DC37 v. City & PD, 75 OCB 8 (BCB 2005) [Decision No. B-8-05, (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-8-2005
Docket No. BCB-2410-04

-and-

CITY OF NEW YORK (NEW YORK CITY POLICE DEPARTMENT),

Respondent.
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DECISION AND ORDER

On June 1, 2004, District Council 37, AFSCME, ("DC 37" or "Union") filed a verified improper practice petition against the City of New York and the New York City Police Department ("City" or "NYPD") alleging that NYPD 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"), by unilaterally promulgating and applying to its civilian employees an approval policy requiring that they notify and receive authorization from NYPD for off-duty visits to incarcerated individuals. The City argues that the requirements are directly related to the mission of NYPD, and, therefore, the City is not required to bargain with the Union. This Board finds that the approval policy involves a mandatory subject of bargaining because it affects a term and condition of employment, and we therefore grant the petition.

BACKGROUND

DC 37 represents civilian employees of NYPD, including, but not limited to, those in Electronic Data Processing titles, Clerical Administrative titles, Engineering and Scientific titles, Accounting titles, Motor Vehicle Operator titles, Social Services-related titles, and those in the School Crossing Guard title.

The Civilian Handbook and its Addendum contain rules and regulations for NYPD civilian employees, who are required to sign an acknowledgment-of-acceptance form upon the start of their employment. The Addendum to the Civilian Handbook prohibits civilian employees from contacting people who have engaged in criminal activities. Additionally, Patrol Guide Procedure No. 104-1, issued on October 1, 1972, states that NYPD employees are prohibited from associating with any person or organization engaged in unlawful activity. Under this procedureContact with inmates was prohibited even if the inmates were family or friends of the employee.

On February 4, 2004, NYPD issued an Interim Order, P.G. 205, Series Number 11 ("I.O. 11"). The new policy requires that employees provide notice to NYPD of intended visits to inmates in city, state, and federal correctional facilities at least seven days prior to any visit. In addition, the commanding officer must approve or disapprove the visit and then notify the employee of this determination.

On March 1, 2004, Dennis Sullivan, DC 37 Director of Research and Negotiation, sent a letter to James Hanley, Commissioner of the New York City Office of Labor Relations, demanding that the City bargain over the approval policy. DC 37 contends that it has not received a response to this letter, and the City admits that it did not engage in bargaining over

I.O. 11.

As a remedy, the Union asks that the Board order the City to rescind I.O. 11, cease and desist from requiring that civilian employees represented by DC 37 notify and receive authorization from NYPD for off-duty visitations to inmates in correctional facilities, bargain over the implementation of the aforementioned requirements, bargain over the practical impact of the requirements, and post appropriate notices.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that by implementing I.O. 11 without bargaining, the City has violated NYCCBL § 12-306(a)(1) and (4).[1] The Union asserts first that the approval policy is a mandatory subject of bargaining because it is germane to the working environment in that it sets forth new parameters of supervision, new procedures for triggering a violation, and a new component for discipline. Second, the approval policy does not involve a subject which is at the core of managerial control because it is not fundamental to the basic direction of the agency – it

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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 . . . .

does not prevent any activity that will stigmatize NYPD and thus prejudice its mission. The mission of NYPD as a law-enforcement agency is to prevent criminal activity and the apprehension of those engaged in criminal activity, and the approval policy does nothing to further those goals. The approval policy not only restricts NYPD employees' use of their time off but also restricts the most intimate personal relationships of some of the employees. The Union asserts that it is significant that the approval policy makes no distinction between those who were convicted of crimes and those who are merely charged and incarcerated while awaiting trial. The Union also contends that it was unclear whether visiting an incarcerated individual violated the association prohibition, and it has not been shown that the prohibition has been applied in this context prior to the implementation of I.O. 11.

Alternatively, the approval policy has a practical impact on employees. All of the civilian employees who wish to visit incarcerated individuals, including family and friends, have had the use of their off-duty hours curtailed in the most intrusive manner. At a minimum, given the notice requirement, it is asserted that these employees must plan their visits differently from the way they did in the past, a result which causes a severe burden for those with childcare issues, for example.

City's Position

The City argues that NYPD has the managerial right to issue a policy or rule regulating off-duty conduct directly related to its mission.[2] I.O. 11 is not "germane to the working

[2] NYCCBL § 12-307(b) provides in relevant part that:

> It is the right of the city, or any other public employer, acting through its agencies, to . . . direct its employees; . . . maintain the efficiency of

(continued...)

environment" because it does not place a new prohibition on employee conduct, but instead expands employees' rights, as it now permits contacts with individuals in correctional facilities. Previously, contact with inmates was prohibited even if the inmates were family or friends of the employee.

Even if I.O. 11 was found to be "germane to the working environment," the approval policy is not a mandatory subject of bargaining because its implementation lies at the core of entrepreneurial control. The prohibition on employee contact with incarcerated individuals is consistent with NYPD's fundamental mission to provide safety, security, and order to New York City. One of the primary ways in which NYPD accomplishes its mission is in the investigation of criminal activities and the arrest of the suspected perpetrators of those crimes. Employee conduct that would create, or cause the perception of, a conflict of interest undermines NYPD's credibility and enforcement capabilities. I.O. 11 maintains the integrity and the public perception of integrity of NYPD by monitoring the contacts between employees and individuals in the criminal justice system. NYPD can now monitor those contacts by having Internal Affairs identify and investigate questionable contacts between employees and inmates.

A strict prohibition against contact with those who have engaged in illegal activities has

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[2](...continued)

> 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, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

been a longstanding policy within NYPD, and the parties have never bargained over this policy. Management's authority is not diminished because the policy involves off-duty conduct, as an employer may restrict such conduct when it harms the reputation of NYPD or publicly stigmatizes the agency.

Additionally, the Union has not shown a practical impact. First, the Union did not file a scope of bargaining petition and has therefore failed to raise its impact claim through the correct process. Even if the Board did entertain the claim, the Union failed to allege any facts to support its allegation that I.O. 11 creates an impact that requires bargaining. Furthermore, there is no duty to bargain over the impact of a rule or policy simply because it may have disciplinary consequences, and there is no *per se* impact on these employees.

Finally, the City argues that the Union's NYCCBL § 12-306(a)(1) claim must fail because the Union did not allege any facts that would support a claim that NYPD interfered with, restrained or coerced public employees.

DISCUSSION

This case presents the issue whether the City is required to bargain over its approval policy concerning off-duty contact between its NYPD civilian employees and incarcerated individuals.

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 the approval policy concerns a bargainable "working condition."

The Court of Appeals has recognized that although terms and conditions of employment or working conditions (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principle, the practical task of assigning a particular matter to one category or the other is often difficult. *Matter of Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120, 127 (1992). The elaboration of the extent of the duty to negotiate has been left to the expertise of this Board and of the Public Employment Relations Board ("PERB"), within their respective jurisdictions, for determination on a case-by-case basis. *Matter of Board of Education of City School District of New York v. New York State Public Employment Relations Board*, 75 N.Y.2d 660, 666 (1990); *Uniformed Fire Officers Ass'n*, Decision No. B-5-90 at 7.

To determine the negotiability of a subject which is asserted to be a working condition, we appraise the interests of both the City and the Union concerning that specific subject. This analysis is consistent with that employed by PERB, which has stated:

> 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] Implementing a policy concerning employees' off-duty activities is not among the rights referred to in the NYCCBL. Therefore, this Board must balance the interests of the employer and of the employees.

We have considered the interests of the employer and its employees regarding the subject

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[3] Although PERB 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.

of employees' off-duty activities in several cases. *Uniformed Firefighters Ass'n*, Decision No. B-43-86 at 25, involved a scope of bargaining dispute over a union demand that Fire Marshals not be restricted in outside employment. This Board, relying on PERB precedent in a similar case, *City of Newburgh*, 16 PERB ¶ 3030 (1983), concluded that although management has a unilateral right to assign its personnel and may seek to impose some limitations upon its employees at times when they would normally be off-duty, such authority cannot be construed to preclude the union from negotiating over unit members' right to use their time when they are off-duty. We stated that unless off-duty behavior harms an agency's reputation, renders an employee unable to perform duties or appear at work, or leads to refusal or inability of other employees to work with an employee, an employer has no basis to interfere with an employee's private life. *Accord, Ulster County Sheriff*, 27 PERB ¶ 3028 (1994)(County ordered to bargain over restrictions on off-duty employment); *see also Uniformed Fire Officers Ass'n*, Decision No. B-5-90 at 12 (City ordered to bargain over implementation of rule prohibiting Fire Officers from soliciting or contributing funds to pay for members' disciplinary fines).

In *District Council 37*, Decision No. B-1-90, the New York City Housing Authority ("NYCHA") unilaterally implemented a policy restricting employees' participation in tenant organizations and advisory councils during their off-duty time. NYCHA promulgated the policy to ensure that the tenant organization would be free of City influence. NYCHA believed that when its employees serve as members of tenant committees, tenants suspect that the employees' loyalties are divided. This Board found that such a perception of a conflict of interest arguably would jeopardize the stability of the landlord-tenant relationship. Thus, we concluded that NYCHA's interest regarding this subject was fundamental to the direction of its enterprise and,

was, therefore, not a mandatory subject of bargaining.

In the instant matter, we find that, except for a conclusory statement, the City has not alleged facts to support its contention that off-duty visits by its civilian employees to incarcerated persons would create, or cause the perception of, a conflict of interest or would undermine NYPD's credibility and enforcement capabilities. NYPD's approval policy imposes new working conditions on its employees and affects their use of off-duty time, a subject which, generally, is a mandatory subject of bargaining. *Uniformed Firefighters Ass'n*, Decision No. B-43-86. In contrast to *District Council 37*, Decision No. B-1-90, here the City has not shown that allowing these employees to visit incarcerated individuals, including friends or family, will have the effect of creating a public stigma on NYPD or giving the appearance of a conflict of interest. The City has failed to demonstrate that the approval policy is so central to its mission that it would outweigh the civilian employees' interests in managing the use of their free time. Accordingly, we hold that the approval policy concerning NYPD civilian employees' off-duty contacts with incarcerated individuals does not fall directly within the scope of the City's right to act unilaterally.

Our holding may also be expressed in the terms of the private sector language that we have sometimes employed from *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488 (1979): although the policy imposed on civilian employees is "plainly germane to the working environment" of these employees, it is not among those "managerial decisions which lie at the core of entrepreneurial [governmental] control." *See Uniformed Fire Officers Ass'n*, Decision No. B-5-90 at 9*; District Council 37*, Decision No. B-1-90 at 11.

We find that the City failed to bargain over the imposition of the policy embodied in I.O.

11, in violation of NYCCBL § 12-306(a)(4). Furthermore, 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. Accordingly, we grant the Union's petition and order the City to cease and desist from requiring that NYPD civilian employees represented by the Union notify and receive authorization from NYPD for off-duty visitations to inmates. Furthermore, we order the City to bargain if it seeks to reinstate the aforementioned restrictions on these employees' off-duty activities. 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-2410-04, is granted with respect to violations of NYCCBL § 12-306(a)(1) and (4), and it is further

ORDERED, that the City cease and desist from requiring that NYPD civilian employees represented by the Union notify and receive authorization from NYPD for off-duty visitations to inmates in correctional facilities, and it is further

ORDERED, that the City bargain if it seeks to reinstate the aforementioned restrictions on these employees' off-duty activities.

Dated: March 2, 2005
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

BRUCE H. SIMON
MEMBER

I dissent.
M. DAVID ZURNDORFER
MEMBER

I dissent.
ERNEST F. HART
MEMBER