Detectives Endowment Association, 77 OCB 37 (BCB 2006)

[Decision No. B-37-2006] (IP) (Docket No. BCB-2502-05), **rev'd,** *Matter of City of New York v. Patrolmen's Benev. Ass'n.*, Index No. 400007/07 (Sup. Ct. N.Y. Co. Dec. 27, 2007)(Wilkins, J.); awaiting app div dec, *rev'd* [Bd dec reinstated], 56 A.D.3d 70 (1st Dept. 2008), *rev'd*, __ N.Y3d __ , 2009 N.Y. Slip Op. 09314 (Dec. 17, 2009).

Summary of Decision: Unions claimed that NYPD violated its duty to bargain by unilaterally changing its procedures for drug testing employees by switching from urine analysis to hair analysis. The City contended that it had no duty to bargain because it had previously discussed the changes which, in any event, did not constitute a change in existing policy. The Board found that the expansion of the categories of employees to whom the hair testing procedures are applied constitutes a unilateral change in drug screening procedures, which is a mandatory subject of bargaining, and granted the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DETECTIVES ENDOWMENT ASSOCIATION, PATROLMEN'S BENEVOLENT ASSOCIATION, AND SERGEANTS BENEVOLENT ASSOCIATION,

Petitioners,

- and -

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

Respondents.

DECISION AND ORDER

On August 26, 2005, the Detectives Endowment Association ("DEA") filed a verified improper practice petition on behalf of itself, the Patrolmen's Benevolent Association ("PBA"), and the Sergeants Benevolent Association ("SBA") (collectively, "Unions"), against the City of New

York and the Police Department ("City" or "NYPD"). The Unions allege that NYPD violated § 12-306(a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally changing the methodology of testing from urine to hair analysis to detect the use of drugs by Detectives, Police Officers, and Sergeants. The City contends that it gave the Unions advance notice and met with them on at least three occasions to discuss NYPD's planned switch to hair testing, and that, in any event, there has been no change in drug testing procedures because the hair testing procedures implemented are the same as those already in effect for certain classes of employees. This Board finds that even if NYPD's procedures for hair testing are the same, the expansion of the categories of employees to whom the procedures now are applied constitutes a unilateral change in drug screening procedures. Accordingly, the Board grants the Unions' petition.

BACKGROUND

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

A. NYPD's Drug Testing Procedures Before August 1, 2005

1. Non-Random Drug Testing

Effective January 1, 2000, NYPD issued a number of Patrol Guide Procedures ("PGPs") that set forth the drug testing procedures applicable to uniformed members of the NYPD in various circumstances.[1] PGP No. 205-30 provides for "reasonable suspicion" drug screening for the presence of drugs in either the urine or hair of members suspected of illegal drug use. Whether urine

[1] The City alleges that there is a "long practice of using [hair testing] for drug screening" (Answer, p. 6). The specified January 2000 PGPs are the earliest sources submitted to document that practice.

or hair samples are tested, this PGP sets forth the procedures to be followed, including provisions for collection of a sample, maintenance of the chain of custody, conduct of a laboratory analysis, the right to request a re-test, and selection of a laboratory for a re-test. It is not disputed that members who have been tested on the basis of "reasonable suspicion" have had samples of their hair tested under this procedure.

PGP No. 205-35 allows members to request voluntary drug screening. This procedure is available to members who are subject to unsubstantiated allegations of illegal drug or controlled substance abuse when reasonable suspicion does not exist. This PGP provides for the testing of hair and urine samples, although the Unions assert that the standard practice actually employed in voluntary screening cases has been to require only urinalysis. Whether hair or urine is used, the collection, testing, and re-testing procedures conform to those contained in PGP No. 205-30.

In addition, all probationary members of the NYPD complete an end-of-probation medical examination that includes drug screening using hair samples.

2. Random Drug Testing

PGP No. 205-29 provides for random drug testing of all members of the NYPD (except, as described *infra,* those assigned to certain specified commands which are subject to separate random drug testing procedures). Under this procedure, the NYPD randomly selects members through the use of an automated database and directs those selected to appear at a specified date and time for drug screening. The procedure states that selected members "must submit to drug screening" but does not define the method of testing. The procedure does state: "Except in unusual circumstances, urine samples will be taken at a facility operated by the Medical Division . . . ." The Unions note that PGP No. 205-29 incorporates a number of procedures they believe are characteristic of urine

testing, including the collection of samples in vials and the requirement that only one person of the employee's same sex be present when the sample is collected. The Unions further assert that prior to August 1, 2005, the actual testing employed by the NYPD under this PGP did not include the testing of hair. The City's own description of the procedure, in its answer to the instant petition, states that members "are required to provide two (2) urine samples, each in a separate vial . . . ."

PGP No. 205-32 requires that applicants applying for, or assigned to, the Organized Crime Control Bureau ("OCCB") must consent to random drug screening. All applicants are tested, and those assigned remain subject to random testing. The PGP does not define the method of testing, but its procedures refer only to the collection of urine samples.

PGP Nos. 205-31 and 205-33 provide procedures for the drug screening of members applying for assignment to designated specialized units, including OCCB, Internal Affairs Bureau, Detective Bureau, Special Operations Division, Intelligence Division, Traffic Control Division's Highway District, Quality Assurance Division, and Patrol Borough Staten Island Detective Operations. All candidates are tested upon application or initial or temporary assignment, and those permanently assigned remain subject to random testing. Similarly, PGP No. 205-34 provides procedures for the drug screening of members applying for discretionary promotions. These three PGPs do not define the method of testing, but, similar to PGP No. 205-29, their procedures contain references only to the collection of urine samples.

B. NYPD's Adoption of Drug Testing of Hair for All Purposes

In January 2005, NYPD informed the Unions that it wished to adopt a method of hair testing, known as radioimmunoassay of hair ("RIAH"), as an alternative to urinalysis for purposes of all drug screening. Representatives of the City and the Unions met several times to discuss NYPD's planned

implementation of RIAH drug screening. At the first meeting, on January 7, 2005, the City expressly declined to characterize the discussions as collective bargaining but described them as "information sharing." Petition, ¶ 10. The City informed the Unions that there would be no change to existing NYPD policies regarding testing triggers, due process protections, and disciplinary consequences, and asserted that the only change would be that hair would be tested rather than urine. The City offered the Unions an opportunity to speak with Psychemedics, the laboratory used by NYPD, to discuss collection, testing, and re-testing procedures. Subsequently, representatives of the Unions visited Psychemedics to discuss those matters. At a second meeting held on February 15, 2005, the Unions asked questions, raised concerns, and received additional information regarding NYPD's proposed RIAH testing procedures.

By letter to the City, dated April 21, 2005, the Unions requested an additional meeting "to continue our collective bargaining to discuss our concerns regarding hair follicle testing . . . ." This letter also elaborated on certain concerns that had been expressed by the Unions at the February 15 meeting. On April 27, 2005, the City sent the Unions a draft copy of a NYPD "Finest Message" constituting a policy on the use of hair analysis and a covering letter informing the Unions that the policy would be implemented on August 1, 2005. The City responded to the Unions' April 21 letter in a letter dated May 17, 2005, stating:

> As you know, we have met with the affected unions to discuss a number of concerns and questions regarding the Police Department's drug testing policy regarding the use of hair analysis. As a result of those meetings, we informed the Unions that we would send a corrected policy to them with at least 90 days advance notice of implementation. The policy was sent to the Unions on April 27, 2005 at which time you were informed that it would be implemented on August 1, 2005.

> To the extent you have further questions, we have set up a meeting for June 1, 2005.

The parties met again on June 1, 2005. The City addressed the matters of concern that were enumerated in the Unions' April 21 letter. The City alleges that, at this meeting, the Unions did not request that NYPD alter or change the proposed August 1, 2005, implementation of hair testing. The Unions dispute this contention, stating that they made a counterproposal that members testing positive have the opportunity to have a second sample taken and tested. The City rejected the demand for a second sample, saying that it was not needed.

The parties did not enter into a written collective bargaining agreement on the subject of their discussions concerning drug testing through the use of hair analysis. On August 1, 2005, NYPD implemented the hair testing procedures contained in the "Finest Message" that had been provided to the Unions on April 27.

C. Differences between Urine Analysis and RIAH for Drug Screening

The City states that RIAH testing has been approved by the federal Food and Drug Administration as accurate and reliable. The standard test includes detection of cocaine, marijuana, opiates, methamphetamines, ecstasy ("MDMA"), and phencyclidine ("PCP"). The primary difference between hair analysis and urine analysis is the "window of detection." Cocaine, methamphetamines, opiates, and PCP are rapidly excreted and usually are undetectable in urine 72 hours after use. In contrast, the detection period of hair analysis is limited only by the length of the hair sample and is approximately several months for a standard screen. Hair analysis has greater accuracy than urinalysis through test repetition capability. The results of RIAH testing can identify even low-level drug use. Use of hair analysis also virtually eliminates test evasion.

According to the City, the standard screen requires a cosmetically undetectable lock of hair, preferably cut from the back of the head just below the crown. Generally, the amount needed is the thickness of a shoelace tip. If a person has little hair on his or her head, hair can be collected from several locations on the head and combined to obtain the required amount. In addition, hair obtained from other parts of the body can be used as an alternative to hair from the head.

The Unions deny that they have knowledge or information sufficient to form a belief as to the truth of these facts concerning RIAH testing as alleged by the City. They do not offer any contradictory allegations of fact. The Unions point out that members subjected to RIAH screening by Psychemedics pursuant to NYPD policy are required to sign a written waiver relieving Psychemedics "from any and all liabilities arising from the testing, the reporting of results to the authorized recipients and the recipients' use thereof."

As a remedy for the City's actions, the Unions request the Board to direct the City to rescind the August 1, 2005, policy and restore the drug testing policy that existed prior to that date; bargain in good faith before implementing any change to the drug testing policy; annul any disciplinary action taken for any alleged violation of the August 1, 2005, policy and restore the disciplinary record and employment of affected individuals to a status equivalent to that which existed prior to the imposition of discipline; and post a written notice of the violation of the NYCCBL.

POSITIONS OF THE PARTIES[2]

[2] During the course of its deliberations, the Board requested the parties to submit written statements of their positions on the question of the applicability and impact, if any, of the decision of the New York Court of Appeals in *Patrolmen's Benevolent Ass'n v. Public Employment Relations Board*, 6 N.Y.3d 563 (2006), which was issued subsequent to completion of the record in this matter. The parties' responses to the Board's request have been considered in the determination of this case.

Unions' Position

The Unions argue that the Board has held that the procedures used by an employer to implement a decision to conduct drug testing of its employees are mandatory subjects of bargaining. Specifically, testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions for re-testing, and reporting and recording of test results all have been held to be mandatory subjects of bargaining. Since the duty to negotiate a mandatory subject includes the duty to negotiate until agreement is reached or impasse procedures are exhausted, the employer may not unilaterally implement a change in a mandatory subject before bargaining and/or impasse procedures have been exhausted.

According to the Unions, NYPD's implementation of RIAH testing in lieu of urine analysis will result in a vastly expanded invasion of the personal privacy of the Unions' members, thereby implicating constitutionally based interests that the prohibition against unilateral modification of mandatory subjects is designed to protect. The Unions assert:

> a) RIAH is able to test for drug use over a longer period of time, typically several months, as compared to the shorter time span for urine analysis. The Unions' members who are unable to provide a sufficient quantity of head hair for sampling are subject to an even greater impairment of privacy. The City has represented that resort to body hair will yield results for a four to six month period preceding the test. Individuals unable to provide head or body hair must submit to a particularly demeaning procedure, *i.e.*, sampling of pubic hair, which will yield results for as long as one year preceding the test. Such testing gives rise to a legitimate risk that the test results will prove stale or otherwise unrelated to the employment at issue.
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> b) There are no uniform standards governing the use of RIAH. In particular, there are no agreed-upon cut-off levels below which a test will be considered negative, in contrast to urine analysis, where uniform standards are the norm.
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> c) Additional privacy concerns are implicated by RIAH testing. Recent advances in deoxyribonucleics ("DNA") technology have made it possible to extract great amounts of information from hair bulbs, including the identification of genetic

abnormalities that may be associated with inherited diseases, susceptibilities, and traits as well as occupational and non-occupational diseases. Since the City is responsible for the cost of medical insurance and disability pension benefits for the Unions' members, it has a financial incentive to minimize the likelihood of having an employee pool with substantial health risks.

d) RIAH testing directly affects the legitimate health and safety interests of the Unions' members. Since RIAH testing was implemented on August 1, 2005, the Unions have received complaints from members who have sustained blood-letting lacerations in the course of providing body hair samples.

e) NYPD's policy does not afford individuals who test positive an opportunity to obtain a second sample that can be tested and that may impeach the reliability of an initial positive test result.

f) Implementation of RIAH testing will have a disparate impact on African American members of the NYPD. Individuals who are unable to provide a sample of one and one-half inches of head hair will be required to yield a more intrusive hair sample. Because of cultural and sociological factors, a higher percentage of African American members will be unable to yield a sufficient sample of head hair. In addition, studies show that darkly pigmented hair, characteristic of African Americans, accumulates more cocaine residue than does lighter colored hair. This "selective accumulation" of drugs in dark hair may predispose populations with dark colored hair to test positive at a higher rate in comparison to groups with brown and blond hair.

By implementing the RIAH policy on August 1, 2005, the City unilaterally modified a mandatorily bargainable term and condition of employment and, in so doing, breached its obligation to bargain in good faith, in violation of NYCCBL § 12-306(a)(4).[3]

In response to the Board's inquiry, the Unions submit that the Court of Appeals' decision in *Patrolmen's Benevolent Ass'n*, *supra*, does not affect the duty to bargain at issue in the present case.

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[3] NYCCBL § 12-306(a)(4) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:

* * *

(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 . . . .

The Court's decision involved the Police Commissioner's statutory right to impose discipline, a right that is not impacted by a demand to bargain over drug testing procedures. Drug testing procedures that are otherwise mandatorily bargainable, and the application of which would precede the point in time at which the employer exercises its right to take disciplinary action, are not rendered non-bargainable merely because a positive test result may or will lead to an exercise of the employer's disciplinary rights. The Unions do not seek to bargain disciplinary procedures here; their petition challenges only the City's unilateral change in drug testing procedures, changes that apply before any basis for discipline is determined to exist. Therefore, the Board should reject the contention that the Police Commissioner's disciplinary powers supersede the duty to bargain in this case.

City's Position

The City alleges that it provided the Unions with several months' advance notice of its planned adoption of RIAH drug screening and of the precise procedures it planned to use. It met with the Unions on at least three occasions to discuss these procedures. At each meeting the City was responsive to the Unions' questions and concerns and provided all the information they requested. The Unions did not object to the planned implementation of RIAH testing nor request that the City change any aspects of the policy. Accordingly, the City did not violate NYCCBL § 12-306(a)(4) by refusing to bargain.

The City acknowledges that this Board and the Public Employment Relations Board ("PERB") have held that the procedures used to implement a management decision to test employees for drugs are mandatorily bargainable, but argues that in the present case there has been no change in drug testing procedures that requires bargaining. NYPD randomly screened employees for drug use, tested candidates for discretionary promotion, and tested applicants to designated specialized

units prior to August 1, 2005. The only change since August 1, 2005, is that drug screening is performed through hair analysis rather than urine analysis.

Moreover, procedures for hair testing were already in place prior to August 1, 2005. Since January 1, 2001, PGP No. 205-30, entitled "Administration of Drug Screening Tests for Cause," provided procedures, to detect the presence of drugs in the urine or hair of members suspected of illegal drug use. The procedures of PGP No. 205-30 are identical to the procedures set forth in NYPD's "Finest Message" dated April 27, 2005, which were implemented on August 1, 2005. The "Finest Message" did not change any procedure relating to drug screening, including, but not limited to, testing triggers, choice of laboratory, collection procedures, chain of custody, sample screening, conditions for testing, reporting and recording of test results, due process protections, or disciplinary consequences. Therefore, the City argues, it did not fail to bargain over any change in a mandatory subject of bargaining.

Additionally, the Unions' claims concerning privacy matters and the alleged disparate impact on African American members of the NYPD are not actionable under NYCCBL § 12-306(a)(4), or determinative of whether the City had a duty to bargain.

Finally, the City argues that bargaining over drug testing procedures is foreclosed by the recent decision of the Court of Appeals in *Patrolmen's Benevolent Ass'n, supra*. Drug testing procedures and the disciplinary consequences thereof are inextricably intertwined with the Police Commissioner's disciplinary authority under the City Charter and Administrative Code. A positive test results in the service of disciplinary charges and specifications, as does a refusal to submit to testing. Therefore, in a police context, drug testing procedures are not bargainable.

For these reasons, the City asks that the improper practice petition be dismissed in its

entirety.

DISCUSSION

The issue before this Board is whether NYPD's adoption of RIAH (hair) testing as the prescribed mechanism of drug screening under circumstances in which, prior to August 1, 2005, NYPD tested only urine, constitutes a unilateral change in a mandatory subject of bargaining. For the reasons set forth below, we find that NYPD violated the NYCCBL by unilaterally changing drug testing procedures, a mandatory subject of bargaining.

It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." 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.

The leading decision in New York addressing the question whether there is a duty to bargain

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[4] NYCCBL § 12-307(a) 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 . . . .

over matters relating to employee drug testing is the decision of PERB in *County of Nassau*, 27 PERB ¶ 3054 (1994). The case involved a comprehensive drug testing program imposed unilaterally in the county's police department. The program had random testing provisions for applicants, probationary officers, and members of special bureaus, and testing upon "reasonable suspicion" for all other officers. The Union demanded bargaining over the implementation of and the procedures incident to the decision to subject employees to drug testing. PERB employed a balancing test to evaluate the interests of the county and the employees. In so doing, PERB expressly recognized a distinction between the *decision* to test and the *procedures* used to implement that decision. PERB concluded that the county's interests in deterring and preventing the impairment of police officers, which could jeopardize safety and compromise the delivery of police services, outweighed the employees' privacy and reputation interests with respect to the *decision* to conduct drug tests. PERB noted that the public employer interests had also been recognized by the Court of Appeals in a series of decisions which upheld the constitutionality of drug testing of employees in safety-sensitive positions. *Id. See DeLaraba v. Nassau County Police Dep't*, 83 N.Y.2d 367 (1994); *Selig v. Koehler*, 76 N.Y.2d 87 (1990); *McKenzie v. Jackson*, 75 N.Y.2d 995, *aff'g* 152 A.D.2d 1 (2d Dep't 1989); *Caruso v. Ward*, 72 N.Y.2d 432 (1988).

However, PERB further found that the employer's managerial interests in deciding to drug test its employees did not outweigh the employees' privacy and reputation interests with respect to procedures for the implementation of testing, including matters of testing methodology. PERB therefore held that testing procedures are mandatory subjects of bargaining. *County of Nassau*, 27 PERB ¶ 3054 at 3119-3120.

This Board similarly has considered the negotiability of aspects of an employer's decision

to subject its employees to drug testing. In *District Council 37*, Decision No. B-16-96, the union challenged a new drug and alcohol testing policy and procedure for employees in the Emergency Medical Service ("EMS") that was issued unilaterally by the employer and was alleged to contain changes in terms and conditions of employment. The Board found that the issue presented was not whether the decision to test was mandatorily bargainable, but whether the procedures used to implement that decision and the consequences of testing are mandatory subjects of bargaining. *Id.* at 13. The Board reviewed PERB's decision in *County of Nassau*, *supra*, and adopted that Board's analysis. Applying PERB's holding to the facts of the case at hand, this Board held that procedures for implementing drug testing, including testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions for retesting, and reporting and recording of test results, were mandatory subjects of bargaining. *District Council 37*, Decision No. B-16-96 at 14-15. Because the Board found that there were questions of fact concerning whether the procedures were changed by the challenged EMS policy, it ordered that a hearing be held.

In *Communications Workers of America, Local 1182*, Decision No. B-47-98, the union challenged NYPD's unilateral promulgation of a new drug testing procedure. The union noted particularly changes regarding the addition of hair testing to the previous policy of urine testing, and the elimination of choice of laboratory for retesting positive samples. Relying on *County of Nassau*, *supra*, and *City of Utica*, 25 PERB ¶ 4641 (1992), and its own interim decision in *District Council 37*, Decision No. B-16-96, the Board reiterated that the procedures and consequences associated with management's decision to implement a drug testing policy are mandatorily bargainable. The Board specifically held that choice of laboratory for retesting positive samples is a bargainable procedure. *Communications Workers of America, Local 1182*, Decision No. B-47-98 at 7-8. The Board did not

rule on the addition of hair testing to the procedure. Apparently, the union sought only to bargain over procedures for retesting positive hair samples, but did not object to the addition of hair testing to the existing testing methodology.

In *District Council 37*, Decision No. B-25-2001, NYPD unilaterally issued an order that broadened the definition of "prohibited substances" under its drug policy to encompass lawful, commercially available products, that may produce a positive result in a drug test. The order provided that the ingestion of any of these lawful substances cannot be used as a defense to a positive test result. Reviewing the union's challenge to this order, the Board stated that while NYCCBL § 12-307(b) reserves to management certain rights, including the right to take disciplinary action against its employees, the management rights clause does not affect the right of a union to bargain over procedures for review and appeals of disciplinary action. *Id.* at 6-7 (*citing District Council 37*, Decision No. B-3-73 at 8-11).[5] The Board found that since the order altered disciplinary procedures relating to drug testing by precluding employees from raising a previously valid affirmative defense at a disciplinary hearing, it was improper for the employer to implement this procedural change without bargaining.

In *Local 1182, Communications Workers of America*, Decision No. B-26-2001, the union

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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; 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. . . .

challenged NYPD's action in testing a Traffic Enforcement Agent's fingernails as part of a drug test. Previously, only urine and hair samples were tested. The City argued that it only tests fingernails when it is unable to obtain adequate urine and hair samples. The Board reiterated that procedures and consequences associated with management's decision to implement a drug testing policy are mandatorily bargainable because they relate to terms and conditions of employment. The Board found that the existing drug testing procedure provided in great detail the method of collecting hair and urine samples, the amount or number that must be collected, the procedure for maintaining these samples, and the method by which samples which test positive are retested. The procedure did not, however, mention or discuss testing fingernails or any bodily substance other than an individual's hair and urine. Therefore, the Board concluded that testing the employee's fingernails represented a unilateral change in a mandatorily bargainable procedure. (The Board declined to order that disciplinary charges against the employee be dismissed, since he also tested positive for drugs in a urine test given at the same time as the fingernail test.)

In the present case, this Board finds that even if NYPD's procedures for hair testing are the same as applied to a subset of employees already subject to such testing, the expansion of the categories of employees to whom the procedures now are applied constitutes a unilateral change in drug screening procedures. The City's argument that there has been no change in drug testing procedures that requires bargaining is based on the fact that procedures for hair testing were already in place prior to August 1, 2005. Since January 1, 2001, PGP No. 205-30 provided procedures to detect the presence of drugs in the urine or hair of members suspected of illegal drug use . The City submits that the procedures of PGP No. 205-30 are identical to the procedures that were implemented for all drug screening on August 1, 2005. Nevertheless, it is undisputed that the

delineation of categories of employees to whom hair testing is applied has changed.

The record shows that, prior to August 1, 2005, hair testing was used for two categories of members of the NYPD: those for whom there was a "reasonable suspicion" of illegal drug use, pursuant to PGP No. 205-30, and probationary officers subject to an end-of-probation medical examination.[6] Random (not for cause) drug screening of members, generally, as well as drug screening incidental to application and/or assignment to designated specialized units, and for applicants for discretionary promotion, pursuant to PGP Nos. 205-31, 205-32, 205-33, and 205-34, was conducted by urine analysis alone. The procedures set forth in these PGPs do not expressly define the method of testing but refer only to the collection of urine samples. The City has expressly acknowledged that screening in these situations previously was conducted by urine analysis. Answer, p.4.

We find that the expansion of hair analysis to broad categories of members of the NYPD who were not previously subject to that form of testing constitutes a change in the applicable drug screening procedures. That the newly-applicable hair testing procedures allegedly are the same as the procedures already applicable to *other* categories of members, *e.g.*, those as to whom there is a reasonable suspicion of drug use and those completing probation, does not negate the fact that, as to all other members of the police force, this is a new procedure that should not have been imposed unilaterally.[7] This unilateral change constitutes a failure to bargain in good faith in violation of

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[6] In addition, PGP No. 205-35 provides for testing of urine and hair samples of members who request voluntary drug screening. The Unions assert that, in practice, voluntary drug screening has been conducted by only urine analysis. Given the other undisputed evidence in this matter, the Board need not resolve this discrepancy.

[7] Any suggestion that all existing members of the force have already been subject to RIAH (continued...)

NYCCBL § 12-306(a)(4). When an employer violates its duty to bargain in good faith, there is also a derivative violation of §12-306a(1) of the NYCCBL.[8] *District Council 37*, Decision No. B-20-2003 at 5-6; *Uniformed Sanitation Chiefs Ass'n*, Decision No. B-32-2001 at 8.

We have considered the argument that drug testing procedures involved here are so intertwined with the disciplinary powers of the Police Commissioner as to foreclose bargaining, even though drug testing procedures are otherwise a mandatory subject. This argument is based on the City's interpretation of the holding of the Court of Appeals in *Patrolmen's Benevolent Ass'n v. Public Employment Relations Board*, 6 N.Y.3d 563 (2006). In that case, the Court stated that it was required to confront:

> a tension between the "strong and sweeping policy of the State to support collective bargaining under the Taylor Law" . . . and a competing policy – here, the policy favoring strong disciplinary authority for those in charge of police forces. We have

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[7](...continued)
testing upon completion of probation is not supported by the record herein. The earliest documented use of hair testing was in 2000, pursuant to several PGPs issued at that time. The City's allegation that hair testing has been used for probationary police officers (Answer, ¶ 50), though undisputed, is unsupported by reference to any document that specifies a date such testing commenced. The draft "Finest Message" sent to the Unions in April 2005 (Answer, Exh. 8, ¶ 3) asserted, without citation to authority, that probationers had been subject to hair drug screening since 1996. Assuming the accuracy of that message, there is no basis in the record to find that probationary police officers were subject to hair testing prior to 1996. Accordingly, there is no evidence that members of the force hired prior to 1996 were ever subject to hair testing as probationers.

[8] Section 12-306(a) of the NYCCBL 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;
* * *
Section 12-305 of the NYCCBL provides:
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.

> held that the policy of the Taylor Law prevails, and collective bargaining is required, where no legislation specifically commits police discipline to the discretion of local officials . . . [Citations omitted].

6 N.Y.3d at 3. The Court went on to state that,

> the scope of collective bargaining may be limited by "'plain and clear, rather than express, prohibitions in the statute or decisional law'" or "in some instances, by 'public policy . . . whether explicit or implicit in statute or decisional law, or in neither'" [Citations omitted].

6 N.Y.3d at 4. The Court found that Section 434 (a) of the New York City Charter[9] and § 14-115 (a) of the New York City Administrative Code[10], which were based on previously-existing State law,

> reflect the policy of the State that police discipline in New York City is subject to the Commissioner's authority.

6 N.Y.3d at 5. On this basis, the Court concluded that these provisions of law expressed a policy so important that the policy favoring collective bargaining should give way. Accordingly, it held that disciplinary procedures for police officers, otherwise mandatorily bargainable under the Taylor Law, are excluded from the scope of bargaining for members of the New York City Police Department. 6 N.Y.3d at7.

We note that this recent ruling by the Court is consistent with the earlier decisions of this Board on the same question. The Board has recognized that certain statutes may remove from bargaining particular subjects that might otherwise be mandatorily negotiable. Specifically, we have

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[9] § 434 provides, in relevant part:
a. The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.

[10] § 14-115 provides, in relevant part:
a. The commissioner shall have power, in his or her discretion, . . . to punish the offending party . . . .

construed Charter § 434 and Administrative Code § 14-115 as restricting bargaining on the issue of disciplinary procedures for City police officers. *Patrolmen's Benevolent Ass'n* Decision No. B-12-2004 at 25-26, *aff'd, Patrolmen's Benevolent Ass'n v. NYC Board of Collective Bargaining* , No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005)(changes in police disciplinary procedures not bargainable); *Sergeants Benevolent Ass'n*, Decision No. B-22-98 at 20 (refusal to continue a police disciplinary procedure not an improper practice).

Nevertheless, we are not persuaded that that the drug testing procedures at issue here involve elements of the exercise of disciplinary power. The procedural matters raised by the Unions, specifically, testing methodology, choice of laboratory, collection procedures, chain of custody, sample screening, conditions for re-testing, and reporting and recording of test results, are not implicit parts of the disciplinary process. As the Unions point out, the procedures for drug testing are utilized before any basis for discipline is determined by the Commissioner to exist. It has not been shown that any drug testing procedures that may be negotiated will affect either the Police Department's standards of conduct nor the procedures for the imposition of discipline on those who violate those standards. As we have stated above, the decision to conduct drug testing, like the decision to impose discipline, is a management right that is not subject to bargaining; but we find here that, unlike the matter of discipline, there is no statutory or policy basis to remove the procedures by which drug testing is to be conducted from within the scope of mandatory collective bargaining.

The City argues in its defense that even if drug testing procedures are bargainable, it gave advance notice of the impending change to the Unions and met with them on at least three occasions to discuss the new procedures. While the City does not overtly characterize these meetings as

collective bargaining and allegedly described the first session as "information sharing," it concludes that it did not violate its duty to bargain. We disagree. The duty to negotiate a mandatory subject 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 subject 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. B-4-99 at 10; *Communications Workers of America*, Decision No. B-47-98 at 6.

Even if the meetings between the City and the Unions can retroactively be deemed to constitute "bargaining," there is no persuasive evidence that an agreement was reached. The City's contention that the Unions did not request that NYPD alter or change the proposed hair testing procedures is belied by the undisputed fact that the Unions requested that the procedure grant an opportunity for an additional test for members who test positive, which request was dismissed by the City on the grounds that there was "no need" for an additional test. Answer, ¶ 72. The fact that the Unions may not have expressly "objected" to other parts of the City's proposed procedures does not equate with the Unions' agreement with the proposal, particularly in light of the position taken by the City in the meetings that it was not "bargaining."

The parties have argued at length regarding the asserted greater accuracy and expanded window of detection; and the potentially greater intrusiveness, safety concerns, and disparate impact of RIAH testing as opposed to urine analysis. We believe that these issues, serious though they may be, concern the merit and advisability of the City's proposed changes and not the negotiability of this subject. Therefore, they need not be addressed in determining whether there is a duty to bargain in this case. Moreover, we note that to the extent the Unions' arguments raise issues based on rights

alleged to arise under the Constitution and other laws outside of the NYCCBL, they will not be considered by this Board. Our authority does not extend to the administration of any statute other than the NYCCBL; a union may not seek redress in this forum for the alleged violation of the rights of its members arising under other statutes. *District Council 37*, Decision No. B-7-2004 at 20; *Flood*, Decision No. B-5-97 at 7; *Local 1182, Communications Workers of America*, Decision No. B-8-96 at 10.

In summary, this Board concludes that the drug screening plan implemented by NYPD on August 1, 2005, constituted a change in drug testing procedures, a mandatory subject of bargaining, and that the City failed to bargain to the point of agreement with the Unions before unilaterally imposing the changes. This action was violative of NYCCBL § 12-306(a)(1) and (4). There is no statutory or policy basis that supersedes the duty to bargain this subject. Therefore, we order the City to rescind the changes to the drug screening procedures implemented on August 1, 2005; restore the drug screening procedures that existed prior to that date; and bargain in good faith with the Unions before implementing any change to the procedures for drug screening. We will also order NYPD to post the attached notice, for no less than thirty days, at all locations used for written communications with employees represented by the Unions. However, in the absence of specific evidence concerning discipline imposed on any members as a result of the changed procedures, we do not find that annulment of any discipline, or the expungement of any disciplinary records, as requested by the Unions, is warranted.

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, Docket No. BCB-2502-05, filed by the Detectives Endowment Association, the Patrolmen's Benevolent Association, and the Sergeants Benevolent Association against the City of New York and the New York City Police Department, be, and the same hereby is, granted; and it is further

DETERMINED, that the New York City Police Department has violated NYCCBL § 12-306(a)(1) and (4) by making a unilateral change in drug screening procedures, a mandatory subject of bargaining; and it is further

ORDERED, that the New York City Police Department rescind the changes in drug screening procedures implemented on August 1, 2005; restore the drug screening procedures in effect prior to that date; and cease and desist from implementing changes in drug testing procedures until such time as the parties negotiate such changes; and it is further

ORDERED, that the New York City Police Department post the attached notice for no less than thirty days at all locations used by the Department for written communications with employees represented by the above unions.

Dated: December 4, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

BRUCE H. SIMON
MEMBER

I dissent for the reasons set forth in my dissent in *Captains Endowment Association*, Docket No. BCB-2514-05, decided herewith (Decision No. B-38-2006).

ERNEST F. HART
MEMBER

Note: City Member M. David Zurndorfer recused himself and did not participate in the decision in this case.

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 in the matter of *Detectives Endowment Association, et al. Decision No. B-37-2006* (Docket No. BCB-2502-05):

The New York City Police Department committed an improper practice when it made a unilateral change in drug screening procedures, a mandatory subject of bargaining.

It is hereby:

ORDERED, that the improper practice petition, Docket No. BCB-2502-05, filed by the Detectives Endowment Association, the Patrolmen's Benevolent Association, and the Sergeants Benevolent Association against the City of New York and the New York City Police Department, be, and the same hereby is, granted; and it is further

DETERMINED, that the New York City Police Department has violated § 12-306(a)(1) and (4) by making a unilateral change in drug screening procedures, a mandatory subject of bargaining; and it is further

ORDERED, that the New York City Police Department rescind the changes in drug screening procedures implemented on August 1, 2005; restore the drug screening procedures in effect prior to that date; and cease and desist from implementing changes in drug testing procedures until such time as the parties negotiate such changes.

New York City Police 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.