COBA v. DOC, 69 OCB 26 (BCB 2002) [Decision No. B-26-2002 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

CORRECTION OFFICER'S BENEVOLENT ASSOCIATION,

Petitioner,

Decision No. B-26-2002
Docket No. BCB-2136-00

-and-

NEW YORK CITY DEPARTMENT OF CORRECTION,

Respondent.

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DECISION AND ORDER

On June 14, 2000, the Correction Officer's Benevolent Association ("COBA"or "Union") filed a verified improper practice petition against the New York City Department of Correction ("DOC" or "City"). The petition alleges that DOC violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 13) ("NYCCBL") when it unilaterally revised its Uniformed Sick Leave Program and implemented Directive 2258R-A to supersede Directive 2258R. The City argues that the revised directive does not change contractual sick leave but merely clarifies DOC's sick leave policy, an action within its management right. The Board finds that these changes do not alter the terms and conditions of employment. The Directive, as revised, puts correction officers on notice as to the standards that DOC will be using in monitoring sick leave and as to the circumstances which may persuade it to initiate disciplinary proceedings for its abuse. Accordingly, the petition is dismissed.

BACKGROUND

The parties' Collective Bargaining Agreement ("CBA") provides that correction officers "shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect" whether or not service connected. Essentially, correction officers have unlimited sick leave with full pay.

On April 12, 1993, DOC issued Directive 2258R. The stated purpose and policy of the Directive was to establish an absence control program to reduce chronic absenteeism by identifying and monitoring correction officers who require special attention and counseling in their use of sick leave. The Directive divided "chronic absent" members into Categories A and B, depending on the number of absences they had. The Directive set forth the types of excusable absences, such as hospitalization, which would not be considered as indicia of excessive absenteeism. For those employees who received a "chronic absent" designation, the Directive set forth an appeal procedure as well as mitigating factors to be considered. The Directive expressly provided for disciplinary sanctions and termination for excessive use of sick leave and set forth the mitigating factors to be considered before such actions were commenced. Moreover, for those members who were developing a pattern of chronic absence and did not respond to counseling, the Directive set forth administrative procedures for the possible revocation of their discretionary assignments and benefits.

In 1993, COBA brought an action in Federal District Court, *Israel v. Abate*, Index No. 93 Civ. 3622, challenging the constitutionality of Directive 2258R. By way of a So-Ordered Stipulation dated January 25, 1996, the action was discontinued with prejudice.

In 1998, COBA brought an action in New York Supreme Court, *Seabrook v. New York City Department of Correction*, Index No. 106695/98, alleging that Directive 2258R violated §75 of the Civil Service Law ("CSL"). By way of a So-Ordered Stipulation dated March 2, 2000, the action was withdrawn without prejudice.

In December 1999, DOC revised Directive 2258R as Directive 2258R-A and forwarded a draft to COBA. On January 31, 2000, DOC's Chief Administrator, Robert Oritz spoke with COBA's treasurer, Elias Husamudeen, about the revised Directive. On February 4 and 7, 2000, Oritz spoke with Husamudeen about other directives but did not discuss Directive 2258R-A. On February 9, 2000, COBA's president, wrote to DOC identifying the Union's concerns about the revised Directive.

Effective February 14, 2000, DOC promulgated Directive 2258R-A to supersede Directive 2258R. Among other changes, the revised Directive eliminated the category system by providing for one category of "chronic absent" members: those members who report sick on six or more occasions within a 12 month period. It modified the list of the types of absences which are excluded from the calculation of sick leave usage and made comparable changes to the list of mitigating factors which can be considered when reviewing a "chronic absent" designation appeal. It retained and modified the provisions concerning disciplinary sanctions and termination for excessive use of sick leave as well as the mitigating factors to be considered before such actions are commenced. For those members who are developing a pattern that will result in a "chronic absent" designation, DOC modified the list of discretionary assignments which could be revoked, and revised, reorganized, and combined the relevant administrative procedure sections. The Union objects to some, but not all, of the changes made in Directive 2258R-A.

In May 2000, COBA commenced another action in New York Supreme Court, alleging that Directive 2258R-A violates CSL §75. This action was dismissed. *Seabrook v. New York City Department of Corrections*, N.Y.L.J June 18, 2002 at 18 (N.Y. Sup. Ct.) (Stallman, J.).

The parties' CBA expired on July 31, 2000. In August 2000, the City commenced contract negotiations when it served COBA with its bargaining demands. Thereafter, COBA served the City with its demands. The parties do not provide any information as to whether Directive 2258R-A was included in the bargaining demands.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City unilaterally implemented Directive 2258R-A to supersede Directive 2258R in violation of NYCCBL §12-306a(4) and (5).[1] The Union states that the mandatory subjects of bargaining include modifications to: (1) the types of absences excluded from the calculation of sick leave; (2) the appeal procedure for the classification of a "chronic absent" designation; (3) matters concerning discretionary assignments; (4) the list of mitigating factors to be considered before disciplinary action is taken; and (5) administrative procedures. Some of these changes, the Union argues, make it more likely that a member will be classified as "chronic absent" and exposed to potential discipline. In its reply, the Union argues that the

[1] NYCCBL§12-306a provides, in relevant part, that it shall be an improper practice for a public employer to:

(4) refuse to bargain collectively in good faith on matters within the scope of collective bargaining. . . .

(5) unilaterally make any changes 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 . . . .

petition is timely because it was filed within four months from the time Directive 2258R-A became effective on February 14, 2000.

City's Position

The City first argues that the petition is untimely because the Union had notice of Directive 2258R-A when it received a copy of the revised draft in December 1999. Second, although DOC's uniformed members are entitled to unlimited sick leave, pursuant to NYCCBL §12-307b, management retains the right to control sick leave abuse.[2] The City argues that Directive 2258R-A does not affect the contractual right to sick leave but merely clarifies the criteria and standards used to determine when and if an employee should be classified as chronically absent. Finally, the Union has failed to state a claim for a violation of NYCCBL's status quo provision, §12-306a(5), because the CBA was not in status quo until August 2000.

DISCUSSION

I. TIMELINESS CLAIM

As a preliminary matter, we find the petition is timely. Section 12-306e of the NYCCBL and §1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), provide that a petition alleging an improper practice in violation of §12-306 may be filed no later than four months after the disputed action occurred. When a claim arises

[2] NYCCBL §12-307b grants the employer the right "to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees. . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization and the technology of performing its work. . . ."

more than four months prior to the filing of the petition, and there is no allegation that the action continued or accrued at any time within the four month time limitation, the petition will be dismissed as untimely. *See District Council 37, AFSCME,* Decision No. B-61-91 at 8. However, "a union appropriately interposes itself only after an action of management has had an immediate impact on the employees represented by the union, or that it necessarily entails an impact in the immediate or foreseeable future. Thus, a party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented and the charging party is injured thereby." *Id.*

In *Dep't of Probation*, Decision No. B-44-86 at 18, we found timely a Union's petition seeking to negotiate criteria and procedures for the granting of merit increases even though the administrative order which provided those guidelines had been issued nine years before the City announced its intention to implement the merit plan. We stated that until the announcement of the merit increase program and its imminent implementation, the Union did not have "actual or constructive knowledge of definitive acts which put it on notice of the need to complain."

Here, we find that the Union's petition is timely because it was filed within four months of Directive 2258R-A's becoming effective on February 14, 2000. Although the Union may have known that DOC intended to revise Directive 2258R in December 1999, only when DOC implemented Directive 2258R-A did it impact on DOC employees and did the Union have knowledge of definitive acts to put it on notice to complain.

II. FAILURE TO BARGAIN CLAIM

It is an improper practice under NYCCBL §12-306a(4) for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective

bargaining with certified or designated representatives of its public employees." Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *See District Council 37, AFSCME, Locals 2507 and 3621,* Decision No. B-35-99 at 12. The petitioner must demonstrate that the matter to be negotiated is a mandatory subject of bargaining. *See Doctors Council, S.E.I.U.,* Decision No. B-21-2001 at 7.

In *MEBA, District No. 1, Pacific Coast District*, Decision No. B-3-75 at 17, we stated that the obligation to negotiate on the provision of sick leave, which is clearly a mandatory subject, encompasses the duty to negotiate on the regulations and procedures governing its proper use. At issue in *MEBA*, was the Union's demand to bargain over the City's requirement that when an employee is absent for more than two days, the employee must provide a statement from a doctor to support a claim for sick leave.

This Board has also recognized a distinction between demands relating to the amount of sick leave and procedures for its authorized use, which are mandatorily bargainable, and those relating to management's actions to monitor the use of sick leave to avoid abuse, which are non-mandatory subjects. In *Correction Officers Benevolent Ass'n*, Decision No. B-16-81 at 97-102, we held that a number of Union demands that would have altered or superseded DOC's sick leave policy, such as a demand that DOC not check on the whereabouts of employees on sick leave and that DOC not restrict the allocation of overtime because of sick leave use, were non-mandatory subjects of bargaining because they sought to displace management's right to control the proper use of sick leave. However, we also found that those demands which dealt with regulations and procedures concerning the use of sick leave and sought to increase the amount of

sick leave available to an employee, such as a demand that a member will have two weeks after his return from sick leave to submit a required doctor's note and that any sickness in a member's family may be deducted from his annual leave or compensatory time, were mandatory subjects of bargaining. We noted that our holding was consistent with the ruling of the Public Employment Relations Board ("PERB") in *City of Rochester*, 12 PERB ¶3010 at 3018 (1979), in which PERB held a Union demand to permit police officers on sick leave to leave their home without restriction non-mandatory because it infringed on management's right to monitor the use of such leave.

In *Poughkeepsie City School District*, 19 PERB ¶3046 (1986), PERB followed *Rochester* and observed that "[w]hen the parties agree to a restricted purpose leave, such as sick leave, the employer has an inherent right to monitor the conduct of its employees who avail themselves of such leave to ascertain that they are using it for the purpose contemplated by the contract." There, a district, concerned that employees were abusing their sick leave rights, announced that it may initiate disciplinary action against such employees and that the suspicion would be allayed if proper medical documentation were submitted. PERB observed that the announcement did not alter the terms and conditions of employment and that the number of sick days did not change. "All that has happened is that employees have been put on notice as to the standards that the District will be using in monitoring sick leave and as to the circumstances which may persuade it to initiate disciplinary proceedings." PERB noted the District had not "promulgated a new rule which provides that the taking of sick leave without medical documentation is itself a chargeable

offense." Since then, PERB has consistently followed its holding in *Poughkeepsie*.[3]

The City's governmental obligation to monitor the abuse of sick leave in situations in which uniformed municipal employees enjoy unlimited sick leave with full pay was recognized in *Loughran v. Codd*, 432 F. Supp 259 (E.D.N.Y 1976). There, a New York City police officer was denied leave to continue as coach of the department football team after he claimed he was unable to return to restricted duty. The Court found constitutional a policy which restricted police officers on sick leave to the confines of their homes except when authorized to leave by the City's district surgeon. The Court stated:

> The city, in affording the most liberal sick leave benefits to its police officers, maintains a scheme riddled with potentialities for abuse. Department officials are faced with a multi-dimensional management problem. Not only must they track individual rehabilitation progress of the disabled member and foster his expeditious return to duty, but they must, in the larger context, encourage Department efficiency and soothe the additional burdens imposed on working officers caused by their colleague's absence. Moreover, although government's interest in maintaining fiscal integrity, by itself, is not decisive of due process claims, we must be cognizant of the strangulating financial conditions that prevail. (*Citation omitted*). Each city agency owes a duty to the public to avoid wasteful spending and provide reasonable and competent services.

Id. at 263-264.

The Union argues that PERB's holdings in *Poughkeepsie* and *Rochester* should not be followed because many of the changes go further than monitoring the use of sick leave and

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[3] *See County of Niagara*, 31 PERB ¶4527 (1998) (new guidelines advising supervisors when review of an employee's sick leave is warranted and what factors may result in disciplinary action is not a change in terms and conditions of employment); *State of New York*, 23 PERB ¶4516 (1990) (new policy, instituting new lateness/absence standards which may result in discipline, is not a change in terms and conditions of employment); *Hyde Park Cent. Sch. Dist.*, 22 PERB ¶4576 (1989) (new policy providing that use of sick leave without medical documentation is considered an abuse of sick leave which may give rise to disciplinary action is not a change in terms and conditions of employment).

instead establish penalties for its use. The Union relies principally on *County of Monroe*, 32 PERB ¶4652 (1999), in which a public employer revised its attendance policy to include, among others, the following penalties: the first five sick leave occurrences will result in a counseling memorandum; the second five sick leave occurrences will result in a warning notice; the third five sick leave occurrences will result in a one day suspension; the fourth five sick leave occurrences will result in a three day suspension; the fifth five sick leave occurrences will result in a five day suspension; and the sixth five sick leave occurrences will result in termination. PERB rejected the County's argument that the policy puts employees on notice of the standards that it will apply in assessing whether an employee's attendance is satisfactory. Instead, PERB found that this new policy was a mandatory subject of bargaining because it established "a new disciplinary component with an explicit categorical system for the imposition of penalties."[4]

The Union indicates a number of changes in the language of Directive 2258R-A which it contends are mandatory subjects of bargaining. We will examine each one.

1. Absences Excluded from the Calculation of Sick Leave

The Union argues that the City narrowed the types of absences excluded from the calculation of sick leave use and thus increased the number of types of absences that qualify as sick leave, making it more likely that a member will be classified as "chronic absent" and exposed to potential discipline. Specifically the Union states that: (1) all absences related to pregnancy, which were automatically excluded, are now "subject to such limitations as DOC

[4] *See County of Niagara*, 19 PERB ¶4607 (1986) (policy on absenteeism eliminating discretionary disciplinary decisions and imposing inflexible penalty and pay docking schedule based on number of violations found bargainable); *Orange County*, 19 PERB ¶4579 (1986) (new policy which contained penalty schedule found bargainable).

imposes"; (2) absences resulting "in admission to and confinement in a hospital" have been narrowed to absences "while confined to an admitting hospital"; (3) the first absence resulting from a line of duty injury which was the result of an "Unusual Incident" now imposes the definition of "Unusual Incident" as defined in Directive 5000R; and (4) the first absence resulting from a line-of-duty injury which was the result of a Use of Force Incident has been modified to add that "subsequent absences resulting from the UOF incident once a member has returned to duty will be considered in the calculation of sick leave." The City argues that DOC has merely clarified the criteria already inherent in the former directive to ensure consistency in policy application and that this change has no effect on the procedures for calculation of sick leave.

We find that these modifications to the types of absences excluded from the calculation of sick leave are non-mandatory subjects of bargaining. These changes do not alter the terms and conditions of employment. Rather, as in *Poughkeepsie,* all that has happened is that correction officers have been put on notice as to the standards DOC will be using in monitoring sick leave and as to the circumstances which may persuade it to initiate disciplinary proceedings. Although these modifications may make it more likely that a member will be classified as "chronic absent" and exposed to potential discipline, unlike *Monroe*, the changes do not establish a new disciplinary component with an explicit categorical system for the imposition of penalties. Like the employer in *Poughkeepsie,* DOC has not promulgated a new rule which provides that the taking of sick leave for reasons other than those expressly excluded from the calculation of sick leave is itself a chargeable offense. Finally, with regard to the Union's argument that DOC is somehow improperly sanctioning pregnant women, we note that the revised directive now treats

illnesses related to pregnancy like other medical conditions.

2. Appeal Procedure for Classification of "Chronic Absent"

The Union argues that the City unilaterally changed the procedures whereby a member can appeal a designation as "chronic absent." First, the Union states Directive 2258R-A omits the written notification of an appeal determination. In its answer, the City states that this omission was inadvertent and that, in practice, written notice is always provided. As a result, we need not decide whether this is a subject of mandatory bargaining. We assume that the City will amend the Appeal Procedure in Directive 2258R-A to include the written notification of an appeal determination, as was its intention and is consistent with its practice. In the event the City does not do so, the Union may seek leave to open this matter for reconsideration of this issue.

Second, Directive 2258R-A adds pregnancy and hospitalization to the list of mitigating factors which can be considered on appeal of a "chronic absent" designation. The Union objects on the grounds that since all absences related to pregnancy and hospitalization were previously excused, they should not be considered as merely mitigating factors on appeal. The City argues that the revised Appeal Procedure simply sets forth the criteria to be applied by management in evaluating an appeal and as such is a nonprocedural, management prerogative. For the same reasons that the City has a right to narrow the types of absences excluded from the calculation of sick leave, we find that the City also has the right to expand the list of mitigating factors in a "chronic absent" designation appeal.

Third, the Union states that under Directive 2258R, a member whose appeal was granted began a new 12 month evaluation period with a clean slate, but now, after an employee wins an appeal and is removed from the "chronic absent" designation, the number of previously

accumulated sick days remain and can be aggregated with future sick days and considered by management. The City argues that it is merely setting forth the criteria for an employee's "chronic absent" classification, which is within management's right. We find that this change is a non-mandatory subject of bargaining. Although this modification may make it more likely that a member will be re-classified as "chronic absent" and exposed to potential discipline, unlike *Monroe*, the revision does not establish a new disciplinary component with an explicit categorical system for the imposition of penalties. Rather, this modification falls squarely within the holding of *Poughkeepsie* and its progeny; it merely puts correction officers on notice as to the standards DOC will be using in monitoring sick leave and as to the circumstances which may persuade it to initiate disciplinary proceedings sooner.

3. Discretionary Benefits and Privileges

The Union argues that the City: (a) improperly modified the types of discretionary benefits and privileges that can be revoked to include the lose of a preferential/special unit or command; and (b) improperly added pregnancy, hospitalization, and the employee's work performance as mitigating factors to be considered when deciding whether to revoke a discretionary benefit of an employee who is classified as "chronic absent." The Union argues that the loss of an assignment to a preferential unit due to a "chronic absent" designation is a disciplinary action and that DOC is attempting to regulate and diminish the amount of sick leave available to its employees. The City argues that the revision advises that chronically absent members may not receive assignments to preferential/special units or commands. This is a reference to a discretionary assignment, and to maintain efficient operations, DOC has a managerial right to appoint these assignments at will.

We find the Union's statement that the revocation of a preferential/special unit or command is a disciplinary action is misplaced. First, the NYCCBL expressly reserves to management the authority to determine the standards of services to be offered by city agencies, and the methods, means and personnel by which governmental operations are to be conducted, including the right unilaterally to "determine the job assignments of its employees." *See District Council 37, AFSCME, Locals 2507 and 362,* Decision No. B-34-99 at 18. This approach is consistent with PERB's longstanding view that, typically, the assignment of job duties is a managerial function which is non-negotiable. *See Graduate Student Employee's Union*, 33 PERB ¶4593 (2000) (reassignment of teaching assistants to assignment of writing tutors nonnegotiable) *aff'd* 33 PERB 3045 (2000); *Peekskill Faculty Ass'n*, 16 PERB ¶4586 (1983) (issue of which employee, specifically, is to be assigned a particular duty is non-negotiable) *rev'd on other grounds*, 16 PERB 3075(1983).

Moreover, a review of the documents makes clear that the DOC directives distinguish between disciplinary sanctions/termination and the revocation of discretionary assignments. For those members who have used an excessive amount of sick leave, DOC may impose disciplinary sanctions and termination, and before such actions are commenced DOC may consider specific mitigating factors. On the other hand, for those members who are developing a pattern that will result in a "chronic absent" designation, the directives have separate provisions for the revocation of discretionary assignments as well as specific administrative procedure sections concerning such revocations.

We also note that the revised Directive merely adds "assignment to preferential/special units or commands" to the previous list of discretionary benefits and privileges, which already

includes: "assignment to a steady tour," "access to voluntary overtime," "promotions," "secondary employment," "transfers," and "assignment to a specified post or duties." DOC has merely clarified that an assignment to a specified post or duty includes assignment to a preferential unit or command.

We also find misplaced the Union's argument that DOC's consideration of mitigating factors, such as whether the absences are due to pregnancy or hospitalization and the employee's work performance, adversely impacts working conditions and exposes members to discipline. Consideration of an employee's work performance as well as their attendance record, supports the City's denial that the decision to revoke a discretionary benefit is a disciplinary matter and is consistent with the view that it is management's right to assign the most appropriate employee to a particular position. This revision puts correction officers on notice of the standards that DOC will use to monitor sick leave and of the circumstances which may persuade it to revoke a discretionary assignment. Unlike *Monroe*, these modifications do not establish a new disciplinary component with an explicit categorical system for the imposition of penalties.

4. Mitigation

The Union claims that the City improperly modified the list of mitigating factors to be considered before disciplinary or termination actions are taken when it changed the provision from sick leave as a result of "a verified line-of-duty injury" to "a line-of-duty injury which is the result of an Unusual Incident (Directive 5000R) or a Use of Force Incident (Directives 5005R/5006)." The City argues that the revision clarifies the criteria to be considered when making the decision to discipline an employee. We find that limiting the line-of-duty injury mitigating factor to "Unusual" or "Use of Force" incidents is a non-mandatory subject of

bargaining. The change does not affect a term or condition of employment. As in *Poughkeepsie,* all that has happened is that correction officers have been put on notice as to the standards that DOC will be using in monitoring sick leave and as to the circumstances which may persuade it to initiate disciplinary proceedings.

5. Administrative Procedures

First, the Union points out that the City modified the requirement that the commanding officer must counsel an employee who is developing a pattern of chronic absenteeism by adding that the lack of counseling will not preclude the City from placing the member into a "chronic absent" classification. The Union fails to articulate any reason why this is a mandatory subject of bargaining. The City argues that this change has no impact on sick leave and that affected employees all receive a copy of Directive 2258R-A and are on notice of the standards concerning counseling. We find that this change is a non-mandatory subject of bargaining. "An employer may extend to or retract from a supervisor discretion with respect to the performance of supervisory functions without incurring a decisional bargaining obligation in that regard." *Town of Carmel*, 31 PERB ¶3023 (1998) (order imposing new duties on supervisors regarding verification that employees on sick leave are in compliance with residence policy is not a change in terms and conditions of employment).

Second, the Union claims that DOC has: (1) claimed the right to automatically revoke discretionary privileges on the basis of "a pattern that evidences an abuse of sick leave" without first giving the employee the benefit of an appeal procedure; (2) added a new and ambiguous classification based on the undefined terms "pattern" and "abuse"; (3) changed the appeal procedure for the revocation of discretionary privileges and given employees only five days to

appeal; and (4) eliminated the requirement that the employee be given written notification of an appeal determination concerning the revocation of a discretionary benefit. The City argues that it is clarifying and defining the criteria and standards considered prior to denying or revoking a discretionary benefit, which is within management's right, and that this change has no impact on the right to sick leave.

The relevant sections of the old Directive, 2258R, are as follows:

Directive 2258R § III G (2) provides:

> The Commanding Officer may deny or revoke one (1) or more discretionary privileges of any member who is developing a pattern of chronic absence and has not responded to counseling.

Directive 2258R § III G (4) provides:

> Category B: A member placed in Category B may suffer the denial or revocation of one or more discretionary benefits and privileges at the discretion of the Commissioner or the Commissioner's designee any time after the twenty (20) day appeal period has expired. If a member has filed a timely appeal, no denial or revocation of discretionary benefits shall take effect pending the determination of the appeal.

Directive 2258R § III (I)(c) provides:

> The Absence Control Coordinator shall notify the Commanding Officer of the denial or revocation of any discretionary benefits and privileges for a member in Category A or Category B. The Commanding Officer shall notify the member in writing.

Directive 2258R § III (J)(2) provides:

> After considering the factors specified in administrative procedure the Chief of the Department or designee shall notify the Absence Control Coordinator which, if any, discretionary benefits and privileges shall be denied or revoked for a member in Category A or Category B. The Absence Control Coordinator shall forward the determination to the member's Commanding Officer who shall notify the member in writing.

The relevant sections of the revised Directive, 2258R-A, are as follows:

Directive 2258R-A § G (2) provides:

> The Commanding Officer may deny or revoke one (1) or more discretionary privileges of member who despite counseling developed a pattern that evidences an abuse of sick leave. The member shall have five (5) days in which to appeal such revocation. The Commanding Officer shall forward the appeal to the respective Bureau/Assistant Chief for final review and determination. The determination shall be returned to the member's command within two (2) business days of receipt. The member shall be advised of the determination and a copy of the review shall be placed in the employee's personal history folder.

Directive 2258R-A § G (3) provides:

> A member placed into a chronic absence designation, may suffer the denial or revocation of one or more discretionary benefits and privileges at the discretion of the Commanding Officer any time after the twenty (20) day appeal period has expired. If a member has filed a timely appeal, no denial or revocation of discretionary benefits shall take effect pending the determination of the appeal.

We find that the two Directives are, in substance, very similar. It appears that these procedures in Directive 2258R were restated and reorganized in a shorter form and reflect that there is now a single general category of "chronic absent" employees. The City has not created an ambiguity by changing "member who is developing a pattern of chronic absence and has not responded to counseling" to "member who despite counseling developed a pattern that evidences an abuse of sick leave." Moreover, DOC has not given itself an automatic right to revoke privileges without the benefit of an appeal. Under both directives, DOC has the right to revoke a discretionary benefit and for those members who file a timely appeal, no revocation shall take effect pending the determination of the appeal. The only change we can see is that Directive 2258R made reference to a "timely appeal" of a commanding officer's determination to revoke discretionary privileges, and the revised Directive now specifies that a "member shall have five

(5) days in which to appeal such revocation." We find that the City has merely clarified the meaning of "timely" to be "five days."

However, we note that under Directive 2258R the Commanding Officer notified the member "in writing" of the appeal determination to revoke privileges and that under Directive 2258R-A the member is "advised of the determination and a copy of the review shall be placed in the employee's personal history folder." The City does not specifically address this modification but previously recognized that it inadvertently omitted the written notification of an appeal determination regarding a designation as "chronic absent." We assume that this was a similar drafting error, and, that in practice, written notice to the member is always provided. If this is incorrect and the City does not amend Directive 2258R-A § G (2) to include the written notification of this appeal determination, the Union may seek leave to open this matter so that we can address the issue whether it is a mandatory subject of bargaining.

6. Duties of Absence Control Monitor

The Union claims that the City improperly modified the duties of the Absence Control Monitor. Previously, a "chronic absent" employee was notified of this designation immediately by telephone and in writing upon return to duty and now the employee is only notified, at an unspecified time, in writing. We find that DOC's procedures for notifying employees of their status as a "chronic absent" is a non-mandatory subject of bargaining because they concern management's right to set the standards and procedures of its sick leave abuse program and do not alter any terms and conditions of employment.

III. STATUS QUO CLAIM

Since we find that the unilateral changes identified by the Union are non-mandatory

subjects of bargaining, we need not reach the question whether the City violated the status quo provisions of the NYCCBL. However, we briefly note that because the City issued Directive 2258R-A effective February 14, 2000, and the parties did not commence negotiations until after the CBA expired on July 31, 2000, the parties were not in status quo. An employer violates §12-306a(5) of the NYCCBL by unilaterally making a change to a mandatory subject of bargaining or a term and condition of employment established in the prior contract only during a period of negotiations. *See Uniformed Sanitation Chiefs Ass'n*, Decision No. B-32-2001 at 7.

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 in the matter docketed as BCB-2136-00 be, and the same hereby is, denied in its entirety.

Dated: July 9, 2002
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

ERNEST F. HART
MEMBER

I Dissent. BRUCE H. SIMON
MEMBER

I Dissent. CHARLES G. MOERDLER
MEMBER