DC 37, Local 1549, 7 OCB2d 3 (BCB 2014)

(IP) (Docket No. BCB-3024-12).

Summary of Decision*:** The Union alleged that the NYPD violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing and refusing to bargain over disciplinary procedures, resulting in the removal of certain due process protections for Union members previously included in the Command Discipline process. The City argued that the Union had not established the claimed violations because, to the extent the NYPD changed the Command Discipline process, any change was *de minimis* and not subject to bargaining because discipline falls within the managerial prerogative. The Board found that NYPD did not make a unilateral change in a mandatory subject of bargaining. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 1549,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On June 15, 2012, District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1549 (collectively, "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). The Union alleges that the City and the NYPD violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)

("NYCCBL") § 12-306(a)(1) and (4) by unilaterally changing and refusing to bargain over disciplinary procedures, resulting in the removal of certain due process protections for Union members previously included in the Command Discipline process. The City argues that the Union has not established the claimed violations because, to the extent the NYPD changed the Command Discipline process, any change was *de minimis* and not subject to bargaining because discipline falls within the managerial prerogative. The Board finds that the NYPD did not make a unilateral change in a mandatory subject of bargaining. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held two days of hearings and found that the totality of the record established the following relevant facts.

DC 37 is an amalgam of 54 local unions representing approximately 120,000 public employees in various agencies, authorities, boards, and corporations throughout the City. Local 1549 represents Police Communication Technicians ("PCTs"), Supervising Police Communication Technicians ("SPCTs"), Police Administrative Aides (PAAs"), and Senior Police Administrative Aides ("SPAAs") employed with the NYPD. The NYPD utilizes an employee disciplinary process known as Command Discipline ("CD"), which is described in Patrol Guide 206-02 ("PG 206-02"). The stated purpose of CD is "[t]o empower a commanding/executive officer to maintain discipline within his/her command, without resorting to formal charges and a Departmental trial." (Union Ex. B.) CD is defined as "[n]on-judicial punishment available to a

commanding/executive officer to correct deficiencies and maintain discipline within the command." (*Id*.)

PG 206-02 describes the duties of the commanding/executive officer's function in CD as follows:

> **COMMANDING/EXECUTIVE OFFICER[:]**
>
> 1. Investigate to determine if allegation is substantiated.
> 2. Indicate findings on **REPORT**, if allegation is not substantiated and:
>   a. For actions described in violations subject to command discipline procedure Schedule "A":
>   (1) File the report in back of Command Discipline Log after recording disposition.
>   b. For actions described in violations subject to command discipline procedure Schedule "B":
>   (1) File original in back of Command Discipline Log
>   (2) Forward copy to next higher command for informational purposes.
> 3. Determine if the violations, when substantiated, may be disposed of under command discipline.
> 4. Confer with supervisor who prepared **REPORT**, if necessary.
> 5. Schedule interview, if possible, with member concerned on a date when supervisor who prepared **REPORT** is available.
> 6. Advise member that one local representative of a line organization may be present at the interview.
> 7. Inform member of alleged violations and conduct interview.
>   a. Do not record minutes.
>   b. Interview will be informal and non-adversarial.
> 8. Give member an opportunity to make a statement in rebuttal.
> 9. Conduct further investigation, if necessary.
> 10. Inform supervisor who prepared **REPORT** of the results of the investigation and any proposed penalty.
> 11. Inform member of results of investigation and any penalty.
> 12. Advise member that he/she is entitled to:
>   a. Accept finding and proposed penalty, or
>   b. Accept finding but appeal proposed penalty to Command Discipline Review Panel, or
>   c. Decline to accept the finding and proposed penalty and have the matter resolved through formal charges and specifications.

13. Inform the member that the decision of the Command Discipline Review Panel is final and not subject to review, and that the Panel has the authority to:
    a. Approve proposed penalty, or
    b. Reduce proposed penalty to any corrective measure the commanding officer was authorized to impose, or
    c. Increase proposed penalty to not more than double that proposed by the commanding officer.
14. Give member copy of **REPORT** at close of interview.

(*Id*.)

On February 17, 2012, the NYPD Commissioner issued Interim Order 9 ("IO 9"), entitled "Revision to Patrol Guide 206-02, 'Command Discipline.'" In pertinent part, the Interim Order states the following:

> 1. Patrol Guide 206-02, "Command Discipline" is being revised in order to eliminate any ambiguity regarding the investigation of substantiated command disciplines and disciplinary action recommended by the Internal Affairs Bureau or any other investigative unit, and to ensure command disciplines are adjudicated in a timely manner.
>
> 2. Therefore, effective immediately, Patrol Guide 206-02, "Command Discipline" is amended as follows:
>
> a. **ADD** new heading, "WHEN A SUBSTANTIATED COMMAND DISCIPLINE IS RENDERED AS A RESULT OF AN INTERNAL AFFAIRS BUREAU OR ANY OTHER INVESITGATIVE UNIT'S INVESTIGATION,", and new step "27", opposite actor "COMMAND/EXECUTIVE OFFICER", ON PAGE "3" TO READ:
>
> **"WHEN A SUBSTANTIATED COMMAND DISCIPLINE IS RENDERED AS A RESULT OF AN INTERNAL AFFAIRS BUREAU OR ANY OTHER INVESTIGATIVE UNIT'S INVESTIGATION:**

COMMANDING/EXECUTIVE OFFICER[:]

27. Comply with the provision of P.G. 206-04, "Authorized Penalties Under Command Discipline," and offer member concerned the three election options found in step "12" above.

a. An investigation of the stated misconduct or determination of whether the allegation(s) are substantiated is NOT required

b. Do NOT change the stated findings

c. Do NOT change the recommended disciplinary action (if noted), without conferral and approval of the investigating entity and/or Deputy Commissioner, Department Advocate."

3. Any provisions of the Department Manual or any other Department directive in conflict with the contents of this Order are suspended.

(Union Ex. A)

The record demonstrates that CD can occur as a result of an investigation initiated from several different sources. First, any supervisor can report a perceived violation of the NYPD's rules or procedures. In such a situation, the employee's CO will follow the steps listed in PG 206-02 to conduct an investigation and determine whether CD is appropriate. IO 9 does not apply in these situations and, therefore, the CD procedure has not changed in this regard since IO 9's implementation.

Alternatively, an investigative unit can conduct an investigation into alleged misconduct and decide whether to substantiate a claim. On its face, IO 9 applies only to discipline which is investigated and substantiated by "[IAB] or any other investigative unit[]." (Union Ex. A) John Beirne, the NYPD's Deputy Commissioner of Labor Relations, explained that investigative units "are units within the Police Department that investigate allegations of misconduct, of corruption, of failure to comply with proper

procedures and the like." (Tr. at 213) Deputy Commissioner Beirne named the Internal Affairs Bureau ("IAB") and the Equal Employment Opportunity ("EEO") office as examples of investigative units. According to Deputy Commissioner Beirne, during an investigation initiated by one of these units, the employee will generally be interviewed during what is referred to as a GO-15 hearing. However, he explained that there are also situations in which a breach of protocol is clear and an employee may not be given a GO-15 hearing. In either situation, if a claim is substantiated, the investigative unit will confer with the Department's Advocate's Office to determine whether the matter is appropriate for CD, or whether it is a more serious matter requiring formal charges and specifications. If it is determined that CD is appropriate, then the matter will be referred to the CO to conduct a CD hearing. Beirne testified that this CD hearing is not an investigative hearing, but rather is an informal interview in which the employee can determine which course of action to take in accordance with Step 12 of PG 206-02.

Deputy Commissioner Beirne testified that IO 9 has not resulted in any change to this procedure as far as employees are concerned. Rather, IO 9 is directed towards COs and its purpose is to clarify that "when complex investigations are conducted, that the [CO] does not have the authority or the ability to unsubstantiate (*sic*) such a referral without conferring and presenting the exculpatory evidence to the internal investigations unit . . . ." (Tr. at 212) Deputy Commissioner Beirne testified that he learned that the specific impetus for the implementation of IO 9 was a particular incident in which a CO disregarded CDs that had been substantiated by IAB without conferring with anyone. When questioned as to why he had done this, the CO was not able to present any exculpatory evidence. Consequently, this CO was transferred out of his command to

another command with lesser responsibility. Deputy Commissioner Beirne stated that after IO 9's implementation, if CD is issued by an investigative unit, a CO who subsequently discovers exculpatory evidence can and should present the evidence to the investigative unit and attempt to persuade the unit to change the result of its investigation if the evidence is strong enough.

NYPD Deputy Commissioner and Labor Counsel David Cohen also testified that IO 9 was implemented in order to clarify for COs that they should not change the factual findings or penalty after an investigative unit has already conducted a thorough and lengthy investigation. He stated that although COs may not technically have been prohibited from doing so under IO 9, it would have been "foolish" for a CO to change the findings of an IAB investigation. (Tr. at 178) Further, Cohen stated that "any [CO] that countermands [IAB] does so at his or her peril." (Tr. at 166) He explained that this is because "[i]t's [IAB's] job to police the police." (Tr. at 156) Deputy Commissioner Cohen additionally testified that although a CO is not required to complete a duplicate investigation into the misconduct after the implementation of IO 9, the CO is still required to afford the employee an opportunity to be heard in the context of a CD interview. Consequently, Deputy Commissioner Cohen stated that he did not believe that IO 9 represented a change in protocol.

The parties dispute the meaning of the term "any other investigative unit" and, thus, which situations IO 9 applies to. (*Id*.) In particular the parties dispute whether IO 9 applies to CDs that are substantiated by the Communications Section's investigative unit. The Communications Section is a unit within the Communications Division that is responsible for taking 911 calls and dispatching police officers appropriately. Deputy

Commissioner Cohen testified that the Communications Section's investigative unit is an internal "management and monitoring unit" which performs "predominantly quality control." (Tr. at 146) This unit monitors 911 calls to ensure that PCTs are asking the correct questions and following proper protocols. According to Deputy Commissioner Cohen, IO 9 does not apply to CD that is substantiated by this investigative unit because it is not considered an *outside* investigative unit. The Union, however, presented testimony from witnesses who stated that a change to the CD procedure utilized by the Communication Section's investigative unit has in fact occurred as a result of IO 9 in these situations.

Two of the Union's witnesses were shop stewards who have represented employees facing CD that had been substantiated by the Communication Section's investigative unit. Jim McLeod and John Armstrong testified that, prior to IO 9's implementation, if the investigative unit completed an investigation and recommended that the employee receive CD, the CO would conduct a CD hearing or interview with the employee. The employee would generally have the opportunity to speak, and the Union representative would take an active role in negotiating with the CO. The CO would then decide whether to ultimately substantiate the allegations and, if so, the CO would determine the penalty. However, both witnesses testified that after IO 9 was implemented, the investigative unit had already determined that the CD was substantiated and a penalty was determined before the employee had the opportunity to speak to a CO at the CD hearing.

McLeod's experience with IO 9 involved an instance in which he represented a PCT in a hearing to determine whether she had followed proper protocols while taking a

911 call. McLeod stated that the CO was not present for the hearing and it was instead conducted by a member of the disciplinary unit.[1] According to McLeod, he was informed at the hearing that because the CD originated from the investigations unit "[t]hey are not allowed to dismiss, reduce or make any changes" to the findings or recommended penalty. (Tr. at 43) He stated that the employee was never given an opportunity to speak with her CO regarding her case and she ultimately was warned and admonished. Armstrong did not testify about any specific instances in which IO 9 had been applied but spoke about the general changes he has noticed since its implementation. Armstrong testified that after IO 9's implementation, the CO no longer has the option to find that a claim is not substantiated and no longer conducts any investigation. However, he stated that the CO may still decide to lower the penalty if he disagrees with the finding.

The Union also presented the testimony of an employee who received CD as a result of an investigation conducted by IAB, as well as that of the Union representative who represented the employee at the GO-15 hearing with IAB. It is uncontested that IO 9 applied in this situation. Bernadette Elstein testified that in January 2012 she received notice to appear at a GO-15 hearing at IAB headquarters. She brought her Union representative, Diana Marenfeld, with her. The purpose of the hearing was to determine whether Elstein had followed proper protocols during a 911 call, or whether she should have reported the call to IAB as a matter involving possible police corruption. At the hearing, the IAB representative asked Marenfeld some questions regarding the relevant

[1] Deputy Commissioner Beirne testified that the CO can delegate his authority to conduct a CD interview to an executive officer, a supervisor, or an integrity control officer.

protocols and asked whether Elstein had followed proper procedures. Marenfeld told the IAB representative that she had, and that she had not done anything wrong.

Thereafter, sometime in June 2012, Elstein received a notice that she was to appear at a CD interview with her CO. Elstein attended this meeting with a different Union representative. According to Elstein, she arrived at the interview and her CO informed her that she was receiving a "Schedule B" CD. Further, the CO stated that "he couldn't negotiate this at all" because the CD originated from IAB and, therefore, "he couldn't do anything for [her]." (Tr. at 100)

Marenfeld testified that after she learned Elstein had received a Schedule B violation she spoke with someone in the disciplinary unit. She asked for, and was given, a guarantee that this CD would not be held against Elstein as she sought a promotion. Marenfeld also testified about her general understanding of IO 9. She stated that prior to IO 9, when a CD originated from an investigative unit or IAB, there was always room for negotiation, because ultimately the decision was left to the CO of the unit. She explained that, "if we couldn't deal with it in the disciplinary unit, we could go to the [CO] of the unit itself . . . and at least have a fair and balanced exchange as to [the reasoning] for penalties." (Tr. at 125) Marenfeld testified that when she represents a member at a hearing with IAB she often has to explain to IAB what the Communications Section's procedures and protocols are because there are thousands of them and, in her opinion, IAB does not always understand them.[2]

[2] The Union also presented the testimony of Patricia Peterson, an SPAA and Union shop steward. Peterson testified about an experience she had in which she represented an employee at a CD hearing after an outside "inspections" unit had substantiated a claim against the employee and determined that CD was appropriate. (Tr. at 82) This unit had not recommended a penalty in this instance. Peterson testified that she, the employee,

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the NYPD violated § 12-306(a)(1) and (4), by failing to negotiate over a *prima facie* change to disciplinary procedures. The Board has consistently held that disciplinary procedures constitute a term and condition of employment and are, therefore, mandatory subjects of bargaining. The Union alleges that IO 9 represents a unilateral change to the disciplinary procedures contained in PG 206-02. Consequently, the NYPD committed an improper practice when it instituted IO 9 without first bargaining with the Union.

The Union alleges that, under IO 9, when a substantiated CD is rendered as a result of an investigation conducted by one of the NYPD's investigative units, "the impacted Union member can no longer expect, as a matter of established protocol, to have a further investigation conducted by their CO." (Union Br. at 27) Additionally, even if a CO does decide to conduct a further investigation, he or she can no longer unilaterally change the stated findings or recommended disciplinary action. The Union claims that by removing the CO's role in fact-finding and asserting CD, IO 9 fundamentally changes the disciplinary procedure to which Union members are subjected. Consequently, the changes represented by IO 9 are logically inconsistent with

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and the CO "sat down and worked out what the penalty would be." (Tr. at 84) Deputy Commissioner Cohen confirmed that this CD had originated from IAB, and that the charges had been substantiated prior to IO 9's implementation but that the CD hearing was conducted after IO 9 took effect. Peterson testified that she did not have any prior experiences with CD that was substantiated by IAB. However, she stated that it was her belief that IO 9 might represent a change in procedure because, in her opinion, it would take away some of the CO's "leniency" in determining a penalty. (Tr. at 85)

the purpose of PG 206-02, which is to empower the CO to maintain discipline within his or her command.

The Union argues that the testimony of all five of its witnesses demonstrates that the investigative units do not have the same knowledge of relevant protocols, or the familiarity with the personnel, as the COs of each individual unit. The Union states that Elstein's CD is a classic example of the impact that this lack of knowledge can have on an employee. It claims that all of the evidence presented demonstrates that in her case there was no basis to find any violation, much less a serious "Schedule B" violation. Further, because the CO can no longer make any changes to factual findings, should Elstein have chosen to pursue formal charges and specifications, the factual basis upon which she could challenge the CD would have differed post-IO 9.

The Union additionally argues that, contrary to the City's claims, IO 9 does not constitute a clarification of existing policy. It states that, for the Board to accept this argument, it would have to ignore the testimony of every Union witness, as well as the plain language of both PG 206-02, which dictates a certain procedure for CD, and IO 9, which constitutes a fundamental change to that procedure.

The Union contends that the Board must reject the City's argument that any change represented by the implementation of IO 9 is *de minimis*. Deputy Commissioner Beirne's testimony establishes that there are some situations where an investigative unit may propose CD without ever interviewing the employee. Because IO 9 no longer requires the CO to conduct any type of investigation, the Union argues that employees may consequently be denied due process. This cannot be considered a *de minimis* change.

The Union argues that it is uncontested that in the cases of Elstein and the PCT represented by McLeod, when discussing charges which arose from IAB and the Communication Section's investigative unit respectively, the COs stated that they were not allowed to dismiss, reduce, or make any changes to the charges or recommended penalty. The Union challenges the City's argument that the PCT's case was not subject to the provisions of IO 9 because it did not arise from an "outside" investigative unit. The Union asserts that this contradicts the language of IO 9, which does not refer to "outside" investigative units. It also contradicts Deputy Commissioner Beirne's testimony that one of the two ways in which CD originates is from an investigative unit, which he described as "units within the Police Department that investigate … failure[s] to comply with proper procedures and the like." (Union Br. at 37-38) (citing Tr. 213) Consequently, the Union argues that it has presented ample evidence of the real and substantial impact that the change in disciplinary procedure has had on its members.

City's Position

The City argues that it did not violate NYCCBL § 12-306 (a)(1) or (4) because the Union has not proven that IO 9 constitutes a unilateral change to CD procedures. It admits that prior to the issuance of IO 9, PG 206-02 did not specifically address the protocol for CD cases that arose from investigations conducted by internal investigative units such as IAB or the EEO. However, Deputy Commissioner Beirne's unrebutted testimony was that it is not a new practice that these investigations sometimes result in CD. Consequently, the City contends that it follows that there has always been some policy, written or unwritten, regarding the way in which these types of CD were handled.

The City argues that the Union has simply failed to produce any testimony or evidence which demonstrates that, prior to IO 9, a CO would conduct a second investigation where CD was instituted as a result of an investigative unit's investigation. Further, the City argues that testimony of its own witnesses demonstrates that, prior to IO 9, an experienced CO would not unilaterally change findings of fact or a proposed penalty, but would instead confer with the investigative unit before making any changes. No evidence was adduced to demonstrate that it was the NYPD's policy, prior to IO 9, that the CO held final decision-making authority regarding CD penalties in all cases, including those substantiated by an investigative unit.

The City also contends that any change that resulted from IO 9's implementation was not material, substantial, or significant. It claims that the testimony from its witnesses establishes that IO 9 is merely a clarification of PG 206-02 that is intended to prevent a full and duplicate investigation of an allegation of misconduct that has already been substantiated as a result of a thorough investigation. Here, the implementation of IO 9 does not require increased participation on the part of employees, nor does it alter the substance of any benefit employees receive from CD procedures. The City argues that, if anything, IO 9 only changes the actor conducting the interview and investigation portion of the PG 206-02 protocol in certain cases. IO 9 has not altered employees' rights to appeal the findings of an investigation and/or the recommended penalty. Thus, any change represented by the implementation of IO 9 is *de minimis*.

Furthermore, the City asserts that the issuance of IO 9 constitutes the exercise of express managerial rights under NYCCBL § 12-307(b).[3] It argues that this Board and the

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

Public Employment Relations Board ("PERB") have recognized that an employer may extend to or retract from a supervisor's discretion with respect to the performance of supervisory functions without incurring a duty to bargain. The City claims that all of the Union's arguments stem from its perception that the CO's discretion to alter command discipline has been curtailed. However, the Union has not proven how this has had any actual effect on employee discipline, which is a managerial prerogative carrying no duty to bargain. According to the City, even if there has been a shift in the apportionment in discretion between the management personnel who implement discipline, ultimately the discretion still resides with management.

The City argues that none of the Union's cited examples demonstrate that the implementation of IO 9 constitutes a unilateral change. Regarding McLeod's testimony, the City argues that IO 9 did not apply in that situation, because the investigation occurred internally, inside of the employee's own command. Thus, the City contends that this case demonstrates only that in such a situation, where the CD came with a recommended penalty prior to the employee's interview, "the exact 'changes' allegedly brought on by IO 9 occur even in non-IO 9 cases." (City Br. at 31) The City contends that even though IO 9 did not apply in that case, the interviewer still determined that the

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> It is the right of the city, or any other public employer, acting through its agencies, to . . . direct its employees; take disciplinary action; . . . 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 . . . . Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining . . . .

penalty was appropriate and did not negotiate with the PCT's about the penalty or the underlying facts.

The City argues that although Elstein testified that her CO stated that he could not negotiate with her at all regarding her CD, this does not demonstrate that he would have done anything differently had IO 9 not been implemented. No one testified that the CO indicated a desire to give Elstein a different penalty, or that he made any attempt to question IAB's determinations or recommendations. Additionally, Marenfeld testified that after Elstein's CD interview, she contacted someone in the disciplinary unit and was able to negotiate that the CD would not be held against Elstein as she pursued a promotion.

DISCUSSION

It is an improper practice under NYCCBL § 12-306(a)(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." Under NYCCBL § 12-307(a), mandatory subjects of bargaining generally include wages, hours, working conditions, and any subject with a significant or material relationship to a condition of employment.[4] Where management makes a unilateral change in a mandatory subject of bargaining, "it accomplishes the same result as if it had

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

> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including, but not limited to, wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including, but not limited to, overtime and time and leave benefits), working conditions . . . .

refused to bargain in good faith, and likewise commits an improper practice." *CEU, L. 237, IBT*, 2 OCB 2d 37, at 11 (BCB 2009) (citation omitted).

In order to establish that a unilateral change has occurred in violation of the NYCCBL, the Union "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)). Here we find that, because the changes at issue relate to supervisory functions and do not change the substantive rights or participation of employees, they do not affect mandatory subjects of bargaining. As such, we find that the NYPD did not violate the NYCCBL when it implemented IO 9.

IO 9 is directed to "Commanding/Executive Officer[s]." (Union Ex. A) It states that its purpose is to "eliminate any ambiguity" regarding the steps a CO should take following a CD that has been substantiated by an investigative unit. (*Id.*) First, it states that once CD has been substantiated, the CO is not required to conduct an investigation into the misconduct. Second, IO 9 instructs the CO not to change the stated findings. Third, it instructs the CO not to change the recommended disciplinary action (if one is noted) without first conferring and obtaining approval of the "investigating entity and/or Deputy Commissioner, Department Advocate." (*Id.*)

The parties dispute whether IO 9 applies to investigations conducted by the Communication Section's investigative unit. We find that, whether IO 9 was intended to apply to these investigations or not, the evidence demonstrates that it has been so applied. First, the language of IO 9 does not refer to *outside* investigative units, as the City contends. Rather, IO 9 applies to CD that is rendered "as a result of an [IAB] or *any*

other investigative unit's investigation." (Union Ex. A) (emphasis added). Deputy Commissioner Beirne described "investigative units" as those that "investigate allegations of . . . failure to comply with proper procedures." (Tr. at 213) The Communication Section's investigative unit investigates whether employees have followed the proper protocols while taking 911 calls and, thus, it falls under Deputy Commissioner Beirne's description. Further, McLeod testified credibly that after IO 9 was implemented, a hearing officer informed him that because the CD originated from the Communication Section's investigative unit "[t]hey are not allowed to dismiss, reduce or make any changes." As such, we find that IO 9 has been applied in these situations. Consequently, we will examine the testimony of all of the Union's witnesses to determine whether IO 9 represented a unilateral change in a mandatory subject of bargaining.

The testimony of at least four of the Union's witnesses establishes that the effect of IO 9 is that the CO's ability to exercise discretion in order to change the findings or recommended penalty of CD that has been substantiated by an investigative unit has been curtailed to some extent. These witnesses testified that, prior to the implementation of IO 9, in certain instances Union representatives were able to take an active role in negotiating the penalty an employee would receive during a CD hearing with the CO. Further, the witnesses testified that sometimes the CO would find that the allegations were not substantiated and the recommended CD would be dismissed. The testimony of the City's witnesses did not contradict this. However, the record demonstrates that after IO 9 was implemented, the CO no longer has the ability to exercise such discretion.

Having found that IO 9 constitutes a change in the level of discretion a CO can exercise over the findings of fact and the determination of a penalty, we now examine

whether this change pertains to a mandatory subject of bargaining. As we have previously explained, "we have long held that, while it is an employer's prerogative to take disciplinary action, the procedures necessary for the administration of discipline are mandatorily negotiable." *DC 37*, 4 OCB2d 19, at 29 (BCB 2011) (quoting *DC 37*, 79 OCB 37, at 10 (BCB 2007) (internal quotation marks omitted). Thus, we have stated that "while it is within management's discretion to . . . impose discipline . . . the procedures for . . . imposing and reviewing disciplinary action . . . are mandatory subjects of bargaining." *DC 37*, 79 OCB 37, at 10 (BCB 2007) (citations and quotation marks omitted).

However, we have also held that certain procedural revisions which pertain only to supervisory functions are not mandatorily negotiable. *See DC 37, Local 3631*, 4 OCB2d 34, at 12 (BCB 2011) ("[W]hen procedural revisions, such as timing issues, are made to performance evaluations, they are mandatorily negotiable *unless they pertain only to supervisory functions*.") (quoting *PBA*, 73 OCB 12, at 15 (BCB 2004), *affd.*, *Patrolmen's Benevolent Assn. v. NYC Bd. of Collective Bargaining*, No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005), *affd.*, 38 A.D.3d 482 (1st Dept. 2007), *lv. den.*, 9 N.Y.3d 807 (2007)) (emphasis in original). *See also COBA*, 69 OCB 26, at 16 (BCB 2002). Hence, where the procedural change "is clearly a management prerogative and does not implicate any expectation or action on the part of the employee, the change is considered substantive and thus a non-mandatory subject of bargaining." *DC 37, Local 3631*, 4 OCB2d 34, at 12 (citing *PBA*, 63 OCB 2, at 15 (BCB 1999)). Further, in *PBA*, 73 OCB 12, at 15, we agreed with PERB's conclusion in *Town of Carmel (PBA)*, 31 PERB ¶ 3023, at 3051 (1998), that: "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."

Here, we find that the changes at issue relate only to supervisory functions and do not require any additional participation from employees. *See PBA*, 73 OCB 12, at 16 (change in the frequency of performance evaluations that concerns only requirements for supervisors assessing employees and does not necessitate any participation by employees is not mandatorily bargainable). As such, these changes do not relate to a mandatory subject of bargaining. Therefore, we find that the NYPD did not violate the NYCCBL by making a unilateral change in this regard.

The Union also contends that the first portion of IO 9, stating that a CO is not required to conduct an investigation, means that "the impacted Union member can no longer expect, as a matter of established protocol, to have a further investigation conducted by their CO." (Union Br. at 27) The Union argues that after the implementation of IO 9, "there are circumstances in which a Union member may be offered [CD], originating from an investigative unit, and have absolutely no chance to present his or her case to the [CO], such an 'interview' being entirely at the discretion of that officer." (*Id*. at 35) Consequently, the Union argues that in such a case the Union member is denied due process.

Here, we find that the first portion of IO 9 is directed only towards the obligations of a CO and that its purpose is to inform the CO that he or she is not required to undertake an independent fact-finding investigation after one has already been completed. However, this portion of IO 9 does not change or limit an employee's participation in disciplinary procedures, since it does not limit the CO's ability to

interview an employee who is subject to CD. Deputy Commissioner Cohen testified that although a CO is not required to complete an independent investigation into the alleged misconduct after the implementation of IO 9, the CO is still required to afford the employee an opportunity to be heard in the context of a CD interview. The Union did not provide any examples in which an employee facing CD after the implementation of IO 9 was not brought in for a CD hearing or interview.[5]

Additionally, it is important to note that the language of IO 9 does not preclude the CO from conducting an investigation. It only states that the CO is not required to do so. Further, the evidence presented established that if a CO is able to uncover any exculpatory evidence after CD has been recommended, the CO can and should bring this evidence to the investigative unit's attention. As such, this portion of IO 9 does not alter the level of employees' participation in a disciplinary procedure. Consequently, we find that it does not impact a mandatory subject of bargaining.[6]

Finally, we are not persuaded by the Union's argument that after the implementation of IO 9 employees facing CD are no longer afforded due process. Although, as the Union contends, it is possible that an employee's CO might be more lenient than an investigative unit in imposing a penalty, the change implemented by IO 9

[5] The Union provided one example of a case in which an employee's CD interview was conducted by a SPCT rather than a CO. However, Cohen's unrebutted testimony established that in cases involving low-level penalties, the CO could delegate his authority to conduct the interview to a SPCT.

[6] Contrary to the assertions of the Union and the dissent, no evidence was presented to demonstrate that when CD was substantiated by an investigative unit a CO ever conducted a second fact-finding investigation of his own prior to conducting a CD hearing, or that employees expected that he would. Therefore, even if we were to find that an additional investigation constitutes a mandatory subject of bargaining, we would nevertheless find that it has not been established that a change was implemented in this regard.

relates only to a difference in the member of management who makes the ultimate decision to impose discipline. Therefore, as stated above, any such change in this regard relates to a non-mandatory subject of bargaining. An employee's options for appealing the proposed findings and penalty have not been changed. The employee is still entitled to explain their conduct and either accept or reject the findings and/or proposed penalty, appeal the penalty to a CD Review Panel, or have the matter resolved through formal charges and specifications. Consequently, we do not find that the NYPD has unilaterally changed due process protections for employees subject to CD. We therefore dismiss the Union's improper practice petition in its entirety.

ORDER

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

ORDERED, that the improper practice petition, docketed as BCB-3024-1, filed by District Council 37, AFSCME, AFL-CIO, Local 1549, against the New York City Police Department, hereby is dismissed in its entirety.

Dated: January 10, 2014
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

Joins in Dissent of Member P. Pepper

CHARLES G. MOERDLER
MEMBER

I Dissent (see attached)

PETER PEPPER
MEMBER

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its

AFFILIATED LOCAL 1549

Petitioner,

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY

POLICE DEPARTMENT,

Respondents.

(Docket No. BCB-3024-12)

I dissent. I must disagree with the majority as to how the reasons for the changes in the due process procedures in Interim Order 9 entitled "Revision to Patrol Guide 206-02, Command Discipline" do not rise to the level of being mandatorily negotiable. In this view, to state that these changes only pertain to supervisory functions appears to be problematic in that the impact of these changes certainly has the potential of reducing the due process options that the employees have come to expect.

As noted by the majority, NYCCBL 12-306 (a)(4) requires public employers to bargain in good faith over wages, hours, and working conditions, as well as any subject with a significant or material relationship to a condition of employment. Although the board has traditionally held that certain procedural revisions which pertain only to supervisory functions are not mandatorily negotiable, this change appears to go beyond such a revision.

I specifically refer to new step "27" When a substantiated command discipline ("CD) is rendered as a result of an Internal Affairs Bureau or any other investigative unit's investigation the Commanding Officer ("CO") is now bound by the following: an investigation of the stated misconduct or determination of whether the allegation(s) are substantiated is not required; the CO is not to change the stated findings; and finally the CO is not to change the recommended disciplinary action (if noted), without conferral and approval of the investigative entity and/or Deputy Commissioner, Department Advocate.

What is clear from the above is that the impacted member may no longer expect to have any additional investigation conducted by their CO. Without this requirement the member may be denied due process, and it because of this that I dissent and would grant the petition.

New York, New York
January 6, 2014

Peter Pepper

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Alternate Labor Member