District Council 37, 77 OCB 34 (BCB 2006)

[Decision No. B-34-2006] (IP) (Docket No. BCB-2552-06)

Summary of Decision: Union claimed that NYPD violated its duty to bargain by unilaterally changing its procedures for requiring documentation of certain categories of sick leave. The City contended that it had no duty to bargain because it had not changed existing policy, merely reasserted it. This Board finds that the actions by the NYPD which are the subject of the complaint herein constituted a change in sick leave procedures regarding documentation required for the use of leave time for FMLA-qualifying health conditions and that the City failed to bargain to the point of agreement with the Union before unilaterally imposing the changes, in violation of NYCCBL § 12-306(a)(1) and (4). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

CITY OF NEW YORK
and the NEW YORK CITY POLICE DEPARTMENT,

Respondents.

DECISION AND ORDER

On June 2, 2006, District Council 37 ("Union") filed a verified improper practice petition on behalf of its members in the civil service titles of Police Communication Technician ("PCT") and Supervising Police Communication Technician ("SPCT") against the New York City Police Department ("NYPD" or "Department") and the City of New York ("City"). The Union alleges that the 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 failing to bargain over unilateral changes in certain departmental

procedures for documenting sick leave used under the federal Family and Medical Leave Act (29 USCS § 2601, *et seq*.) ("FMLA") and instituting disciplinary procedures for violation of those departmental procedures. The Union further alleged that the NYPD improperly failed to bargain over the practical impact to the safety of the affected employees who may be required to return to duty prematurely in order to avoid disciplinary action against them. The City contends that the duty to bargain is not implicated because it has not changed any procedures for either documenting sick leave or instituting discipline but rather has merely reiterated pre-existing departmental procedures. The City further contends that the employer's managerial prerogative under NYCCBL § 12-307(b) encompasses the NYPD's lawful unilateral decision to require documentation for certain illness-related absences and in any event that the Union's case is time-barred. This Board finds that the NYPD's changed requirements for documentation required by employees seeking to use leave time for FMLA-qualifying health conditions constitute a change in procedures and that the City failed to bargain with the Union prior to unilaterally implementing the changes in violation of NYCCBL § 12-306(a)(1) and (4). Accordingly, the Board grants the Union's petition.

BACKGROUND

The facts material to deciding this matter are undisputed; only their legal significance is at issue.

The Communications Division of the NYPD consists of 1,200 PCTs and SPCTs. The Union is the designated collective bargaining representative for employees in both titles. PCTs answer phone calls made to the City's emergency number, 911, and dispatch police

officers via radio. SPCTs supervise the work of the PCTs.

Medical Leave and Implementation

The Family Medical Leave Act of 1993 (29 U.S.C. § 2801, et seq.) ("FMLA") entitles eligible employees, including employees of public agencies, to take up to twelve (12) weeks unpaid leave annually for any one of several reasons, including the onset of a "serious health condition" in a spouse, child or parent. *See Nevada v. Hibbs*, 538 U.S. 721, 724 (2003). The statute creates a private right of action to permit employees to seek equitable relief and damages "against any employer (including a public agency) in any Federal or State court of competent jurisdiction should that employer interfere with, restrain, or deny the exercise of FMLA rights." *Id*. at 724-725 (editing marks and citations omitted). The FMLA permits the employer to require certification of the condition occasioning the request for leave. 29 U.S.C. §2613. Regulations have been promulgated by the Department of Labor to codify the minimum procedural requirements of the FMLA and to implement the statute. 29 C.F.R. Part 825.

The City has promulgated its own regulations governing the implementation of FMLA leave. The Department of Citywide Administrative Services ("DCAS") has issued Personnel Services Bulletin ("PSB") No. 440-8R, entitled "Guidelines on the Family Medical Leave Act." (Answer Exhibit 5).

Since February 1994, the City has afforded FMLA benefits to employees in the titles at issue pursuant to the Citywide collective bargaining agreement ("Citywide Agreement") and the Local 1549 Clerical Unit Agreement. FMLA benefits include up to 12 weeks' leave time in a 12-month period for child care, for the care of the employee's own serious health

condition, or for the health care of certain other family members. At the time period relevant herein, some 563 PCTs and SPCTs were on approved FMLA leave. The Communications Division Disciplinary Unit ("Unit") certifies initial requests for leave after confirming eligibility under the FMLA.

The Union does not dispute that the guidelines in DCAS' PSB No. 440-8R, published in April 2000, are consistent with the provisions of the FMLA and the federal rules and regulations which implement the FMLA. In negotiations for the 1995-2001 Citywide Agreement, the City and the Union agreed to abide by the guidelines set forth in PSB No. 440-8R. In relevant part, PSB No. 440-8R states that an employee may take leave for his or her own serious health condition on an intermittent schedule, *i.e.*, in separate blocks of time due to a single qualifying reason. Under the federal rule implementing the FMLA provision regarding intermittent leave, the employer may not request recertification in less than the minimum period of time specified in the certification submitted with the original request for intermittent leave. 29 CFR § 825.308 (b)(2). Should no specific time period be specified in the request for leave, the regulations provide that the employer is not permitted to request recertification in fewer than 30 days. *Id.*

Moreover, if an employee substitutes paid leave that he or she may have accrued for his or her leave for unpaid under the FMLA, the employer may not impose certification procedures that are any more stringent than the employer's certification requirements for paid leave. 29 CFR § 825.207(h). The employer may only impose the less stringent procedure, whether it is that applicable under the FMLA or that applicable under the employer's sick leave policy.

The NYPD's Administrative Patrol Guide ("AGP") contains procedures relating to civilian employees. AGP No. 319-14, effective since April 1985 and updated in 2005, describes procedures for processing sick leave requests of civilian employees. (Answer Exhibits 6, 7; Petition Exhibit B). Initially promulgated before the FMLA became law, it makes no reference to FMLA leave.

The NYPD has a "Step Program" wherein an employee with three undocumented absences in a six-month period is designated, generally speaking, as being assigned to Step I. Each additional undocumented absence leads to a subsequent step until, generally, a total of six undocumented absences are reached, at which point the employee reaches Step IV.[1] Any further undocumented absences result in discipline in the form of a command discipline which, in turn, may result in loss of pay, loss of annual leave, or loss of compensatory time.

The Conflict Over Procedures

In January 2005, SPCT Cynthia Hill applied for FMLA leave and submitted medical certification for intermittent leave due to a chronic health condition. The NYPD approved her request. On eight separate days between January 4, 2006, and February 16, 2006, she telephoned her employer to report that she would be out on her pre-approved FMLA leave. Each time that she called, she was granted use of accrued sick leave and was paid for each separate day.

On February 3, 2006, the NYPD issued Memo No. 1/17.7 regarding "sick leave procedures." The memorandum reasserts the requirements of AGP No. 319-14. Memo No.

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[1] An undocumented absence which occurs before or after a holiday, vacation day, or regular day off triggers a Step I designation at two undocumented absences; a Step IV designation is triggered at only five such undocumented absences.

1/17.7 stated that "[t]hese procedures apply to all civilian members requesting sick leave, including regular sick usage and utilization of FMLA." AGP No. 319-14 is silent as to FMLA leave, and the original order was promulgated prior to passage of the FMLA in 1993. Memo No. 1/17.7 instructed employees that for both regular sick leave usage and FMLA leave, employees must submit the documentation required for sick leave that is taken as described in AGP No. 319-14 (5)(a) through (d). Memo No. 1/17.7 also authorizes Commanding Officers to permit documentation in the form of a note or letter on the attending health practitioner's letterhead.

On April 6, 2006, Hill was notified that she was designated at Step I of the Step Program. She was subsequently placed at Steps II, III, and IV of the Step Program, requiring that any subsequent absences – even for her pre-approved FMLA condition – be supported by medical documentation. Failure to comply would subject her to disciplinary action.

In September 2004, PCT Toni Reid requested intermittent leave under FMLA for the treatment of a chronic health condition. The NYPD approved her request. In August 2005, Reid submitted written recertification of her FMLA qualifying condition and her leave was again approved. On February 23, 2006, Reid was notified that she was placed in the Step Program due to her alleged use of undocumented FMLA qualifying sick leave. In March 2006, she again submitted written recertification of her FMLA-qualifying condition and her leave was approved. Nevertheless, Reid has been placed at Step IV of the Step Program, requiring that any subsequent absences – even for her pre-approved FMLA condition – be supported by medical documentation. Failure to comply would subject her to disciplinary action.

In February 2006, representatives of the Union met with managers of the NYPD's Communications Division to discuss Hill's and Reid's placement in the Step Program. Hill and Reid also attended. Additionally, in March 2006, a labor-management meeting was held with representatives of the NYPD, OLR, and the Union, and they agreed to research the FMLA questions raised by the Union.

The Union asserts that the committee formed at the labor-management meeting was scheduled to meet again on March 31, 2006, but that the NYPD cancelled the meeting. On June 15, 2006, the NYPD issued Communications Section Memo No. 1/18.3 requiring employees to submit recertification of their FMLA-qualifying conditions every 30 days and, effective July 1, 2006, to submit recertification on the first day of the month following the month in which they use FMLA leave. The Union asserts that, to date, the NYPD has continued to apply its sick leave documentation requirements when FMLA leave is used and its disciplinary procedures to employees whom the NYPD determines have failed to meet the requirements of Memo Nos. 1/17.7 and 1/18.3. The City disputes the cancellation of the meeting but acknowledges that the requirements of the memoranda are applicable to employees availing themselves of FMLA leave.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that, unilaterally and in violation of NYCCBL § 12-306(a)(1) and

(4),[2] the NYPD has changed the procedures by which employees in the titles of PCT and SPCT are required to substantiate leave requests for FMLA-qualifying conditions, under penalty of newly imposed progressive discipline. The Union contends that, in promulgating Memo No. 1/17.7 on February 3, 2006, and without bargaining, the NYPD for the first time subjected FMLA leave to the procedures applied to regular sick leave – a change not permitted under either FMLA itself or under the NYCCBL, without bargaining. The Union contends that its claim is thus timely filed.

The Union asserts that Memo No. 1/18.3 requires recertification every 30 days which is more stringent than the requirements of 29 CFR § 825.308(a) through (c) and thus would bring AGP No. 319-14 into conflict with 29 CFR § 825.207(h). Those requirements call for recertification no more frequently than every 30 days unless there is a change in the medical condition at issue, a request for an extension of medical leave, or doubt as to the validity of the need for leave time.

The Union also argues that the requirement that recertification be submitted on the first day of the month following the month in which the leave is used does not comport with

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[2] Section 12-306(a) of the NYCCBL 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. . . .

Further, § 12-305 of the NYCCBL 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 and shall have the right to refrain from any or all of such activities . . . .

earlier practice. No such time requirement previously existed, the Union argues. Nor does this assertedly new requirement comport with PSB No. 440-8R which, instead, requires that documentation must be provided within 15 days from the agency's request where practicable. In addition, the Union argues, Memo No. 1/18.3 does not comport with 29 CFR § 825.207(h) which requires that no more stringent documentation be required for employees who substitute paid leave for FMLA-qualifying leave than would be required under the employer's regular sick leave program. AGP No. 319-14 requires sick leave documentation after 12 working days and every 30 calendar days thereafter but not more frequently for extended illness. Moreover, nowhere does AGP No. 319-14 specify that documentation be submitted on a specific day of the month. The language in AGP No. 319-14 states only that, in cases of "protracted illness, a physician's certificate shall be presented at the end of each month of continued absence."

In sum, the Union argues that the unilateral change in procedures implementing FMLA – leave by imposing documentation requirements and disciplinary procedures which were not previously required – without engaging in collective bargaining violates NYCCBL § 12- 306(a) (1) and (4). Moreover, the Union asserts that the NYPD is also under a duty to bargain to alleviate a safety impact which assertedly is created by the fact that the threat of discipline for failure to adhere to the newly imposed requirements induces employees to return to work medically prematurely, putting their health at risk. The Union seeks a cease and desist order to stop the continued implementation of Memo Nos. 1/17.7 and 1/18.3, rescission of disciplinary action in connection with the attendant Step Program and of any negative performance evaluation reflecting any such discipline, and an order directing

bargaining in good faith over any changes to the relevant procedures regarding FMLA leave.

City's Position

The City argues that the instant petition is time-barred because Memo No. 1/17.7 of which the Union complains merely reiterates pre-existing policy and procedure set forth in AGP No. 319-14, originally promulgated in 1985 and revised in 2005. The City also argues that the Union has failed to plead and prove the contention that Memo Nos. 1/17.7 and 1/18.3 constitute any changes affecting terms and conditions of employment. The Memos simply reiterate longstanding City and departmental policy on the documentation of sick leave, whether regular sick leave or FMLA leave. According to the City, employees on FMLA leave over time took advantage of the NYPD's inundation with leave requests and the resultant strain on administrative resources and did not comply with the recertification provision of AGP No. 319-14, leading to the need for the NYPD to reassert the requirement in the Memos at issue.

The City further argues that, in promulgating the Memos at issue herein, the NYPD has lawfully asserted its managerial right under NYCCBL § 12-307(b) to unilaterally decide the methods, means, and personnel by which governmental operations – in this case, the dispatching of police resources to respond to 911 emergency calls – are to be conducted.[3]

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[3] Section 12-307(b) of the NYCCBL 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; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters

Employees in the titles at issue in this case provide a necessary service to ensure that emergency assistance is routed to people in need. The NYPD must be able to document and control employees on sick leave in order to assure sufficient staffing for this purpose. Memo Nos. 1/17.7 and 1/18.3 enable the City to accomplish this goal and implicate no duty to bargain.

Finally, the City argues that the Union has failed to articulate a claim of practical impact on the employees at issue. The Union has asserted no facts as to any concrete instance of an employee who actually suffered an impact of the type triggering any duty to bargain. The Union's claim as to any practical impact, as well as its other claims of a failure to bargain, are speculative, non-specific and factually unsupported.

DISCUSSION

The issue before this Board is whether the City's implementation of Memo Nos. 1/17.7 and 1/18.3 pertaining to documentation required for FMLA-qualifying sick leave constitutes a unilateral change in a mandatory subject of bargaining. For the reasons set forth below, we find that the City violated the NYCCBL by unilaterally changing the documentation and certification procedures applicable to employees availing themselves of FMLA leave, which constitute a mandatory subject of bargaining.

As a threshold matter, we do not opine on the extent to which the procedures adopted

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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.

by the City comport with the FMLA. The FMLA creates a private right of action against "any employer (including public agencies)" but vests jurisdiction of all claims thereunder in "any State or Federal court of competent jurisdiction." *Nevada v. Hibbs*, 538 U.S. 721, 724-725 (2003) (construing 29 U.S.C. §§ 2617(a)(2), 2615(a)(1)). This Board does not have jurisdiction over claims under statutes other than the NYCCBL and does not purport to exercise jurisdiction over claims based on the FMLA. *Edwards*, Decision No. B-35-2000, *Pruitt*, Decision No. B-11-95, n. 7; *see also Williams*, Decision No. B-48-97; *Siegel*, Decision No. B-23-91. Thus, we do not here decide to what extent, if at all, the procedures set forth in Memo No. 1/17.7 or Memo No. 1/18.3 comport with the FMLA or the federal regulations promulgated thereunder.

Contrary to the City's argument, we find the petition is timely. Section 12-306(e) of the NYCCBL and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) provide that a petition alleging an improper practice in violation of NYCCBL § 12-306 may be filed no later than four months after the disputed action occurred. When a claim arises more than four months prior to the filing of the petition and there is no allegation that the action continued or in other manner accrued at any time within the four-month time limitation, the petition will be dismissed as untimely. *See District Council 37, AFSCME*, Decision No. B-61-91 at 8. However, "a union appropriately interposes itself only after an action of management has had an immediate impact on the employees represented by the union or that it necessarily entails an impact in the immediate or foreseeable future. Thus, a party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented and

the charging party is injured thereby." *Id*.

In *Probation Officers Ass'n*, Decision No. B-44-86 at 18, we found timely a Union's petition seeking to negotiate criteria and procedures for the granting of merit increases even though the administrative order that provided those guidelines had been issued nine years before the City announced its intention to implement the merit plan. We found that prior to the announcement of the merit increase program and its imminent implementation, the union did not have "actual or constructive knowledge of definitive acts which put it on notice of the need to complain." *Id*.; *see also Correction Officers' Benevolent Ass'n.*, Decision No. B-26-2002 at 6 (petition timely filed within four months of the effective date of a departmental directive, despite claim that union might have known that department intended to revise an earlier directive).

In the instant case, Memo No. 1/17.7 was promulgated on February 3, 2006, and subjects the NYPD civilian employees at issue herein to what the Union asserts were changes in the Department's prior procedures regarding sick leave for FMLA-qualifying conditions and further subjects them to discipline if they fail to comply. Memo No. 1/18.3 about which the Union also complains was promulgated in June 2006. The City's argument that the memoranda in question did nothing more than articulate pre-existing policy confuses a determination of the merits of the claim with the threshold question of timeliness; it depends upon the ultimate resolution on the merits to assert that the Union cannot be heard on the merits. Because the petition was filed within four months of the promulgation of these directives, we find the Union's petition timely.

It is an improper practice under NYCCBL § § 12-306(a)(4) for a public employer or

its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Under NYCCBL § 12-307(a), mandatory subjects of bargaining generally include wages, hours, 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-14-2005 at 12-13; *District Council 37*, Decision No. B-12-2003 at 7; *Social Service Employees Union, Local 371, AFSCME*, Decision No. B-22-2002 at 7. A unilateral change in terms and conditions of employment constitutes a refusal to bargain in good faith and, therefore, an improper practice. *District Council 37*, Decision No. B-14-2005 at 13; *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.

It is well-established that the implementation of new procedures to comply with statutory mandates nonetheless implicates the duty to bargain in good faith. *District Council 37*, Decision No. B-14-2005 at 13; *see also Doctors' Council*, Decision No. B-31-2002 at 10-11 (finding procedures for implementing compliance with the Conflicts of Interest Law bargainable); *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).

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[4] Section § 12-307(a) of the NYCCBL provides, in pertinent part:
[P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages(including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions. . . .

In District Council 37, Decision No. B-14-2005 at 13, this Board followed the Court of Appeals' decision in *City of Watertown v. State of New York Public Employment Relations Board*, 95 N.Y.2d 73, 76 (2000), which established that where a public employer is required to make certain determinations pursuant to statutory obligation to provide health-related benefits, "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.'" *District Council 37*, Decision No. B-14-2005 at 13 (quoting *City of Watertown*, 95 N.Y.2d at 76 [citations omitted]). Similarly, here, changes in the procedures for requesting FMLA leave are bargainable.

We have long held that regulations and procedures regarding the use of sick leave in fact constitute a mandatory subject of bargaining. *MEBA, DistrictNo.1, Pacific Coast District*, Decision No. B-3-75 at 17. In *MEBA*, this Board found that the City's requirement that an employee, absent for more than two days, provide a written statement from a doctor, constituted a bargainable, procedural requirement. *Id*. In *Correction Officers Benevolent Ass'n*, Decision No. B-26-2002, we reaffirmed that case's holding that the NYCCBL "recognized a distinction between demands relating to the amount of sick leave and procedures for its authorized use, which are mandatorily bargainable, and those relating to management's actions to monitor the use of sick leave to avoid abuse, which are non-mandatory subjects." *Id*. at 7; *see also Correction Officers Benevolent Ass'n* , Decision No. B-16-81 at 97-102 (finding regulations and procedures concerning the use of sick leave, including procedures regarding the submission of medical documentation, were mandatory

subjects of bargaining) (citing *City of Rochester*, 12 PERB 13010 at 3018 [1979]); *Poughkeepsie City School District*, 19 PERB 13046 (1986) (same, where employer had not "promulgated a new rule which provides that the taking of sick leave without medical documentation is itself a chargeable offense").

The City's argument that Memo 1/17.7 only reaffirmed the application of AGP No. 319-14 to FMLA leave, is not borne out by the language of AGP No. 319-14, which limits its applicability to "when personal illness or injury prevents the proper performance of duty." (Answer Exhibit 6 at 1; Answer Exhibit 7 at 1.) This provision was promulgated prior to the enactment of FMLA. The Union submits a revised text which also does not mention the FMLA (Petition Exhibit B); nor, conversely, does PSB No. 440-8R, which addresses the applicability of FMLA to City employees, mention any of the certification requirements contained in individual agency procedures, let alone a direct reference to AGP No. 319-14 (Answer Exhibit 5). Thus by its own terms, AGP No. 319-14 cannot be read to apply to FMLA leave but rather only to "sick leave." Moreover, according to the City's Answer, employees on FMLA leave did not comply with this recertification provision of AGP No. 319-14, leading to the reassertion of the requirement in the Memos at issue.

Because the language of AGP No. 319-14 as originally promulgated antedates FMLA and has not been amended to address FMLA specifically, we do not read the regulation to apply to FMLA leave. Accordingly, Memo No. 1/17.7, which applies AGP No. 319-14 to FMLA leave, was a change. Therefore, by subjecting FMLA leave to the reporting requirements of AGP No. 319-14 Memo No. 1/17.7 introduces new procedures concerning the use of FMLA leave that are mandatory subjects of bargaining.

Further, the provisions of AGP No. 319-14 apply different reporting and/or documentation to employees on FMLA leave. Prior to the application of AGP No. 319-14, FMLA leave applicants had only to comply with PSB No. 440-8R. Specifically, the employer could not require recertification in fewer than 30 days. The provisions in AGP No. 319-14 for a covered employee to request that an attending licensed health practitioner submit written certification of a continuing health condition "after twelve (12) working days, and every thirty (30) calendar days thereafter" are less stringent than the requirement in Memo No. 1/18.3 for recertification for a FMLA-qualifying condition every 30 days. The latter Memo's requirement, therefore, is different from the requirements both of AGP No. 319-14 purportedly applied to employees or FMLA leave by Memo No. 1/17.7, as well as from PSB No. 440-8R.

Although AGP No. 319-14 provides that a physician's certificate "shall be presented at the end of each month of continued absence" during a "protracted illness," we find a distinction between the phrases "at the end of each month," in AGP No. 319-14, and "on the first day of the next month," in Memo 1/18.3. However, this distinction, in the absence of any allegation of a legally cognizable difference appears to be *de minimis* and therefore not sufficient to implicate the duty to bargain. *See District Council 37*, Decision No. B-23-2002; *Patrolmen's Benevolent Ass'n*, Decision No. B-12-2004.

Thus, we find that Memo Nos. 1/17.7 and 1/18.3 each act to change the procedure by which affected employees seek FMLA leave by enacting new procedural requirements different and distinct from those provided by PSB No. 440-8R and from the federal regulations implementing FMLA, and which therefore must be bargained. We do not find

that the City could not properly monitor employees' compliance with whatever procedures are bargained in relation to FMLA leave, and in fact such monitoring would not constitute a mandatory subject of bargaining. *District Council No. 37*, Decison No. B-26-2002.[5]

Having determined that the City has changed the procedures applicable to FMLA leave through promulgation of the Memos in question, we find that these unilateral changes constitute a failure to bargain in good faith in violation of NYCCBL § 12-306(a)(4). When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *District Council 37*, Decision No. B-20-2003 at 5-6; *Uniformed Sanitation Chiefs Ass'n*, Decision No. B-32-2001 at 8.

The City's duty to negotiate the mandatory subjects of bargaining which we have found herein includes the duty to negotiate until agreement is reached or the statutory impasse procedures are exhausted; the City may not unilaterally implement a change in a mandatory subject of bargaining before bargaining on the subjects has been exhausted. *See, e.g., Correction Officers' Benevolent Ass'n*, Decision No. B-26-99 at 9; *Patrolmen's Benevolent Ass'n,* Decision No. 4-99 at 10; *Communications Workers of America*, Decision No. B-47-98 at 6. Thus, this Board concludes that the actions which are the subject of the complaint herein constituted a change in documentation required for the use of leave time for FMLA-qualifying health conditions and that the City failed to bargain to the point of agreement with the Union before unilaterally imposing the changes. This action was violative of NYCCBL § 12-306(a)(1) and (4). Therefore, we order the City to rescind the

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[5] As previously stated, we do not opine as to whether the step program comports with the FMLA.

changes implemented in Memos 1/17.7 and 1/18.3 and rescind the Step Program to the extent it is predicated on application of said changes, restore the documentation procedures that existed prior to the issuance of these Memos, and bargain in good faith with the Union before implementing any change to the documentation procedures for FMLA leave and related disciplinary procedures. We also order expungement of any disciplinary records of Hill and Reid pertaining to the Step Program to the extent that such records relate to the changes at issue herein.

With respect to the Union's claim of a practical impact, because we grant the petition for the reasons given above, we do not reach the claim of 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

DETERMINED, that the New York Police Department violated NYCCBL § 12-306(a) (1) and (4) by making unilateral changes in documentation procedures attendant to the use of leave time under the Family and Medical Leave Act, and it is further

ORDERED, that the improper practice petition, Docket No. B-2552-06, filed by District Council 37, on behalf of its affiliated Local 1549, against the New York Police Department and the City of New York, be, and the same hereby is, granted, and it is further

ORDERED, that the New York Police Department rescind the changes in the documentation procedures attendant to the use of leave time under the Family and Medical Leave Act; restore the documentation procedures in effect prior to the issuance of Communications Division Memo Nos. 1/17.7 and 1/18.3; and cease and desist from implementing changes in documentation procedures attendant to the use of leave time under the Family and Medical Leave Act until such time as the parties negotiate such changes; and it is further

ORDERED, that the New York Police Department expunge any disciplinary records of Cynthia Hill and Toni Reid pertaining to the Step Program to the extent they relate to alleged violations of the procedures at issue herein.

Dated: December 4, 2006
New York, New York

MARLENE A. GOLD
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