DC37 v. City & DOT , 75 OCB 14 (BCB 2005) [Decision No. B-14-2005, (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME,

Petitioner,

Decision No. B-14-2005
Docket No. BCB-2394-04

-and-

CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

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DECISION AND ORDER

On March 3, 2004, District Council 37, AFSCME, ("DC 37" or "Union") filed a verified improper practice petition against the New York City Department of Transportation ("City" or "DOT"). The Union alleges that in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1) and (4), DOT unilaterally changed procedures for notification and verification of employee residency by requiring employees to complete a Residency Affidavit and/or an Employee Address Verification Form and by implementing a change in policy regarding residency verification. The Union contends that these changes involve mandatory subjects of bargaining. The City maintains that these changes relate to enforcement of the statutory residency requirement and involve the exercise of management rights which are not subject to mandatory bargaining. Further, the City submits that because, subsequent to the filing of the petition, it rescinded the changed procedures

and destroyed the documents filed thereunder, this matter has become moot. The Union disagrees that the matter is moot. This Board finds that the case is not moot and that the City may not unilaterally change procedures requiring employees' participation in the residency verification process without bargaining. Accordingly, the petition is granted.

BACKGROUND

A. The Requirement of City Residency

New York City Administrative Code §§ 12-119 through 12-121 ("Residency Law") provide that except as exempted under the provisions of § 12-121, all employees who entered City service on or after September 1, 1986, are required to maintain City residence. Section 12-120 states:

> Except as otherwise provided in section 12-121, any person who enters city service on or after September first, nineteen hundred eighty-six (i) shall be a resident of the city on the date that he or she enters city service or shall establish city residence within ninety days after such date and (ii) shall thereafter maintain city residence as a condition of employment. Failure to establish or maintain city residence as required by this section shall constitute a forfeiture of employment; provided, however, that prior to dismissal for failure to establish or maintain city residence an employee shall be given notice of and the opportunity to contest the charge that his or her residence is outside the city.

In addition, Mayoral Directive 78-13 (July 26, 1978) requires that employees who are in positions in the exempt, noncompetitive, or provisional classes of the civil service and who entered City service before September 1, 1986, also maintain City residence.

The Department of Citywide Administrative Services ("DCAS") issued Personnel Services Bulletin 100-8, dated June 30, 1997, ("Bulletin") to implement the City's residency

requirement. The Bulletin sets forth the policy and law regarding the residency requirement, the exceptions thereto, the time limitations for establishing residency, and the procedures for complying with and requesting exemptions to the requirement. Like the Residency Law, the Bulletin states that the failure to establish or maintain residency shall result in forfeiture of employment but that prior to dismissal, an employee shall be given notice and an opportunity to contest the charge. Section IV.A of the Bulletin also sets forth "indicators" that will be considered in determining an employee's residency, including, but not limited to:

- employee, spouse and minor children reside at City address;
- employee and spouse are registered to vote at City address;
- any motor vehicle registered to employee or spouse is registered at City address;
- employee and spouse file tax returns from City address; and
- children who attend public school attend the public schools of the City of New York.

The Bulletin notes that these "indicators" may be verified by rent receipts, mortgage payments, motor vehicle registration and license, motor vehicle insurance receipts, bank statements, credit card statements, utility bills, withholding tax statements, registration to vote, and payment of City income tax. In a section entitled "Procedures for Complying with the Residency Law and the Mayoral Directive on Residence," the Bulletin says:

> It is the responsibility of the employing agency to notify eligibles and applicants, in advance of appointment, of the residence requirements set forth above, to verify claims of residence by obtaining the type of verification described in the Note under Section IV.A above of this policy, to comply with the following procedures to ensure that all residence information on current employees is accurate, and to verify claims of City residents by their employees.

B. DOT's Actions to Enforce Compliance with the Residency Requirement

DOT periodically has distributed memoranda to its employees to remind them of their obligations under the Residency Law. Such a memorandum, from DOT's Assistant Commissioner of Human Resources to all DOT employees, was issued on September 23, 2003. When, after initial appointment, a question concerning an employee's residency arose, DOT would investigate, give notice to the employee and grant an interview before taking further action. In addition, DOT has maintained a written Change of Address Policy under which employees are required to notify the agency within five business days of any change in their address by completing and submitting a "Change of Employee Address Form" with attached copies of documentation, such as utility bills, bank statements, or a lease verifying the change of address. This policy dates back at least to September 1996, and was revised in January 2000 and again in September 2003, prior to the present dispute.

In 2003, DOT learned that two of its employees, who were involved in separate accidents, were residing outside of New York City. This prompted DOT, in late 2003, to revise its residence verification policy and establish three new documents to implement that revised policy. First, between November 7, 2003, and April 16, 2004, DOT distributed an "Employee Address Verification Form" ("Verification Form") to employees in all five of DOT's divisions. This Verification Form indicates the employee's address on record and instructs all employees to verify or update their addresses and to submit any changes of address on a separate form. In addition, employees were required to sign the Verification Form, have it notarized, and return it to DOT by a certain date. The Verification Form states:

> Further, we want to remind all employees of their obligation to comply with the City's Residency Policy.

* * *

> Please note that any employee who gives false information regarding their home address may be subject to discipline.

Attached to the Verification Form was DOT's Residency Policy, its Change of Address Policy, and a Change of Employee Address Form.

Second, DOT issued a Change of Address Policy, dated November 2003, which was annexed to the Verification Form. Like the earlier-dated change of address policies, this one requires employees to notify DOT of any change by completing and filing a Change of Employee Address Form (the same one attached to the Verification Form) to which they must attach "copies of documentation verifying the change of address, such as utility bills, bank statement, lease, etc."

Third, DOT thereafter promulgated a Residency Affidavit which it distributed to a random sample of five percent of the employees in four of the five DOT divisions. On or about February 12, 2004, DOT mailed the Residency Affidavit to employees in titles represented by DC 37. The affidavit is an eight-page document consisting of 28 questions relating to what the City characterizes as "established and commonly used indicators of residency." The Union disputes whether some of the questions relate to residency. The affidavit ends with the statement:

> I understand that a material false statement willfully or fraudulently made in connection with this questionnaire may result in my termination and may subject me to penal sanctions for perjury.

The Residency Affidavit, like the Verification Form, is required to be signed, notarized and submitted to DOT.

DOT did not notify the Union or seek negotiations prior to issuing the Verification Form, the Residency Affidavit, and the November 2003 Change of Address Policy attached to the Verification Form.

DOT maintains a Code of Conduct that was last revised in May 1995. The Code of Conduct defines types of misconduct that may subject an employee to disciplinary action. The proscribed conduct includes, in pertinent part:

> 26. Knowingly create for the purpose of misrepresentation, falsify, alter and/or change any document, record or form of any City agency.
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> * * *
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> 30. Fail, refuse, or neglect to obey any lawful order of a supervisor or superior . . . .
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> * * *
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> 51. Fail to report a change of home address and/or telephone number in writing to the Personnel office within five business days of such change.
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> * * *
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> 62. Knowingly make a false statement or material omission regarding his/her background when disclosing background information to DOT or other City entities.

The Union identified several of its members who were summoned to appear before DOT's Residence Review Board concerning their residency. They appeared with Union representation and were asked questions, some of which were based on the Residency Affidavit. The Union also identified one member whose employment was terminated for his alleged failure to comply with the requirements of the Residency Law.

The City acknowledges that ten DOT employees have admitted non-compliance and have been given 90 days to move to New York City. Three other employees have been terminated for failing to maintain City residence. Five employees did not submit the Verification Form, despite

having been given additional time to do so, and were suspended for five days after service of disciplinary charges. To date, and on this record, no employee has been disciplined in connection with the Residency Affidavit.

The Union asks the Board to order the City to rescind and cease enforcement of the Verification Form, the Residency Affidavit, and the November 2003 Change of Address Policy; to remove and destroy all documents submitted by employees or generated by the City and its agents pursuant to the enforcement of the above; to negotiate in good faith with the Union concerning the terms and conditions of employment of unit employees; and to post a notice of the Board's determination.

On March 24, 2005, the City wrote to inform the Board that DOT "has ceased distribution of, and destroyed existing copies of the random affidavit" in this matter. The City requests that the petition be dismissed as moot. By letter dated April 3, 2005, the Union objected to the City's request.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that while residency is a qualification for initial appointment to a position with the City, and, as such, is not bargainable, procedures concerning the verification of continuing residence and the creation of new bases for discipline are mandatory subjects of bargaining. The blanket mailing of the Verification Form and the Residency Affidavit and the issuance of a new policy represent an abrupt departure from long standing and established

procedures. In addition, the information solicited by DOT is not limited to the employee and the question of residence, but extends to employees' spouses and children and is highly intrusive of an employee's privacy. Furthermore, the documents required by DOT cause employees to incur the out-of-pocket cost of having the documents notarized. These actions constitute a unilateral change in terms and conditions of employment and a refusal to bargain with the Union in violation of NYCCBL § 12-306(a)(4).[1]

The Union also notes that the Verification Form and the Residency Affidavit provide that failure to complete, sign, have these documents notarized, and submit them to DOT, will subject the offending employee to disciplinary action. Thus, the change in procedure and issuance of these forms have created new bases for discipline. The Union cites examples of DOT employees who have been disciplined for not timely submitting residency verification documents or have been told that they "are required to move or face dismissal" if found in violation of the Residency Law. The designation of such grounds for discipline is a mandatory subject of bargaining.

The Union contends that the existing DOT Code of Conduct relied on by the City makes no mention of any requirement to submit affidavits or notarized forms, and the only reference

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[1] NYCCBL § 12-306(a) provides, in pertinent 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 . . . .

proscribing the making of a false statement concerns "background" information, which implies a background check upon initial appointment.

Furthermore, the Union argues that employees who are summoned to an interview which may lead to disciplinary action have the right to written notice and Union representation, pursuant to various collective bargaining agreements as well as the Civil Service Law.[2] By issuing the Verification Form and the Residency Affidavit which may subject an employee to discipline, DOT has fundamentally changed the investigatory process. The Verification Form and the Residency Affidavit that were mailed to employees have replaced, *de facto*, the interview process at which there would have been a right to Union representation. This unilateral change in procedures is bargainable.

Additionally, DOT's unilateral changes in mandatory subjects of bargaining interfere with the exercise of employees' rights under NYCCBL § 12-305, in violation of § 12-306(a)(1).

Finally, this matter has not become moot simply because the City has ceased distribution of, and destroyed existing copies of the random affidavit. There is no adequate assurance that information gleaned from the affidavits before their destruction will not be used; and no relief has been provided to employees who were subjected to further action as a result of the affidavits. In any event, there is an exception to the mootness doctrine, applicable here, that exists when there is a likelihood of repetition and a showing of important questions that the Board has not previously passed upon. Therefore, the request for dismissal on the ground of mootness should be denied.

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[2] The Union identifies Article IX, § 19, of the Citywide Contract and § 75 of the Civil Service Law as sources of these rights.

City's Position

DOT is obligated to comply with, and enforce its employees' compliance with, the Residency Law. The Residency Law establishes a qualification for employment, the enforcement of which lies within the City's statutory management prerogative pursuant to NYCCBL § 12-307(b).[3] Even if the Board were to balance the City's statutory management right to determine how to run its agency, including its right generally to promulgate personnel policies and practices, with the obligation to bargain under the NYCCBL, the Board should find that enforcement of employee compliance with the Residency Law lies at the core of DOT's entrepreneurial control. Failure to maintain residence disqualifies an employee's continued employment, and the specialized training a majority of DOT's employees require give it an overriding interest in preventing the loss of its staff. Therefore, DOT has a compelling interest in ensuring compliance with the residency requirement and need not bargain over the means by which it enforces that requirement.

Addressing the Union's claim that DOT's actions have created new bases for discipline, the City observes that pursuant to NYCCBL § 12-307(b), management has a statutory right to take disciplinary action which may be exercised whenever its rules or policies have been

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[3] NYCCBL § 12-307(b) provides in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; 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 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 . . . .

violated. Moreover, DOT's revised residency verification policy has not created new bases for discipline. Employees are not disciplined for failure to comply with the Residency Law; such failure results in forfeiture of employment. Rather, employees may be subject to discipline for acts of misconduct as set forth in DOT's existing Code of Conduct, such as failing to submit notice of change of address within five days of the change, or providing false information or statements on any City document. DOT has an established practice to discipline employees for these types of misconduct.

The City also contends that the revised residency verification policy has not so intruded on the personal privacy of employees as to constitute a unilateral change in terms and conditions of employment. The Verification Form and Residency Affidavit are tailored for the limited purpose of verifying residence. Much of the information is already in the City's possession, and the questions asked are directly related to established indicators of City residence as set forth in the Bulletin. The City's interests in, among other things, preventing fraud, enforcing the Residency Law, and preventing the loss of staff, outweigh the privacy interests of DOT's employees.

Finally, the City argues that since DOT has ceased distribution of, and destroyed existing copies of the random affidavit in this matter, the issues raised in this case have become moot. The City therefore requests that the petition be dismissed.

DISCUSSION

This Board finds that this case is not moot and, while DOT has the right and obligation to

enforce compliance with the Residency Law, it cannot unilaterally adopt new procedures affecting terms and conditions of employment for implementing that objective without bargaining with the Union. However, we do not find that the challenged procedures create new predicates for discipline. Accordingly, we grant the petition and order the City to bargain over the procedural changes.

We address, first, the City's mootness argument. The City claims that the Union's petition has become moot because DOT has ceased distribution of, and destroyed existing copies of the random affidavit at issue in this matter, the case has become moot. We must reject that contention. We have stated that an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open to consideration." *Assistant Deputy Wardens/Deputy Wardens Association*, Decision No. B-9-2003 at 8: *Cotov*, Decision No. B-16-94 at 20; *Sferrazza*, Decision No. B-56-91 at 7. Therefore, we will consider the merits of the Union's improper practice claim.

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. *District Council 37,* Decision No. B-12-2003 at 7*; Social Service Employees Union, Local 371, AFSCME*, Decision No. B-22-2002 at 7. Petitioner must show that the matter to be negotiated is a mandatory subject

of bargaining. *District Council 37,* Decision No. B-37-2002 at 7; *Doctors Council*, Decision No. B-21-2001 at 7. A unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith and, therefore, an improper practice. *Local 1182, Communications Workers of America,* Decision No. B-26-2001 at 4; *Patrolmen's Benevolent Ass'n*, Decision No. B-4-99 at 10.

A public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accord with statutory law. *Doctors Council,* Decision No. B-31-2002 at 10; *Correction Officers Benevolent Ass'n*, Decision No. B-72-89 at 11. Even if management action is taken pursuant to another statute, certain obligations – for example, bargaining over mandatory subjects – may arise under our law. *Patrolmen's Benevolent Ass'n*, Decision No. B-41-87 at 6; *Committee of Interns and Residents,* Decision No. B-25-85 at 9-10. Thus, the procedures by which management implements a statutory mandate may be subject to mandatory bargaining. In *Matter of City of Watertown v. State of New York Public Employment Relations Board*, 95 N.Y.2d 73 (2000), involving a dispute under General Municipal Law § 207(c), the Court of Appeals held that while a municipality's initial determination of disability status was a non-mandatory subject of bargaining, the *procedures* for challenging the determinations, as they affected terms and conditions of employment, were mandatory subjects. Accordingly, the union had the right to "negotiate the forum – and procedures associated therewith – through which disputes related to such determinations are processed." *Id.* at 76 (citations omitted).

This Board has followed the same principle. In *Doctors Council,* Decision No. B-31-

2002 at 10-11, we held that procedures for implementing compliance with the Conflicts of Interest Law are bargainable. *See also City of New York v. Lieutenants Benevolent Ass'n*, 285 A.D.2d 329 at 334-335 (1st Dep't 2001), *aff'g Lieutenants Benevolent Ass'n*, Decision No. B-23-99 (procedures for implementing verification of overpayment of nonresident tax claims under City Charter § 1127 are bargainable).

In the present case it is not disputed that the City residency requirement set forth in Residency Law § 12-120 is a qualification for appointment as well as continued employment. The Union does not dispute DOT's right to investigate and verify employee residence to ensure compliance with the law. What the Union objects to is DOT's unilateral implementation of allegedly new procedures affecting terms and conditions of employment to accomplish that otherwise-lawful objective.

The Union asserts that DOT's actions in compelling its employees to complete and return either the Verification Form and attachments, mailed to all employees, or the eight-page Residency Affidavit, mailed to randomly selected employees, constitute a unilateral change in procedures affecting terms and conditions of employment. We agree. The record reflects that prior to November 2003, DOT's practice was to enforce the Residency Law by periodically distributing memoranda and written policies to remind employees of their obligations, and by conducting investigations when it suspected that an employee was not complying with the residency requirement. The City does not claim that DOT had previously used the verification procedures challenged herein. Rather, the City acknowledges that in late 2003, DOT "revised its residency verification policy" when it began distributing the Verification Form and the Residency

Affidavit. Therefore, we find that though the residency requirement existed at all relevant times, the procedures by which DOT verifies employee compliance have changed.

We reject, however, the Union's claim that the issuance of the November 2003 Change of Address Policy memo represented an unlawful unilateral change. We find that the record establishes that this was a restatement of existing DOT policy dating back to 1996.

DOT's unilateral adoption of the revised residency verification procedures has compelled a qualitative change in employees' participation in the process. Sending these documents to all employees, regardless whether there has been any change in an employee's address, and requiring employees to complete and submit them in notarized form, goes well beyond DOT's pre-existing residence verification procedure. In addition, the required notarization of the documents imposes a cost on employees. We hold that this change in the procedures for how employees are required to participate in the verification of residency may not be implemented unilaterally without bargaining. Even though enforcement of the City residency requirement is a management right, a change in the procedures by which that right is implemented is mandatorily bargainable. *See City of Schenectady*, 26 PERB ¶ 3025 (1993) (imposition of residency affidavit constituted a failure to bargain over a mandatory subject). For this reason, we hold that when DOT unilaterally implemented this change, the City failed to bargain over a mandatory subject, in violation of NYCCBL § 12-306(a)(4).

We have held that when the City refuses to bargain with the certified employee representative regarding a change affecting terms and conditions of employment, the City interferes with the effectiveness of the employee representative and, consequently, the rights of

the employees, in violation of NYCCBL § 12-306(a)(1). *Uniformed Fire Officers Association,* Decision No. B-17-2001 at 7; *Committee of Interns and Residents*, Decision No. B-25-85 at 10-11. Since we have found, here, that the City failed to bargain with the Union regarding a unilateral change in a mandatory subject, in violation of NYCCBL § 12-306(a)(4), we also find a derivative violation of § 12-306(a)(1).

We find, however, that the Union's contention that the forced completion and submission of the Verification Form and/or the Residency Affidavit, as well as the Change of Employee Address Form, where applicable, have created new bases for disciplinary action, is without merit. The only ground for discipline mentioned in the Verification Form is in the statement:

> Please note that any employee who gives false information regarding their home address may be subject to discipline.

Similarly, the only reference to discipline in the Residency Affidavit is the statement:

> I understand that a material false statement willfully or fraudulently made in connection with this questionnaire may result in my termination . . . .

Both of these references are consistent with pre-existing bases for discipline set forth in DOT's Code of Conduct, which has been in effect in its present form since May 1995. The Code provides that employees of DOT shall not:

> 26. Knowingly create for the purpose of misrepresentation, falsify, alter and/or change any document, record or form of any City agency.
>
> * * *
>
> 62. Knowingly make a false statement or material omission regarding his/her background when disclosing background information to DOT or other City entities.

Given the consistency between these provisions, we find that the Verification Form and the Residency Affidavit do not create new bases for discipline.

The examples given by the Union of employees who have been disciplined do not compel a different conclusion. The record shows that employees have been disciplined for failing to submit the Verification Form and/or the Residency Affidavit by the date on which they were directed to do so. This failure is a violation of that provision of the Code of Conduct which provides:

> 30. Fail, refuse, or neglect to obey any lawful order of a supervisor or superior . . . .

In such cases, the failure to comply with the order to submit the document by a certain date, not the content or substance of the document, creates the basis for discipline. The record also shows that employees have been terminated for failure to maintain residence in the City. In those cases, the employee's noncompliance with the Residency Law, not DOT's verification procedures, is the cause of the termination.

Accordingly, the Union's petition is granted. Having disposed of the Union's improper practice claim in the manner set forth above, we need not address its other arguments.

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-2394-04, filed by District Council 37, AFSCME, AFL-CIO, be, and the same hereby is, granted as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over changes in procedures requiring employees' participation in the Department of Transportation's residency verification process, and dismissed in all other respects; and it is further

ORDERED, that the Department of Transportation cease and desist from requiring its employees to submit the Verification Form and Residency Affidavit challenged herein until such time as the parties negotiate such changes in procedure; and it is further

ORDERED, that the Department of Transportation remove from its files and refrain from using all documents submitted by employees pursuant to the unilateral changes in its residency verification process.

Dated: May 10, 2005
New York, New York

MARLENE A. GOLD
CHAIR

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