DC37 v. City & DOT , 75 OCB 13 (BCB 2005) [Decision No. B-13-2005, (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

Decision No. B-13-2005
Docket No. BCB-2435-04

-and-

CITY OF NEW YORK and the DEPARTMENT OF TRANSPORTATION,

Respondents.
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DECISION AND ORDER

On October 8, 2004, District Council 37, AFSCME ("DC 37" or "Union") filed a verified improper practice petition against the City of New York and the Department of Transportation ("City" or "DOT"). The Union alleges that DOT violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), when it refused to bargain over the implementation of a policy regarding searches of and seizures from DOT-provided storage facilities used by employees. The City argues that the subject is not a mandatory subject of bargaining because the policy is not so intrusive of employees' privacy as to outweigh DOT's right to implement a measure which will aid it in providing for the safe and efficient movement of people and goods in the City. This Board finds that DOT's decision to search its own storage facilities and to determine the circumstances surrounding when to search them is a nonmandatory subject of bargaining, but that the

procedures involved with implementing this policy are a mandatory subject of bargaining.

BACKGROUND

DOT provides lockers, desks, file cabinets, and other storage facilities to its employees for work-related purposes. On June 11, 2004, DOT implemented a policy titled "Inspection Procedures" ("IPP"). Under the IPP, the storage facilities of all DOT employees serving in safety-sensitive titles or performing safety-sensitive functions are subject to inspections by authorized supervisory personnel, without notice, at any time. The storage facilities of all DOT employees are also subject to inspections, without notice, upon reasonable belief that the storage facility may contain evidence of work-related misconduct, for non-investigatory work-related or other legitimate governmental purposes, or in case of emergency. The IPP also provides for the seizure of items. The IPP reads:

> All New York City Department of Transportation ("DOT") employees are advised that lockers, desks, cabinets, closets and other storage facilities (together "storage facilities") furnished by DOT and on DOT premises or property are the sole property of DOT, and as such, there should be no expectation of privacy on the part of DOT employees with regard to use of such storage facilities, whether locked or unlocked. Employees choosing to store personal items in storage facilities do so at their own risk. DOT is not responsible for any missing or damaged items.
>
> The following are guidelines for the inspection of such storage facilities on DOT premises or property.
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> 1. For any such storage facilities that contain a lock, a copy of the key must be provided to the employees' supervisor(s).
> 2. The storage facilities of all DOT employees serving in safety sensitive titles, including but not limited to the titles set forth in Attachment A, or performing safety sensitive functions, regardless of title, are subject to inspections by authorized supervisory personnel, without notice, at any time.
> 3. The storage facilities of all DOT employees are subject to inspections by

authorized supervisory personnel, without notice, upon reasonable belief that the storage facility may contain evidence of work-related misconduct, for non-investigatory work-related or other legitimate governmental purposes, or in case of emergency.

4. The purpose for inspection and the names of the persons inspecting the storage facility shall be documented promptly after the inspection.
5. When possible, within 48 hours of the inspection, the supervisor conducting the inspection shall notify any employee whose storage facilities were inspected of such inspection.
6. Any property that is removed from a storage facility is to be itemized, receipted and safeguarded by the Supervisor at the work unit or another appropriate location, subject to paragraph 7 below. Unless there is reason to retain the property removed from the facilities, employees are to be notified to retrieve their property by their next tour of duty at a place designated by the Supervisor.
7. Unauthorized property that is found in storage facilities that is prohibited by statute, the DOT Code of Conduct, or any applicable directive, rule or regulation will not be returned. Supervisors shall notify the New York City Police Department ("NYPD") and/or the Office of the Inspector General and/or the DOT Office of the Advocate, and/or other appropriate body, as warranted.
8. Notwithstanding any provision of this Procedure, supervisors may enter into any storage facility or other area containing work-related material to retrieve such material.
9. Disciplinary action and criminal prosecution may be sought against members based on evidence of misconduct or illegal activity obtained during a storage facility inspection.

DOT claims it implemented the IPP because, after the crash of the Staten Island Ferry, the "ANDREW J. BARBERI," on October 15, 2003, and the ensuing investigation, DOT realized it did not have a search policy in place. DOT also asserts that it must comply with post-September 11, 2001, security regulations imposed by the Department of Homeland Security. By letter dated July 26, 2004, DC 37, demanded that the City bargain over the IPP. The City did not bargain with the Union after the demand.

As a remedy, the Union asks that the Board order the City: to rescind the IPP and to cease and desist from utilizing the IPP in connection with the Union's members; to bargain in good faith over any procedures sought to be implemented relating to the storage facilities DOT

provides; to bargain over the implementation of any policies, procedures, rules or regulations relating to DOT searches of storage facilities; and to post appropriate notices.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that by unilaterally implementing rules or policies concerning the inspection of employee storage facilities, DOT violated NYCCBL § 12-306(a)(1) and (4).[1] In balancing an employer's right to manage its affairs against the right of employees to negotiate their terms and conditions of employment, the Board must weigh management interests not related to its mission against the unilateral elimination of a constitutionally protected privacy interest. DOT implemented a policy to conduct unannounced searches without union involvement, which authorized its agents to seize personal property for prolonged periods of time, and allowed for the documentation of the causes of the search to occur after significant time has passed. This, in effect, forces employees to relinquish union protections in an investigatory context.

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[1]NYCCBL § 12-306(a) provides, in relevant part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
* * *
(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. . . .

NYCCBL § 12-305 provides, in relevant part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

The IPP discourages employees from bringing personal property to work and subjects them to unannounced searches and seizures, which may result in criminal and/or civil liability or discipline. The IPP is unreasonably intrusive and is not the least restrictive method of dealing with the problems the City claims exist. While the City cites a search and seizure case relating to the individual rights and privacy expectations of private-sector employees, the instant matter relates to the collective bargaining process and the question whether the IPP is a mandatory subject of bargaining.

The Union further argues that the provision of lockers and disciplinary matters relating to pecuniary sanctions are mandatory subjects of bargaining.

The Union also asserts that the rules or policies in the IPP will have a practical impact on the bargaining unit's employees. If employees wish to avoid the possible intrusion of an unannounced, warrantless search of personal property, they must now refrain from using employer-issued storage facilities. The IPP could lead to the loss of employment and related wages and benefits by virtue of disciplinary ramifications resulting from a search, and this financial component makes the implementation of the IPP a mandatory subject of bargaining.

City's Position

The City argues that DOT's mission is to provide for the safe, efficient, and environmentally responsible movement of people and goods in the City of New York and to maintain and enhance the transportation infrastructure crucial to the economic vitality and quality of life of its primary customers, City residents.

The City maintains that it is not required to bargain over the IPP because it is not so intrusive of employees' privacy as to outweigh DOT's interests. DOT's IPP is the least intrusive

measure available to address its concerns of safety. The City contends that it implemented the IPP following the crash of the Staten Island Ferry in October 2003. DOT had to comply with search warrants related to the investigation, which prompted concerns that it would not be able to comply fully with subpoenas or even conduct its own searches of storage facilities, if necessary, because there was no policy regarding searches. DOT also realized that in order to cmply with post-September 11, 2001, security regulations imposed by the Department of Homeland Security, it had to have immediate and unfettered access to all of its facilities.

Under the IPP, searches are conducted for limited purposes only. DOT is not subjecting its employees to daily searches of their lockers, desks, or file cabinets, and it is not conducting searches of employees' personal property. Rather, the IPP permits only authorized supervisory personnel to search City-owned storage facilities, under strict guidelines. Moreover, the City argues, employees do not have a right to privacy in their use of DOT-owned storage facilities, as DOT has taken steps to diminish their expectation of privacy, in accordance with *O'Connor v. Ortega*, 480 U.S. 708 (1987). Additionally, there is no duty to bargain under the NYCCBL because the right to discipline employees is an enumerated managerial right under § 12-307(b).[2] Management's disciplinary powers may be exercised whenever its rules or decisions have been violated.

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[2] NYCCBL § 12-307(b) reads, in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to . . . direct its employees; take disciplinary action . . . relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining . . .

The City argues that bargaining over the impact of an exercise of managerial prerogative does not become mandatory until the Board declares that an impact exists and the public employer fails to correct or minimize the impact. Since Petitioner has failed to assert its impact claim by filing a scope petition, the petition should be dismissed. Furthermore, the Union's allegations fail to give rise to a practical impact claim sufficient to warrant a hearing. The Union has not established that in the six months that the policy has been in effect, employees have in fact, given up their lockers or suffered any real loss. Finally, the City argues that there has been no independent or derivative violation of NYCCBL § 12-306(a)(1).

DISCUSSION

This case presents the issue whether the City is required to bargain over the policy regarding searches of and seizures from DOT-provided storage facilities used by employees. We find that DOT's decision to search its own storage facilities and to determine the circumstances surrounding when to search them is a nonmandatory subject of bargaining, but that the procedures involved in implementing the policy are a mandatory subject of bargaining.

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." 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 Correction Officers' Benevolent Ass'n,* Decision No. B-26-2002 at 6-7; *District Council 37, AFSCME, Locals 2507 and 3621,* Decision No. B-35-99 at 12. The Union claims that the IPP concerns a

bargainable working condition.

To determine the negotiability of a subject which is asserted to be a working condition, we consider the interests of both the employer and the union concerning that subject. *District Council 37, AFSCME*, Decision No. B-8-2005. This analysis is consistent with that employed by the New York Public Employment Relations Board ("PERB"), which stated, in interpreting N.Y. Civil Service Law Article 14 ("Taylor Law") § 209-a(1)(d):

> The [Taylor Law] requires negotiations about 'terms and conditions of employment.' In a very real sense, the determination regarding the negotiability of all terms and conditions of employment is premised upon a balancing of employer-employee interests. A very few subjects have been prebalanced, in effect, by the Legislature according to the nature of the subject matter. Certain subjects are mandatory, *e.g.*, wages and hours and, until recently, local government agency shop fees. Certain others are prohibited, *e.g.*, retirement benefits as defined in § 201.4 of the Act. A balance of interests on the facts of each particular case as to these subjects is quite obviously not undertaken because no amount of fact-based persuasion can alter the balancing determination which the Legislature has already made. The negotiability analysis is the same with respect to the vast majority of subjects whose negotiability has been left for determination by us in the first instance. A balance of interests is undertaken, directed again to the nature of the subject matter in issue.

State of New York (Department of Transportation), 27 PERB ¶ 3056, 3131 (1994).

The NYCCBL reflects such a legislative "prebalancing" of interests. Section 12-307(a) enumerates certain subjects that the legislature has determined to be mandatorily bargainable (*e.g.*, wages, hours and working conditions), while § 12-307(b) identifies those subjects that the legislature has reserved for managerial discretion (*e.g.*, the right to direct its employees, to determine the methods, means, and personnel by which government operations are to be conducted). Certain of the reserved rights are described in specific terms, such as the right to determine the content of job classifications and the right to relieve employees because of lack of

work, and other rights are stated in more general terms, such as the right to "maintain the efficiency of government operations."[3] The subject of searches of and seizures from DOT-provided storage facilities used by employees is not among the rights expressly referred to in the NYCCBL.

The question the Board must decide first is whether DOT's decision to search its own facilities, including lockers, desks, and file cabinets, is a mandatory subject of bargaining. In order to do so, we must consider and balance the competing interests of the City and the Union. DOT seeks to detect and prevent situations in which items stored in its facilities may jeopardize safety and otherwise compromise the delivery of DOT's service to the public. The City stresses the need to inspect its own facilities, which are used by employees, in order to ensure the safety and security of the transportation services it provides, especially in light of the heightened security required after September 11, 2001, and after the ferry crash in October 2003. On the other hand, the search of storage facilities used by employees to store personal property is, undoubtedly, an intrusive procedure. The outcome of these searches can affect the employee's reputation and employment in several ways and may lead to discipline and/or criminal prosecutions.

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[3] Although the Taylor Law has no statutory management rights clause, in a case balancing the interest of the employer and the employee organization, PERB stated in *Local 280, New Rochelle Federation of Teachers*, 4 PERB ¶ 3060, 3706 (1971):

> Of necessity, the public employer, acting through its executive or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail service, are matters the public employer should not be compelled to negotiate with its employees.

We find that DOT's interests here outweigh the interests of the employees. In light of heightened concerns about safety in the transportation industry, DOT's decision to search its own storage facilities used by employees and to determine the circumstances surrounding when to search them is intrinsic to the core mission of DOT, *i.e.,* providing safe transportation in the City of New York. This decision falls directly within the City's statutory right to "maintain the efficiency of government operations" and is not bargainable. DOT's interests are not unreasonable: citizens depend on DOT employees to provide them with safe transportation and DOT's ability to search its own facilities fosters the public's confidence in the security of this transportation system. Although the decision to search storage facilities where employees may keep personal belongings is intrusive, and triggers personal privacy issues, the interests of the employees is not greater than those of the employer here. The employees are on notice that they have no expectation of privacy in these storage facilities and may choose not to place any items therein which they do not want to be searched.

Our finding in this case may be contrasted with that in *District Council 37,* Decision No. B-8-2005, in which we appraised the interests of the employer and its employees regarding an NYPD policy for agency approval of off-duty visits by civilian employees to incarcerated persons. The Board engaged in the same balancing of interest test and found that the policy did not fall directly within the scope of the City's right to act unilaterally. There, the City failed to allege sufficient facts to demonstrate that the approval policy is so central to its mission that it would outweigh the civilian employees' interest in managing the use of their free time. Here, the City has demonstrated that the search of what is stored on its own property is in furtherance of its stated mission to provide safe and secure transportation services. Therefore, we find DOT's

decision to search its own storage facilities used by employees and to determine the circumstances surrounding when to search them is a nonmandatory subject of bargaining.

While the City has the right to make and implement decisions concerning its management prerogatives without bargaining, the procedures for implementing decisions that affect terms and conditions of employment are mandatorily bargainable. For example, while it is within management's discretion to evaluate its employees' performance, impose discipline, and grant merit pay, the procedures for implementing performance evaluations, imposing and reviewing disciplinary action, and determining eligibility for merit pay are mandatory subjects of bargaining. *See Local 371, SSEU*, Decision No. B-31-2003 (merit pay procedures); *District Council 37*, Decision No. B-25-2001 (disciplinary procedures); *District Council 37*, Decision No. B-36-2000 (disciplinary procedures); *Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 (performance evaluation procedures); *United Probation Officers Ass'n*, Decision No. B-44-86 (merit pay procedures). Similarly, there is a distinction between DOT's decision to create a policy regarding the search of these storage facilities and the procedures used to implement that decision. We hold that the procedures involved with searches of and seizures from DOT-provided storage facilities, *e.g.*, the procedures for notification and documentation of searches, and the removal and safeguarding of property, are mandatorily bargainable because they affect terms and conditions of employment.[4]

Accordingly, we deny the Union's petition to the extent that DOT has the right unilaterally to promulgate a policy to search its own storage facilities and the right to determine

[4] We note that the City's reliance on cases involving individual constitutional rights and privacy expectations of private-sector employees is not relevant because here we are concerned with the collective bargaining rights of public employees.

the circumstances surrounding when to search them, but we grant the petition insofar as the procedures involved with implementing the policy are a mandatory subject of bargaining. Therefore, the City failed to bargain over the procedures involved in implementing the IPP, in violation of NYCCBL § 12-306(a)(4), and we order the City to bargain over that subject. Additionally, when a public employer violates §12-306(a)(4), it derivatively violates §12-306(a)(1) of the NYCCBL. *Uniformed Fire Officers Ass'n*, Decision No. B-6-2003. As we grant the petition on this basis, we need not reach the Union's claim regarding practical impact.

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, BCB-2435-04, is denied to the extent that the decision to search DOT's own storage facilities and to determine the circumstances surrounding when to search them is a nonmandatory subject of bargaining, and it is further

ORDERED, that the improper practice petition, BCB-2435-04, is granted with respect to violations of NYCCBL § 12-306(a)(1) and (4) to the extent that the procedures involved with implementing the IPP are a mandatory subject of bargaining, and it is further

ORDERED, that the City bargain over the procedures involved in implementing the IPP.

Dated: May 10, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
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