

DC 37 v. NYPD & City, 67 OCB 25 (BCB 2001) [Decision No. B-25-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

Decision No. B-25-2001
Docket No. BCB-2101-99

-and-

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

Respondents.

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DECISION AND ORDER

On November 19, 1999, District Council 37 (“Union”) filed a verified improper practice petition against the New York City Police Department and the City of New York (“NYPD” or “City”). The Union alleges that in violation of the New York City Collective Bargaining Law (“NYCCBL”), the NYPD unilaterally promulgated an order that changes the disciplinary procedures enforced against NYPD’s civilian employees who are found to have a positive result to a drug test.¹ Respondents assert that the NYPD was not obligated to bargain over the issuance of the Order because it merely involves a modification of the predicates for discipline under NYPD’s drug policy. Respondents argue in the alternative that the Order does not change, but rather clarifies the policy. The Board hereby grants the Union’s improper practice petition on the

¹ Petitioner claims that HHC’s actions violated Section 12-306a(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).

ground that the NYPD's promulgation of the Order constitutes a change in disciplinary procedure over which it has not bargained.

BACKGROUND

On July 19, 1999, as part of the NYPD's "zero tolerance" drug policy enunciated in the Department's Civilian Employee Handbook in 1991, the Department issued Interim Order 37 ("the Order"), entitled "Commercially Available Products Containing Prohibited Substances." The Order states that "[M]embers who test positive on a drug test, for any reason, including as a result of the use of prohibited substances, will be subject to disciplinary action including termination." The Order broadens the definition of prohibited substances under the policy to encompass commercially available products, including lawful over-the-counter products, that may produce a positive result in a drug test. The Order further states that the ingestion of any of these lawful substances cannot be used as defense to a positive test result.²

² Section 3 of the Order provides, in relevant part:

. . . [I]n order to help members of the service to promote good health, avoid potentially harmful substances, and adhere to the Department's fitness for duty and zero tolerance drug policies, the following policy is effective immediately:

Policy The unauthorized use or ingestion of prohibited substances by all members of the service is prohibited, and shall be cause for disciplinary action including termination. Furthermore, the unauthorized use or ingestion of prohibited substances is not a valid defense when a positive drug test occurs.

Definition Prohibited Substances - commercially available products or substances including foods, cosmetics, and alleged health care products that contain or may contain illegal drugs (including marijuana) or their derivatives or active ingredients.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union contends that the City violated the NYCCBL by unilaterally promulgating the Order without bargaining with the Union. The Union argues that the addition of lawful, commercially available products to the category of prohibited substances and the elimination of a defense to a charge of illegal drug use based upon a positive test result caused by the ingestion of such products, constitutes a change in the disciplinary procedures related to drug testing, and is thus a mandatory subject of bargaining.

The Union points out that the City, in promulgating the Order, has decided not to distinguish between legal and illegal products that may lead to a positive test result. Thus, the effect of the Order is to subject the Department's civilian employees to discipline and discharge for the use of legal products. An employee can no longer defend him- or herself against a positive result with the explanation that s/he used a legal product. By removing a procedural defense to a charge of illegal drug use, the Order changes existing terms and conditions of employment which are subject to modification only through bargaining.

According to the Union, the purpose of the substance abuse policy described in the Civilian Employee Handbook is to prohibit employees from using illegal substances. The tests, however, cannot distinguish between illegal substances and legal, commercially available products made, for example, from the cannabis plant. Thus, although the lawful consumption of food, cosmetics or health care products that contain hemp or hemp oil, poppy seeds or derivatives of those products, has no known psychoactive impact on the consumer, even if such products are

ingested at levels that cause a positive result to a drug test, the policy proscribes such products in the same manner as it does controlled substances.

The Union notes that PERB has held that a work rule establishing new criteria for discipline constitutes a mandatory subject of bargaining. Furthermore, the Union asserts that the management prerogative provision of the NYCCBL does not cover every eventuality in the area of discipline. The Union suggests that the Board utilize the balancing test in *Ford Motor Co. v. NLRB*³ to find that the NYPD's unilateral alteration of a working condition constitutes a mandatory subject of bargaining.

Respondent's Position

The City contends that the Order establishes a new predicate for discipline, and since discipline is an enumerated management right, the NYPD did not have to bargain over the promulgation of the Order.

The City argues, in the alternative, that the Order does not, in effect, change the existing policy. Since the issuance of the Civilian Employee Handbook in 1991, employees have been on notice that the NYPD would test them if it had a reasonable suspicion of drug use and that a positive finding of a prohibited substance would lead to disciplinary action. The Order does not change the level of the substance in the employee's system triggering disciplinary action for a positive result. The Order simply clarifies existing policy by notifying employees that a positive result can also be caused by commercially available products. Because the NYPD is unable to determine whether a positive result indicates use of an illegal substance or a commercially

³ 441 U.S. 488, 101 LRRM 2222 (1979).

available product, the NYPD has decided to treat all positive results the same.

The City argues that there has been no change in disciplinary procedure, but only to the substance of the drug policy. The NYPD's enunciation of a policy under which it will not consider a plea of commercial availability as a valid defense to a positive test result does not relate to the procedures for review of the disciplinary charge, but to the definition of offensive conduct. Since substantive issues of discipline are within management's rights, there has been no violation of the NYCCBL.

Furthermore, the City argues that New York State Labor Law Section 201-d provides that discrimination against individuals based upon the legal use of consumable products off duty is permissible pursuant to an established substance abuse program. Since the policy in the Order relates to NYPD's existing substance abuse policy, the Order is in compliance with the state law.

DISCUSSION

The question that the Board must decide is whether the City failed to bargain over a mandatory subject of bargaining when it unilaterally promulgated Interim Order 37. It is an improper practice under NYCCBL Section 12-306a for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. . . .

In order to decide whether the alleged failure to bargain violates the NYCCBL, the Board must determine whether the disciplinary issues addressed in the Order constitute a mandatory subject of bargaining. Public employers and employee organizations have a statutory duty under

Section 12-307a of the NYCCBL to bargain on all matters concerning wages, hours and working conditions – mandatory subjects of bargaining. Section 12-306a(4) of the NYCCBL makes it an improper practice for a public employer to refuse to bargain in good faith on such matters. We have held that a unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith, and, therefore, an improper practice.⁴

In *District Council 37 v. New York City Human Resources Admin. and The City of New York*,⁵ the City unilaterally issued a memorandum which established the method by which disciplinary pay fines would be deducted from employees' pay checks pursuant to grievance determinations. The Board held that the City violated the NYCCBL by issuing the memo without bargaining because deducting fines is a disciplinary procedure which is a mandatory subject of bargaining. In *District Council 37*, the Board recognized that Section 12-307b⁶ of the NYCCBL reserves for management the right to take disciplinary action against its employees. The Board, however, stated that "the management prerogative provision of the NYCCBL was not intended to cover the entire area of discipline."⁷ The City was therefore required to bargain over the procedures related to disciplinary actions. Also, in *City of New York v. District Council 37*,

⁴ *Patrolmen's Benevolent Ass'n v. The City of New York and City of New York Police Dep't*, Decision No. B-4-1999 at 10, *Communications Workers of Am., Local 1182 v. New York City Police Dep't and the City of New York*, Decision No. B-47-98 at 6.

⁵ Decision No. B-36-2000 at 9.

⁶ Section 12-307b provides in relevant part,
It is the right of the City, or any other public employer, acting through its agencies, to . . . take disciplinary action. . . .

⁷ *District Council 37*, Decision No. B-36-2000 at 9.

the Board held that the management rights clause does not affect the right of a union to bargain over procedures for review and appeals of disciplinary actions.⁸

This Board finds that the Order alters disciplinary procedures related to drug testing, and the City is therefore obligated to bargain over the change. The net effect of Section 3 of the Order is to preclude employees from raising a previously valid defense at a disciplinary hearing – that a positive test result was due to the consumption of legal, commercially available products. An employee facing discipline is now precluded from offering as an affirmative defense evidence that the positive test was the result of lawful conduct. Expansion of the definition of prohibited substances to include unspecified, legal, commercially available products, having no known psychoactive effects was merely incidental to the elimination of the previously valid defense.

We have considered the City's argument that promulgation of the Order did not require bargaining because the Order merely changes a predicate for discipline, a change which the City argues is within its managerial rights under Section 12-307b of the NYCCBL. We disagree with the City's contention that the Order only expands the category of prohibited substances, which, if used, may result in employee discipline. The NYPD did not add commercially available products to the category of prohibited substances because of their psychoactive effects or because the NYPD seeks to proscribe their use as a matter of drug policy. Indeed, there is no dispute that the use of such products is entirely lawful. Rather, the effect of restricting their use is simply to bar a defense that until now has been available to employees charged with illegal drug use. The thrust of the Order is the elimination of a previously available affirmative defense and the

⁸ Decision No. B-3-73 at 8-11.

preclusion of evidence that would support such defense. This modification constitutes a change in disciplinary procedure which is a mandatory subject of bargaining.

The Union requests that the Board vacate the dispositions of employees who were disciplined after the issuance of the Order and asks that the Board order the NYPD to grant such employees a new hearing. The Union has made no allegations that specific individuals have attempted to raise a defense of commercial availability but were barred from doing so. On the record before us, we do not find that such relief is warranted.

Because Section 3 of Interim Order 37 modifies the procedures relating to discipline, a mandatorily bargainable subject, we find that the City violated Section 12-306a(1) and (4) of the NYCCBL when it unilaterally implemented the Order. Accordingly, the Union's improper practice petition is granted.

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 by District Council 37 be, and the same hereby is granted; and it is further

ORDERED, that the New York City Police Department cease and desist from implementing Section 3 of Interim Order 37 until such time as the parties negotiate the modification of disciplinary procedures contained therein; and it is further

ORDERED, that the New York City Police Department post the attached notice for no less than thirty days at all locations used by the NYPD for written communications with unit

employees.

Dated: June 14, 2001
New York, New York _____

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GABRIELLE SEMEL
MEMBER

CONCUR IN RESULT

CHARLES G. MOERDLER
MEMBER

I DISSENT

EUGENE MITTELMAN
MEMBER

I DISSENT

RICHARD A. WILSKER
MEMBER

NOTICE
TO
ALL CIVILIAN 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:

All civilian employees that the New York City Police Department committed an improper practice by issuing Interim Order 37 without negotiating with DC 37.

It is hereby:

ORDERED, that the New York City Police Department cease and desist from implementing Section 3 of Interim Order 37 until such time as the parties negotiate the modification of disciplinary procedures contained therein.

New York City Police Department
(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.