District Council 37, Local 1457, **77 OCB 26 (BCB 2006)**
[Decision No. B-26-2006] (IP) (Docket No. BCB-2513-05).

Summary of Decision: The Union alleged that DJJ improperly revised three provisions of its Standard of Conduct without bargaining over mandatory subjects of bargaining. The City claimed that the change in the procedures in the drug use provision was *de minimis* and that the Union waived its right to bargain over the provisions on outside employment and arrests and desk appearance tickets. The Board found that the City had a duty to bargain over several policies and procedures in the drug use provision but that the parties had completed discussion over the other two provisions. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 1457,

Petitioner,

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF JUVENILE JUSTICE,

Respondents.

DECISION AND ORDER

On November 4, 2005, District Council 37, Local 1457 ("Union" or "DC 37"), filed a verified improper practice petition against the City of New York and the New York City Department of Juvenile Justice ("City" or "DJJ"). The Union alleges that the City 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 DJJ revised its Standard of Conduct in July 2005 without bargaining over mandatory subjects in three provisions concerning drug use, outside employment, and arrests and desk appearance tickets ("DATs"). The City argues that it fulfilled any obligation to bargain on the subjects at issue and that the change to the drug use provision was *de minimis* and did not necessitate bargaining. This Board finds that the City has a duty to bargain over the provision on drug use but no duty to bargain over outside employment or arrests since the record demonstrates a completion of discussions on those topics. Accordingly, we grant the petition in part and deny it in part.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

DJJ provides detention facilities and services for alleged Juvenile Delinquents or Offenders whose cases are pending or who are awaiting transfer to state facilities. DJJ employees in the title Juvenile Counselor Occupational Group are members of Local 1457. A 1984 Standard of Conduct ("1984 Standard"), revised in 1999, is a guide to work performance for employees at DJJ. On June 24, 2005, DJJ sent DC 37 an e-mail letter indicating that it planned to distribute a revised Standard of Conduct ("2005 Standard") on July 1, 2005, and attached a copy "in the interest of good labor relations." The Union was invited to share any comments about the draft by June 29, 2005. At a labor-management meeting on June 29, DJJ agreed to DC 37's request to postpone promulgation until the Union had a further opportunity to review the revised policies and procedures.

Between June 29 and July 15, 2005, the parties discussed by phone and e-mail the language

of several sections of the 2005 Standard. For example, on July 11, Moira Dolan, Assistant Director, Research and Negotiations at DC 37, sent Maria Guccione, DJJ's Director of Strategic Planning, Policy and Labor Relations, comments concerning 20 different provisions. On Friday, July 15, 2005, Guccione and Dolan exchanged a flurry of e-mails about various provisions. Dolan was planning to be out of the office the next week. At 4:14 p.m., Guccione e-mailed the "newest draft" of the 2005 Standard. At 6:03 p.m., Guccione wrote that she was attaching "the draft policy regarding outside employment" and attached a five-page Administrative Order, 02/05, dated July 14, 2005, concerning that subject. The Administrative Order requires, among other things, that an employee desiring to engage in outside employment inform his or her supervisor in writing of the specifics of the job and wait for written approval from the First Deputy Commissioner prior to starting or changing that employment.

Dolan, writing back at 7:36 p.m., said: "Maria, after further review and discussion with staff, the only item we are objecting to in writing is the drug notification policy. A hard copy will be mailed. I will return on Monday, July 25th." The hard copy of the July 15 letter from Dolan to Guccione reads as follows:

> On behalf of District Council 37, AFSCME and its affiliated locals, I am writing to respond to the draft code of conduct items. In the last version that we received, the Union objects to the following item:
>
> C.1.4 b) Possession/Use of Alcohol, Drugs, Contraband
> In cases where a drug or controlled substance has been prescribed by a duly licensed physician, the employee must immediately inform his or her supervisor in writing that such a substance has been prescribed.
>
> It is our position that this is a violation of the employee's privacy.
>
> We acknowledge and appreciate the changes that have been made to the policy as a result of our feedback. I will be away from July 18 to 22nd. If you have

any questions during that period, please contact Tyler Hemingway.

Thank you for your attention to this matter.

The language of § C.1.4 that Dolan quotes is from the attached version of the 2005 Standard that Guccione sent at 4:14 p.m.

On July 15, DJJ sent the Union a copy of the Standard of Conduct marked: Revised: July 11, 2005; Reissued: July 14, 2005. The record does not indicate whether Dolan saw the July 14 version before she left the office for one week. However, the language of § C.1.4 in the July 14 version is different from the language in the draft attached to Guccione's 4:14 p.m. e-mail and cited by Dolan in her hard copy letter to Guccione. On the other hand, the sections on outside employment, § C.1.19, and arrests and DATs, § E.1.2, of the July 14 version are the same as the sections in the 4:14 p.m. attachment.

On Tuesday, July 19, 2005, Guccione sent an e-mail to Dolan and Tyler Hemingway at DC 37, asking Hemingway to look at the revised version of § C.1.4 concerning drug notification because Dolan was not in the office. Nothing in the record indicates that there was a response.

On July 20, 2005, DJJ issued the final version of the 2005 Standard and sent it to all staff. On July 21, DJJ sent the Union a copy.[1] Dolan returned to the office on July 25, 2005. The record contains no further evidence of communication between the parties on this issue.

The Union objects to changes made to three provisions – §§ C.1.4, C.1.19, and E.1.2 – of the 1984 Standard and incorporated into the 2005 Standard. Section C.1.4 of the 1984 Standard reads:

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[1] The City states that on July 21, DJJ inadvertently sent the Union the July 14 draft instead of the July 20 final version of the 2005 Standard. However, the parties agree that the provisions at issue are identical in the July 14 and July 20 versions.

C.1.4 Possession/Use of Alcohol, Drugs, Contraband

An employee shall not use, possess, or be under the influence of any alcoholic beverage or other intoxicant, drug or controlled substance while on duty, unless the use of such drug or controlled substance has been directed by a duly licensed physician. In such cases, the employee must inform his/her supervisor that such a substance has been prescribed.

The provision in the 2005 Standard reads:

C.1.4 Possession/Use of Alcohol, Drugs, Contraband

a) An employee shall not use, possess, or be under the influence of any alcoholic beverage while on duty and/or on Agency property.
b) An employee shall not use, possess, or be under the influence of marijuana or any other drug or controlled substance while on duty or off duty. In the event a drug or controlled substance has been prescribed by a duly licensed physician which has been indicated to have the potential to affect the user's activities or judgment, particularly in carrying out their job responsibilities where the employee is assigned to work within a detention facility, detention room or with or around children, the employee must immediately notify the Executive Director of the facility or unit they are assigned that such a substance has been prescribed.
c) An employee who is assigned an Agency vehicle or is authorized to use an Agency vehicle who has been prescribed a drug or controlled substance by a duly licensed physician must immediately notify the Court Services/Transportation Executive Director where such prescription use coincides with the use of such Agency vehicle.
d) All notifications under this provision must be in writing, and the highest level of confidentiality must be maintained to ensure the employee's privacy.[2]

Section C.1.19 of the 1984 Standard reads:

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[2] Section C.1.4 in the version that Guccione e-mailed to Dolan at 4:14 p.m. on July 15, 2005, reads:

Possession/Use of Alcohol, Drugs, Contraband
a) An employee shall not use, possess, or be under the influence of any alcoholic beverage while on duty and/or on Agency property.
b) An employee shall not use, possess, or be under the influence of marijuana or any other drug or controlled substance while on duty or off duty. In cases where a drug or controlled substance has been prescribed by a duly licensed physician, the employee must immediately inform his or her supervisor in writing that such a substance has ben prescribed.

C.1.19 Outside Employment

An employee shall not engage in any other employment or in any vocational activity which interferes or conflicts with the regular hours or terms and conditions of employment in the Agency or which impairs the employee's productivity and efficiency.

The provision in the 2005 Standard reads:

C.1.19 Outside Employment

a) An employee must seek written approval from the Commissioner, or the Commissioner's appointed representative, to engage in any and all outside employment, and where applicable, apply for and receive a written waiver from the City's Conflicts of Interest Board to be dually employed.
b) An employee shall not engage in any other employment or in any volunteer or vocational activity which interferes or conflicts with the regular hours or terms and conditions of employment in the Agency or which impairs the employee's productivity and efficiency.
c) An employee shall not perform outside employment that is beyond the scope of the Commissioner's expressed approval for this outside employment.

Section E.1.2 of the 1984 Standard reads:

E.1.2 Arrests of Employees

An employee who is arrested anywhere shall on the next business day following such arrest or as soon as practicable thereafter, notify the Agency Inspector General of his/her arrest and shall furnish and give the following information: (only the information below need be provided and not the details of the alleged offense.)

(a) Time and date of arrest
(b) Bail or recognizance status
(c) Specific charge or charges upon which arrested
(d) Any temporary or final disposition.

The provision in the 2005 Standard reads:

E.1.2 Arrests and Issuance of Desk Appearance Tickets

An employee who is arrested anywhere or is issued a desk appearance ticket shall on the same day of such arrest or issuance, or as soon as practicable thereafter, notify the Agency Inspector General and the Director of Disciplinary Affairs by furnishing verbally and in writing the following information:

> (a) Circumstances surrounding the arrest and/or desk appearance ticket issuance
> (b) Time and date of arrest and/or encounter
> (c) Bail, recognizance status, or desk appearance ticket information
> (d) Specific charge(s) or violations
> (e) Any temporary disposition, including providing dates of each court appearance, and final disposition.
>
> Contact Information . . . .

As a remedy, the Union requests an order that DJJ rescind the 2005 Standard and cease and desist from implementing it in connection with DC 37 members, reinstate the provisions of the 1984 Standard, bargain in good faith over the provisions at issue, bargain over the impact of the provisions, rescind any disciplinary action taken against any employee pursuant to the 2005 Standard, expunge any reference to violations from employee records, and post appropriate notices.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the subjects covered in §§ C.1.4, C.1.19, and E.1.2 of the 2005 Standard constitute working conditions and are thus mandatory subjects of bargaining. According to the Union, DJJ's unilateral issuance and implementation of the 2005 Standard before the completion of bargaining interferes with employees' rights under NYCCBL § 12-305 and violates the duty to bargain in good faith under NYCCBL § 12-306(a)(1) and (4).[3]

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[3] NYCCBL § 12-305 provides in pertinent 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 . . . .

§ 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:

Citing to a balancing test used by the Board to determine whether a challenged subject is a term and condition of employment, the Union argues that imposition of new grounds for employee discipline and the potential intrusion into employees' privacy outweigh interests enunciated by the City and are mandatory subjects of bargaining. Therefore, the City must bargain over the changes.

Specifically, § C.1.4 of the 2005 Standard, unlike § C.1.4 of the 1984 Standard, includes a prohibition of being under the influence of drugs while off duty, not just while on duty; a requirement to inform the Executive Director of the facility or unit, not just the immediate supervisor, that the employee is taking a prescription drug; a requirement to notify the employer in writing, not simply verbally or informally; and a prohibition of possessing alcohol on agency property even if not on duty. Furthermore, the Union contends, the 2005 Standard "forbids the use of any 'drug or controlled substance while on or off duty.'" (Petitioner's Memorandum of Law at 15.) Thus, the language of the new section, even if it does not "mean what it seems to say," subjects employees to disciplinary action for taking a legal drug while off duty. As such, the language both creates a new ground for discipline and changes disciplinary procedures by barring a previously available defense under the 1984 Standard that drugs being taken were legal and/or were taken while off duty. The Union also argues that § C.1.4 improperly requires the employee to determine whether a prescription has the "potential to affect the user's activities or judgment" – a determination that at some point the employee may be unfit for the position at DJJ.

> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
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> * * *
>
> (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. . . .

In addition, § C.1.19 of the 1984 Standard prohibits outside employment only if it interferes with regular hours or if it impairs productivity. This section does not include a notification requirement, and, according to the Union, employees informed DJJ of outside employment only verbally and only if they took a job involving children. In contrast, § C.1.19 of the 2005 Standard requires employees to seek written approval from the Commissioner to engage in any outside employment. The revised provision, the Union contends, goes well beyond the requirements of the New York City Conflicts of Interest Board or Department of Citywide Administrative Services as to dual employment by demanding written approval even before taking a job at a local fast food restaurant. According to the Union, this change creates new bases for employee discipline and new procedures concerning outside employment.

Similarly, the Union says that the additional requirement under § E.1.2 of the 2005 Standard to inform DJJ of a DAT, not just an arrest, as in the 1984 Standard, is a new ground for discipline. Moreover, this section includes new procedures over which the City should bargain. While in the 1984 Standard the disclosure of the details of the arrest is explicitly excluded, the 2005 Standard requires that employees report the "circumstances" of the arrest or DAT to both the Inspector General and the Director of Disciplinary Affairs in writing.

In response to the City's arguments, the Union asserts that the revisions to the policies and procedures in these three sections alter the terms and conditions of employment and are not *de minimis*. Although DJJ did revise the language in certain provisions in response to the Union's suggestions, there was never a meeting of the minds as to the wording of the sections at issue here. Nor did Dolan's e-mail of July 15, 2005, waive the Union's interest in bargaining on all provisions other than § C.1.4, the drug policy; rather the e-mail states that the drug notification policy was the

only item that the Union was "objecting to in writing." (Reply ¶ 21; alteration in original.) Furthermore, the Union says, Dolan's hard copy letter of July 15, 2005, indicated her exception to a draft of § C.1.4 that is different from the language in the final version. But on July 15 she objected to the requirement that an employee notify a supervisor in writing, in part because the provision violates employee privacy. Moreover, that DJJ sent the Union the final 2005 Standard on July 21, one day after its effective date, after it was sent to the staff, and while Dolan, the major negotiator, was out of the office, does not represent a good faith effort to bargain over the contested revisions.

The Union also argues that the City committed a derivative violation of NYCCBL § 12-306(a)(1) when it failed to bargain over mandatory subjects because the City interfered with the effectiveness of the Union and, therefore, the rights of its members.

Finally, the Union claims that the Policy imposes a practical impact on employees. For example, an employee who does not wish to disclose that he had an "encounter" with the police or that he takes legally prescribed drugs for high blood pressure, depression, or epilepsy might face an increased threat of discipline or an economic impact.

City's Position

The City argues that the Union has not met its burden of showing that DJJ unilaterally changed terms and conditions of employment. There was no failure to bargain because DJJ and the Union met to discuss the 2005 Standard, and, after phone and e-mail discussions, DJJ revised various provisions in response to the Union's suggestions.

On July 15, 2005, DJJ sent an e-mail to DC 37 concerning outside employment. But the only provision to which the Union objected on July 15, 2005, was the notification policy in § C.1.4 concerning the use of prescription drugs. In her e-mail and in the hard copy of the letter, Dolan

limited her objection to one "item," the section on drug use and possession. Thus, the City contends, the Union has waived objections to any other part of the 2005 Standard. Because all other provisions were fully discussed and explored, the Union has "consciously yielded" its interest in bargaining over revisions to those sections.

As to § C.1.4, the City claims that the Union is unable to show a substantive change in policy. The Union objected in its July 15 letter that the provision's notification requirement concerning prescription drugs was a violation of employees' privacy. However, the 1984 Standard also requires that the employee inform a supervisor that the employee is taking prescription drugs. Thus, the only change in § C.1.4 is the title of the person to whom the employee must report – the Executive Director of a facility or unit instead of a supervisor. According to the City, this change is *de minimis*, and no bargaining is required.

The City also argues that since there is no violation of NYCCBL § 12-306(a)(4), there can be no derivative violation. Furthermore, the Union cannot establish an independent violation of NYCCBL § 12-306(a)(1) or prove discrimination or anti-union animus.

DISCUSSION

The issue in this case is whether DJJ violated its duty to bargain in good faith when it unilaterally changed three provisions in the 2005 Standard of Conduct. We find that § C.1.4, the provision concerning off-duty prescription drug use and possession of alcohol on agency property, involves mandatory subjects and contains substantial procedural changes over which the parties must bargain. However, the record shows that the parties' discussions concerning sections on outside employment, § C.1.19, and arrests and DATs, § E.1.2, were concluded, and, therefore, we do not

order bargaining over these provisions.

Public employers and employee organizations have a duty pursuant to NYCCBL § 12-307(a), to bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment.[4] *See District Council 37*, Decision No. B-8-2005 at 6-7. It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining. *See District Council 37*, Decision No. B-8-2006 at 7-8. A unilateral change in a term and condition of employment constitutes a refusal to bargain in good faith and, therefore, an improper practice. *See District Council 37, AFSCME*, Decision No. B-14-2005 at 13.

Since neither the NYCCBL nor the Civil Service Law expressly delineates the nature of "working conditions," or "conditions of employment," both this Board and the Public Employment Relations Board ("PERB") determine on a case-by-case basis the extent of the parties' duty to negotiate. *See District Council 37*, Decision No. B-8-2005 at 7; *Uniform Fire Officers Ass'n, Local 854*, Decision No. B-5-90 at 8; *District Council 37*, Decision No. B-1-90 at 7-8. To determine the negotiability of a subject asserted to be a working condition, this Board and PERB balance the interests of the employer and those of the union concerning that subject under the circumstances of the particular case. *See District Council 37*, Decision No. B-8-2005 at 7-8; *State of New York (Dep't of Correctional Services)*, 38 PERB ¶ 3008 (2005). The New York Court of Appeals approved the

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[4] NYCCBL § 12-307(a) provides in pertinent part:
Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public 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
. . . .

balancing test in *Board of Education of the City School District of the City of New York v. New York State Public Employment Relations Board*, 75 N.Y.2d 660, 670-671 (1990) (requirement to disclose health information and financial statements is mandatory subject of bargaining because intrusion on employees' terms and conditions of employment and privacy interests outweighs Board of Education's interest in integrity of its work force); *cf. Levitt v. Board of Collective Bargaining of the City of New York*, 79 N.Y.2d 120 (1992) (requirement to disclose matters of public record are nonmandatory subjects of bargaining).

In *District Council 37*, Decision No. B-13-2005 at 8, we noted that some subjects are "prebalanced" by the legislature. *See County of Montgomery*, 18 PERB ¶ 3077, at 3167 (1985). Thus, NYCCBL § 12-307(b) identifies those subjects that are reserved for managerial discretion, such as the right to direct its employees or to maintain the efficiency of government operations.[5] The legislature has not specifically pre-balanced the subject of employees' off-duty activities, such as prescription drug use, outside employment, or arrests. Therefore, this Board must balance the interests of the employer and those of the employees.

Section C.1.4

We address first the drug use provision, § C.1.4, specifically, the revisions concerning (1) off-duty use of drugs, (2) possession of alcohol on agency property, and (3) various new procedures.

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[5] 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 . . . ; 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. . . .

Off-Duty Use of Drugs

In *District Council 37, AFSCME*, Decision No. B-8-2005 at 10, this Board held that the New York City Police Department's new policy requiring civilian employees to notify and receive authorization from the department to visit incarcerated individuals on the employees' own time improperly imposed new working conditions affecting off-duty time, which, generally, is a mandatory subject of bargaining. We cited to a scope of bargaining case, *Uniformed Firefighters Ass'n*, Decision No. B-43-86 at 25, in which the Board concluded that although a public employer may seek to impose some limitations on employees when they normally would be off-duty, such authority "cannot be construed so as to preclude the Union from negotiating over unit members' right to use their time when they are off-duty." In *Uniformed Fire Officers Ass'n, Local 854*, Decision No. B-5-90, we balanced management's right to take disciplinary action and impose fines with employees' right to privacy in their off-duty conduct to contribute or solicit funds to help pay other members' disciplinary fines. We approved a standard used in the private sector that "unless behavior away from the plant harms a company's reputation or product, renders an employee unable to perform his or her duties or appear at work, or leads to refusal or inability of other employees to work with the employee, there is no basis for an employer to interfere with an employee's private life." *Id*. at 12-13 (citation omitted).

With respect to use of drugs, in *District Council 37, Locals 2507 and 3621*, Decision No. B-16-96, an interim decision, the union alleged that the Emergency Medical Service unilaterally began to require employees arrested for drug- or alcohol-related offenses committed while off duty, not just while on duty, to submit to drug testing. The City argued that the policy was not new. This Board ordered a hearing to determine whether the policy was changed, with the implication that the subject

was mandatorily bargainable if the obligation concerning off-duty conduct was new.

PERB has used a balancing test to determine when regulation of off-duty drug use is negotiable. In *Arlington Central School District*, 25 PERB ¶ 3001 (1992), the issue was whether the district, which had never before required a drug test, could subject an employee to such a test without first negotiating with the union. The district ordered the drug test based on an affidavit it had received that the employee, a school bus driver, had ingested an illegal substance on several occasions. PERB balanced the employee's interests – privacy, reputation, and job security – with the district's interest – the safe transportation of students – and stated:

> The District, as an employer, had no interest in [the employee's] off-duty use of any drug except and to the extent that her alleged use impaired her ability to drive a bus safely. However, no evidence was presented in this case that [the employee's] job performance was actually impaired, that any on-the-job drug use occurred or from which suspicion of impairment could reasonably be inferred.

Id. at 3004-3005. PERB recognized that off-duty drug use by employees in safety-sensitive positions may be used to demonstrate a reasonable suspicion of impairment. However, that evidence must be "reasonably proximate" to the employee's job performance. *Id*. at 3005. In *Arlington*, no evidence indicated that the employee's off-duty conduct impaired her ability to drive a bus, and, thus, the decision to test her for drugs was mandatorily negotiable. *See also City of Utica*, 25 PERB ¶ 4641 (1992) (without analysis, PERB Director finds the requirement for notification of use of prescription medication that can potentially impair job performance is a mandatory subject of bargaining).

In this case, § C.1.4 in the 1984 Standard provides that "An employee shall not use, possess, or be under the influence of any alcoholic beverage or other intoxicant, drug or controlled substance while on duty . . . ." Section C.1.4(b) of the 2005 Standard provides that "An employee shall not use, possess, or be under the influence of marijuana or any other drug or controlled substance while

on duty or off duty . . . ." The change, thus, relates to off-duty conduct. This Board must balance the interests of the employees in preserving their privacy, reputation, and job security and the interest of DJJ in assuring the safety of the youth under its care. While we recognize that DJJ has a significant interest in the integrity of its youth counselors, we find that, under the circumstances of this case, the interests of the employees in the privacy of their off-duty conduct and their interests in negotiating the requirements of § C.1.4 outweigh those of the employer. An employee's use of a prescription drug or other controlled substance while off duty may not have any adverse effects on that individual while he or she is on the job. Although the 1984 Standard had a disclosure requirement, there was no issue concerning off-duty use, and an employee may not wish to divulge medications taken while off duty. By adding the language requiring this disclosure, DJJ improperly made a unilateral change to a mandatory subject. In its e-mail exchange with DJJ, the Union expressly reserved its right to continue discussions on § C.1.4. We hold that the City violated its duty to bargain in good faith over the terms regarding off-duty use of drugs and order bargaining over this issue.

Possession of Alcohol on Agency Property

Section C.1.4 of the 1984 Standard prohibits using, possessing, or being under the influence of alcohol or drugs while on duty. The 2005 Standard separates alcohol from other substances and creates subsection C.1.4(a), which provides: "An employee shall not use, possess, or be under the influence of any alcoholic beverage while on duty and/or on Agency property." The new provision prohibits possession of alcohol on agency property. In *Elmira City School District*, 25 PERB ¶ 4666 (1992), the district unilaterally adopted a policy that, among other things, banned bringing alcoholic beverages on school property, including storage in an employee's car in the school parking lot, even

when stored out of view and intended for lawful consumption off premises. The administrative law judge ("ALJ") first found that, generally, an employer's intrusion into off-duty conduct (such as lawful drinking of alcohol away from agency premises), is a mandatory subject of bargaining. Using a balancing test, the ALJ found that "the prohibition against storage of alcoholic beverages in an unopened container in an employee's car, out of view, intended for lawful consumption after work elsewhere . . . , extends beyond any reasonable educational mission." *Id*. at 4908.

Here, we find the new prohibition of possessing alcohol on agency property a mandatory subject of bargaining. The provision prohibits an employee from possibly storing a lawful alcoholic beverage in a car on agency property. While we again acknowledge the sensitive nature of working with youth, we find that the employees here, just like the school employees in *Elmira*, have the greater interest in bargaining over the possession of legal substances that are closed and inaccessible to children. Accordingly, we direct that the City bargain over the ban on possession of alcohol on agency property as written in § C.1.4(a).

New Procedures

DJJ has changed various procedures in § C.1.4(b), (c), and (d) from the 1984 to the 2005 Standard. These procedures relate not only to the mandatory subjects of bargaining discussed above but also to provisions that may not be mandatory subjects of bargaining. The law is now well-settled that even when management has a right to make a policy decision unilaterally, certain procedures implementing the policy are mandatorily negotiable. *See, e.g., District Council 37, AFSCME*, Decision No. B-8-2006 (procedures for road workers' use of cell phones); *District Council 37, AFSCME*, Decision No. B-14-2005 (procedures for notification and verification of residency); *Doctors Council, S.E.I.U.*, Decision No. B-31-2002 (procedures for implementation of requirements

of the Conflicts of Interest Law); *District Council 37, AFSCME*, Decision No. B-25-2001 (procedures for drug testing policy); *City of Utica*, 32 PERB ¶ 3056 (1999) (procedures for required physical examinations).

Here, to the extent that the 2005 Standard dictates procedures relating to on-duty use of prescription drugs as well as off-duty use, we find those procedures mandatorily bargainable. Subsections (b) and (c) of § C.1.4 of the 2005 Standard direct an employee to notify the Executive Director of his or her unit or, if the employee is assigned a vehicle, the Court Services/Transportation Executive Director instead of an immediate supervisor, as was required in the 1984 Standard. Furthermore, under subsection (d) of § C.1.4, the notification must now be in writing. The City claims that these revisions are *de minimis*. We disagree because the changes require an employee not just to report a private matter informally to a supervisor but to document this confidential information to the person in charge of the facility or unit. *Cf. Patrolmen's Benevolent Ass'n*, Decision No. 12-2004 at 17 (changes in procedures regarding counseling in a performance monitoring program were *de minimis* since basic requirements for participation were the same). The provision also requires an employee to determine in advance what medication might have an adverse effect on his or her particular activities or judgment or face discipline for failing to disclose. The Union did not see the final version of § C.1.4 before it was issued. Since the procedures enunciated in § C.1.4(b), (c), and (d) of the 2005 Standard are mandatory subjects over which the City was required to bargain under NYCCBL § 12-306(a)(1) and (4), we order negotiation.

Sections C.1.19 and E.1.2

The Union seeks to bargain over several substantive and procedural changes in provisions concerning outside employment, § C.1.19, and arrests and DATs, § E.1.2, in the 2005 Standard,

while the City argues that the Union waived any objections to these two sections. Each of these sections arguably has aspects that are mandatorily negotiable. We have said that a union can waive its right to bargain if prior discussions indicate that the matter was "fully discussed or consciously explored and the union 'consciously yielded' or clearly and unmistakably waived its interest in the matter." *Captains Endowment Ass'n*, Decision No. B-16-2005 at 10. In *District Council 37*, Decision No. B-21-75 at 18-19, *aff'd, City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 18, 1976), this Board found that certain subjects over which the union sought to bargain had been carefully explored in contract negotiations, and, thus, the union waived its right to bargain over them mid-contract; there was no waiver as to other subjects which had not been fully discussed. *Id*. at 19.

In this case, the provisions involved are part of a new policy, not a contractual change, but the waiver standard remains the same. *See Captains Endowment Ass'n*, Decision No. B-16-2005 (dealing with a policy). Here, when DJJ wished to revise its 1984 Standard, it notified the Union by e-mail and attached a draft of the 2005 Standard. In the next two weeks, the parties spoke on the telephone and sent various drafts of the 2005 Standard back and forth. On July 15, 2005, at 4:14 p.m., DJJ sent the Union an e-mail with the latest version of the 2005 Standard attached. Although § C.1.4 was revised after this version, §§ C.1.19 and E.1.2 in the 4:14 p.m. version are identical to the provisions in the final July 20, 2005, version. Furthermore, at 6:30 p.m., DJJ sent a draft policy regarding outside employment and attached an Administrative Order spelling out details that do not diverge from the requirements in the 2005 Standard. At 7:36 p.m., the Union wrote that "after further review and discussion with staff, the only item we are objecting to in writing is the drug notification policy." In its hard copy letter of July 15, 2005, the Union wrote that it was responding

to "the draft code of conduct items. In the last version that we received, the Union objects to the following item: C.1.4(b) . . . ." Towards the end of that letter, the Union declared: "We acknowledge and appreciate the changes that have been made to the policy as a result of our feedback."

We find that the Union had an opportunity to respond to the provisions concerning outside employment and arrests and DATs. The Union's letters to the City show the Union's intention to continue discussion of only § C.1.4, but not §§ C.1.19 and E.1.2. The plain language of the Union's final letters to DJJ demonstrates that the Union "clearly and unmistakably waived its interest" in matters other than § C.1.4 and thus relinquished its right to bargain over §§ C.1.19 and E.1.2. Indeed, the Union acknowledged that DJJ had revised sections in response to the Union's suggestions. Accordingly, we do not find a violation of the NYCCBL and do not order bargaining over these provisions.

NYCCBL § 12-306(a)(1)

When the City refuses to bargain with an certified employee representative regarding a change affecting terms and conditions of employment, the City interferes with the effectiveness of the union and, consequently, the rights of the employees, in violation of NYCCBL § 12-206(a)(1). *See District Council 37, AFSCME*, Decision No. B-14-2005 at 15. Here, since we have found that the City violated NYCCBL § 12-306(a)(4) by failing to bargain with the Union regarding a unilateral change in mandatory subjects contained in § C.1.4, we also find a derivative violation of § 12-306(a)(1). However, the City has not violated NYCCBL § 12-306(a)(4) regarding the sections on outside employment and arrests, and as to those sections we find no derivative violation of § 12-306(a)(1).

Conclusion

This Board concludes that DJJ's unilateral revision to the drug use provision, § C.1.4, constitutes a change in a mandatory subject and thus violates NYCCBL §12-306(a)(1) and (4). We grant this part of the petition and order bargaining over this issue. We also conclude that the Union relinquished its right to bargain over any changes to outside employment or arrests and DATs, §§ C.1.19 and E.1.2, and deny this part of the petition.

Because of our ruling here, we need not reach the Union's claim of practical impact. Furthermore, since the Union has made no allegations that an individual member has been disciplined pursuant to the revised version of the drug use policy, we do not order that any disciplinary action taken under § C.1.4 be rescinded or record of violations expunged.

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-2513-05, filed by District Council 37, Local 1457, be, and the same hereby is, granted as to the claim of unilateral change to § C.1.4, the drug use provision, of the 2005 Standard of Conduct and denied as to claims regarding § C.1.19, the outside employment provision, and § E.1.2, the provision on arrests and desk appearance tickets, and it is hereby

ORDERED, that, having violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing § C.1.4 of the 1984 Standard of Conduct, the Department of Juvenile Justice rescind § C.1.4 of the 2005 Standard of Conduct and cease and desist from using it in connection with District Council 37, Local 1457, members, and restore the provision in effect prior to the change, and it is hereby

ORDERED, that the Department of Juvenile Justice bargain in good faith over any unilaterally revised mandatory subjects contained in the policies and all revised procedures in the drug use provision, § C.1.4, of the 2005 Standard of Conduct as it pertains to members of District Council 37, Local 1457, and it is hereby

ORDERED, that the Department of Juvenile Justice post the attached notice for no less than thirty days at all locations used by the Department for written communications with employees represented by District Council 37, Local 1457.

Dated: September 12, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

I concur in the result, but not the reasoning. CHARLES G. MOERDLER
MEMBER

I concur in the result, but not the reasoning. BRUCE H. SIMON
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK

and in order to effectuate the policies of the NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued Decision No. B-26-2006, determining an improper practice proceeding between District Council 37, Local 1457, and the City of New York and the New York City Department of Juvenile Justice.

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

ORDERED, that the improper practice petition, filed as BCB-2513-05, be granted as to the Union's claim of unilateral change to § C.1.4, the drug use provision, of the 2005 Standard of Conduct, in violation of NYCCBL § 12-306(a)(1) and (4), and denied as to claims regarding § C.1.19, a provision on outside employment, and § E.1.2, a provision on arrests and desk appearance tickets; and it is further

ORDERED, that the Department of Juvenile Justice rescind § C.1.4 of the 2005 Standard of Conduct and cease and desist from using it in connection with District Council 37, Local 1457, members, and restore the provision in effect prior to the change; and it is further

ORDERED, that the Department of Juvenile Justice bargain in good faith over any unilaterally revised mandatory subjects contained in the policies and all revised procedures in the drug use provision, § C.1.4, of the 2005 Standard of Conduct as it pertains to members of District Council 37, Local 1457; and it is further

ORDERED, that the Department of Juvenile Justice post the appropriate notices; and it is further

ORDERED, that the petition is dismissed in all other respects.

The New York City Department of Juvenile Justice
(Department)

Dated: _____ **(Posted By)**
(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.