinary process might impermissibly interfere with criminal investigations, in which event it would involve a nonmandatory subject of bargaining.[18] Here, bargaining on disciplinary procedures is precluded for the reasons stated above, and no separate basis to require bargaining over interrogation procedures has been shown to exist.

In summary, we find that § 14-115 of the Administrative Code is a "general, special or local law or charter provision" within the meaning of § 76(4) of the Civil Service Law. Since the language of the statute removes the subject of procedural disciplinary issues from collective bargaining, bargaining over those issues is not mandatory. Any attempt to impose a duty to negotiate disciplinary procedures on the Police Commissioner through collective bargaining would repeal or modify the Police Commissioner's discretion to determine and impose discipline in violation of Civil Service Law § 76(4).

The mere fact that the City has agreed, in the past, to negotiate over the Bill of Rights provision in the past does not transform the provision into a mandatory subject of bargaining.

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[17] *Amherst Police Club v. Town of Amherst*, 12 PERB ¶3071 (1979); *Schenectady Police Benevolent Ass'n v. City of Schenectady*, 21 PERB ¶4605 (1988), *aff'd* 22 PERB ¶3018 (1989); *City of Cortland V. Cortland Paid Fire Fighters Ass'n*, 29 PERB ¶3037 (1996).

[18] *City of Rochester v. Rochester Police Locust Club, Inc.*, 12 PERB ¶3010 (1979); *City of Schenectady v. Schenectady Patrolmen's Benevolent Ass'n*, 21 PERB ¶3022 (1988).

Previously, this Board has held that the fact that a public employer chose to negotiate over a permissive subject in the past does not transform the subject into a mandatory subject, nor does it obligate the employer to continue to negotiate that subject in the future.[19] The mere fact that the City has agreed to negotiate over provisions in the Bill of Rights in the past does not make the subject mandatory.

We hold only that the City has no duty to bargain over disciplinary procedures. The interplay of § 14-115 of the Administrative Code and §§ 75 and 76 of the Civil Service Law as it may affect the Commissioner's authority outside the context of collective bargaining is not before us.[20]

The SBA asserts that even with non-mandatory subjects of negotiation, the employer, upon request, is required to bargain concerning the impact of such decision on all affected employees. It states that an employer cannot avoid its duty to negotiate the impact simply by making a unilateral determination that the decision has no impact upon the terms and conditions of employees. The SBA argues that the two business day rule is invoked in excess of 1,000 times per year and, as such, is a significant working condition. We find, however, that the Union has not made any allegation of fact sufficient to raise an issue of practical impact on a term or condition of employment. Merely stating that the provision is "used" by its members does not equal an impact, and the Union's petition is devoid of any other factual evidence of the presence of an impact. Therefore, we find no merit to the Union's claims of a practical impact.

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[19] Decision Nos. B-4-89 and B-34-93.

[20] *See Montella v. Bratton,* 670 N.Y.S.2d 10, 1998 WL 107463 (N.Y.App.Div. 1 Dept. 1998).

For all of the reasons stated above, the Board finds that the City is under no obligation to bargain over the two day business rule.

ORDER

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

ORDERED, that the improper practice petition filed herein by the SERGEANTS BENEVOLENT ASSOCIATION, docketed as BCB-1968-98 be, and the same hereby is, dismissed; and it is further

ORDERED, that the improper practice petition filed herein by the LIEUTENANTS

BENEVOLENT ASSOCIATION, docketed as BCB-1976-98 be, and the same hereby is, dismissed.

DATED: New York, New York
July 2, 1998

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

I dissent. CAROLYN GENTILE
MEMBER

I dissent. ROBERT H. BOGUCKI
MEMBER