Captains Endowment Association, 77 OCB 38 (BCB 2006)

[Decision No. B-38-2006] (IP) (Docket No. BCB-2514-05), **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: Union 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 and the unilateral selection of testing laboratory constitute unilateral changes in drug screening procedures, which are mandatory subjects 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-

CAPTAINS ENDOWMENT ASSOCIATION,

Petitioner,

- and -

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

Respondents.

DECISION AND ORDER

On November 7, 2005, the Captains Endowment Association ("CEA" or "Union") filed a verified improper practice petition against the City of New York and the Police Department ("City" or "NYPD"). The Union alleges 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 CEA members, and subsequently unilaterally changing the laboratory used to conduct the drug tests. The City contends that it gave the Union advance notice and met with its representatives 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. The Board further finds that the selection of the laboratory that will perform drug screening is an aspect of procedures for the implementation of drug testing that cannot be changed unilaterally. Accordingly, the Board grants the Union's petition.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows. The background facts in this case are virtually identical to those adduced in *Detectives Endowment Ass'n*, Docket No. BCB-2502-05, decided by the Board this same day, and described in detail in our determination therein, Decision No. B-37-2006. In the interest of avoiding unnecessary repetition, the background facts set forth in the decision in that companion matter are incorporated by reference herein, except as supplemented below.

In summary, the essential facts are that prior to August 1, 2005, NYPD implemented random drug testing of uniformed members of the police force solely through urine analysis. At the same

time, drug testing of members based on "reasonable suspicion" and testing of members completing probationary periods were implemented using a method of hair testing known as radioimmunoassay of hair ("RIAH"), instead of or in addition to urine analysis. In January 2005, NYPD informed the various police unions, including CEA, that it intended to adopt RIAH testing for all drug screening. Representatives of the City and the unions met several times to discuss NYPD's planned implementation of RIAH drug screening. The City expressly declined to characterize the discussions as collective bargaining but described them as "information sharing." 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 parties did not enter into a written collective bargaining agreement concerning drug testing through the use of hair analysis. 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. On August 1, 2005, NYPD implemented the hair testing procedures that had been provided to the unions.

Supplemental Facts

When, in early 2005, NYPD informed the CEA and other unions of its intention to use RIAH testing for all drug screening, it designated Psychemedics as the laboratory it would use for hair analysis. NYPD offered the unions an opportunity to meet with Psychemedics to discuss collection, testing, and re-testing procedures and the unions did so. It was represented that Psychemedics was approved by the United States Food and Drug Administration and had expertise in taking hair samples from different parts of the body, depending on the circumstances. Psychemedics performed hair testing under the procedure implemented by NYPD on August 1, 2005, through the time the

instant petition was filed.

Thereafter, on or about January 2006, NYPD changed laboratories without informing the unions. Psychemedics was replaced by Quest Laboratories for the performance of RIAH testing. CEA believes that Quest Laboratories does not have the same licensing and/or government agency approvals as Psychemedics, but the City has not informed CEA of any differences between the qualifications and certifications of the two laboratories.

As a remedy for the City's actions, CEA requests 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[1]

Union's Position

The Union points out 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 have been held

[1] 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). The parties' responses to the Board's request have been considered in the determination of this case.

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.

CEA asserts that since the outcome of drug screening tests can affect an employee's employment and may affect the employee's reputation irrevocably, drug screening is a process that triggers personal privacy issues of Constitutional dimension. RIAH testing also directly affects the legitimate health and safety interests of CEA's members. Since RIAH testing was implemented on August 1, 2005, the Union has received complaints from members who have sustained blood-letting lacerations in the course of providing body hair samples. Further, NYPD's implementation of the hair testing policy does not afford individuals who test positive a sufficient opportunity to obtain a second probative sample that can be tested and that may impeach the reliability of an initial positive test result.

Finally, 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, and subsequently, in January 2006,

changing the laboratory designated to perform the RIAH tests, the City unilaterally modified mandatorily bargainable terms and conditions of employment and, in so doing, breached its obligation to bargain in good faith, in violation of NYCCBL § 12-306(a)(4).[2]

In response to the Board's inquiry, the Union asserts 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. 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 Union does not seek to bargain disciplinary procedures here; its 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 Union 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 Union on at least three occasions to discuss these procedures. At each meeting, the City was

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[2] 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 . . . .

responsive to the Union's questions and concerns and provided all the information it requested. The CEA 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 that date 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, written NYPD policy, 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. Those procedures 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, according to the City, the Union's claims concerning privacy matters and the

alleged disparate impact on African American members of the NYPD are neither actionable under NYCCBL § 12-306(a)(4) nor 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 primary issue in this case 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. This Board has addressed, analyzed, and determined this precise issue in a virtually identical case brought by other police unions, *Detectives Endowment Association*, Decision No. B-37-2006 (Docket No. BCB-2502-05), which we decide this same day. The rationale and holding we state there is equally applicable to the present case, which arises out of the same facts. As in that case, we find that NYPD violated the NYCCBL by unilaterally changing drug testing procedures, a mandatory subject of bargaining.

Here, as in *Detectives Endowment Association*, it is undisputed that NYPD's delineation of categories of employees to whom hair testing is applied has changed. 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 and probationary officers subject to an end-of-probation medical examination. 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, was conducted by urine analysis alone. That the testing procedures implemented on August 1, 2005, for *all* drug testing allegedly are the same as the procedures previously applicable to limited categories of members, *i.e.*, 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. Therefore, for the reasons stated in *Detectives Endowment Association*, Decision No. B-37-2006, 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.[3] Consequently, we find that NYPD violated § 12-306(a)(4) of the NYCCBL by unilaterally changing drug testing procedures, a mandatory subject of bargaining, in violation of its duty to bargain in good faith.

[3] Any suggestion that all existing members of the force have already been subject to RIAH 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, ¶ 41), 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.

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

The instant matter presents additional facts which occurred subsequent to the completion of the record in *Detectives Endowment Association*, and which pose a further question for our determination: whether a change in testing laboratory is encompassed within mandatorily bargainable drug testing procedures. We find that it is.

Both this Board and PERB have stated that the choice of laboratory to perform drug testing is a bargainable procedure for the implementation of the employer's decision to test. *Communications Workers of America, Local 1182*, Decision No. B-47-98 at 7; *District Council 37*, Decision No. B-16-96 at 14-15; *County of Nassau*, 27 PERB ¶ 3054, at 3119-3120 (1994); *see City of Utica*, 32 PERB ¶ 4570 at 4737 (1999)(ALJ decision). Most directly on point, in *Communications Workers of America*, *supra*, NYPD issued an order limiting the re-testing of positive hair samples to the original laboratory utilized by the department, while previous policy had permitted the employees to have the sample tested at an independent lab of their choosing. This Board, relying on the decisions in *District Council 37* and *County of Nassau*, held explicitly that choice of

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[4] 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.

laboratory is a mandatory subject of bargaining and that the order issued by NYPD was a unilateral change which constituted an improper practice. Decision No. B-47-98 at 7-8. That holding is dispositive of the additional question raised in the instant matter.

Here, CEA's reply suggests that the laboratory used by NYPD from the August 1, 2005, date of implementation of the challenged drug screening policy through the end of 2005 may have gone out of business. If so, though this would necessitate the selection of a new laboratory, it would not excuse NYPD's unilateral choice of a new laboratory without bargaining with the Union. Accordingly, we find that the City violated its duty to bargain, in violation of NYCCBL § 12-306(a)(1) and (4).

As in the companion case of *Detectives Endowment Association*, 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). There, based on the Police Commissioner's statutory disciplinary powers under Section 434 (a) of the New York City Charter[5] and § 14-115 (a) of the New York City Administrative Code,[6] the Court held that disciplinary procedures for police officers, otherwise

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[5] § 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.

[6] § 14-115 provides, in relevant part:
a. The commissioner shall have power, in his or her discretion, . . . to punish the offending party . . . .

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 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.

To remedy the City's violations, 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 Union before implementing any change to the procedures for drug screening. We 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 Union. However, the Union did not submit specific evidence concerning discipline imposed on any members as a result of the changed procedures; therefore we find no basis to warrant the annulment of any discipline or the expungement of any disciplinary records, as requested by the Union.

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-2514-05, filed by the Captains Endowment 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 Union.

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. M. DAVID ZURNDORFER
MEMBER

I dissent. ERNEST F. HART
MEMBER

Dissent of M. David Zurndorfer and Ernest F. Hart
In Docket No. BCB 2514-05

We dissent. The Board's Decision ignores the fact that the challenged procedures concerning the use of hair testing to detect use of unlawful drugs have been in effect for many years, and, in addition, it cannot be reconciled with the recent Court of Appeals decision in *Patrolmen's Benevolent Association v. Public Employment Relations Board*, 6 N.Y.3d 563, 815 N.Y.S.2d 1 (2006).

I. The NYPD has not changed the procedures for hair testing for drugs.

At issue in this case is whether the NYPD committed an improper practice in using hair analysis to detect the use of drugs as part of its random testing program. As the Board acknowledged, the NYPD has had Patrol Guide Procedures in effect since at least January 1, 2000, that spell out the procedures for hair testing, 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. (Dec., pp. 2-3)[1]

Thus, whatever interest the Union may have concerning the scientific validity of the procedures for gathering, preserving and testing hair samples, the identity of the laboratories, and the laboratory protocols, these concerns have all been satisfied.

Nevertheless, the Board concludes 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." (Dec., p. 17) This statement is incorrect, both factually and legally. Every member represented by the Union has already been subject to drug testing using the more accurate hair sample procedure. The hair testing procedure has been used for both end-of-probation and reasonable suspicion testing, and has been available for voluntary drug screening. (Dec., pp. 2-3) As every employee undergoes "an end-of-probation medical examination that include[s] drug screening using *hair* samples," (Dec., p. 3), and is at least potentially the subject of reasonable suspicion and voluntary drug testing using hair samples, these testing procedures were applicable to everyone.[2]

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[1] The facts set forth in Detectives Endowment Ass'n, Docket No. BCB-2502-05 ("DEA decision") have been incorporated into the decision in this case by reference and the legal analysis in the two cases is virtually identical. For the sake of simplicity, this Dissent quotes from and cites to the text of the DEA decision ("Dec., p. __").

[2] The Board's assertion that some current members may not have received an end-of-probation hair test is not relevant to the question whether the procedures already in effect must be bargained again. Even those members who may not have already undergone the hair testing procedure are subject to that procedure in the event of a reasonable suspicion test or a voluntary test.

In sum, there has been no material change either in the categories of persons who were subject to hair testing for drugs, nor in the procedures and protocols followed in such testing. All that has changed is the relative frequency with which the NYPD uses hair testing as opposed to urine testing, where the employees were already subject to testing with both procedures and where the procedures themselves were already well-established.

None of the cases discussed at pages 12 to 16 of the Decision address this situation. Accepting for the moment the proposition that the cases require that a decision to implement a new drug testing procedure (either by adopting a new procedure or by extending an existing procedure to employees who had not previously been subject to it) constitutes a mandatory subject of bargaining, these cases do not apply to the situation here.[3] In this case, the NYPD already has in place two valid testing procedures and simply wants to use one test more and the other test less. Apart from a general desire to be able to use illegal substances without getting caught (an interest that is obviously not entitled to legal protection), the Union has not identified any legally recognizable interest that makes this fluctuation in relative frequency of use of existing procedures a separately bargainable subject.

In analogous circumstances, this Board and PERB have repeatedly held that the unilateral implementation of more accurate processes does not violate the employer's bargaining obligations where the change "does not materially alter the petitioners' terms and conditions of employment." *CWA*, BCB No. B-62-88 (1988) (unilateral implementation of mechanical time clocks). *See also CSEA Local 1000 (Office of Mental Retardation & Developmental Disabilities)*, 36 N.Y.P.E.R. (LRP) ¶ 4595 (2003) (bargaining not required for unilateral change in process for employees purchasing gas for state vehicles, requiring employee to enter a PIN based on a portion of his social security number); *Stony Point PBA*, 26 N.Y.P.E.R. (LRP) ¶ 4650 (1993) (unilateral implementation of a new patrol log requirement, including more accurate time details, did not represent a "material alteration in the degree of employee participation"); *Local 1931, Bridge & Tunnel Maintainers (TBTA)*, 21 N.Y.P.E.R. (LRP) ¶ 4561 (1988) ("mere substitution of one manner of employee participation for another does not constitute a change in terms and conditions of employment"; bargaining not required).

The National Labor Relations Board has reached the same conclusion. *See Bath Iron Works Corp.*, 302 N.L.R.B. 898 (1991) (unilateral implementation of drug testing, where only alcohol testing had previously been performed under substance abuse policy that referenced both drugs and alcohol, did not constitute an unlawful refusal to bargain; mere change in methodology of implementation of existing policy was not a material change in terms or conditions of employment); *Rust Craft Broad. of N.Y., Inc.*, 225 N.L.R.B. 327 (1976) (unilateral change from handwritten time cards to time clocks did not constitute an unlawful refusal to bargain even though the new procedure was substantially more accurate, where the underlying rule remained intact; the employees did not have a legally protected interest in maintaining the less accurate method of recordkeeping).

In this case, the NYPD formerly required the employees represented by this Union to provide a urine sample in some circumstances and a hair sample in other circumstances. Now,

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[3] For the reasons discussed in Point II, the proposition that mandatory bargaining applies to any aspect of the Police Department's drug testing process is also incorrect.

the hair sample procedure will be used in more circumstances than before. No employee will be subject to hair testing who could not have been tested using that process under the former protocols. The substances that may be tested for have not been changed. The testing procedures have not been changed. The circumstances in which testing may be conducted have not been changed. Unless the words are stretched beyond all meaning, there has been no material change in the employees' "terms and conditions of employment."

It is true that the hair testing process is more accurate, so it is possible that an officer who has used an unlawful substance will be caught using the hair testing procedure when he or she would have escaped detection using the urine testing procedure. Escaping detection, however, is not itself a legally protected "term" or "condition" of employment. Under established principles, therefore, changing the frequency of use of existing procedures is not an improper practice.

II. The Police Commissioner's statutory authority over departmental discipline supersedes any bargaining obligation.

The Board's Decision is fundamentally irreconcilable with the Court of Appeals' March 2006 decision in *Patrolmen's Benevolent Association v. PERB*, 6 N.Y.3d 563, 815 N.Y.S.2d 1 (2006). The Court there held that New York City Police Commissioner's statutory responsibility for "cognizance and control of the . . . discipline of the department" superseded the obligation to bargain. *Id.* at 576, 815 N.Y.S. at 5, *quoting* New York City Charter § 434(a). Specifically, the Court said, "[t]he New York City Charter and Administrative Code . . . state the policy favoring management authority over police disciplinary matters in clear terms. . . . These legislative commands are to be obeyed even where the result is to limit the scope of collective bargaining." *Id.* at 576, 815 N.Y.S.2d at 4-5.

Applying these principles, the Court of Appeals held that, among others, proposals concerning the conduct of departmental investigations of possible misconduct constitute prohibited subjects of bargaining. One of the proposals found to be prohibited addressed the NYPD's "guidelines" for interrogating police officers. Another related to the subject of an officer's opportunity to confer with counsel before he or she could be questioned by the Department concerning an incident that the officer witnessed. Both of these provisions (among others) were contained in the expired collective bargaining agreement and the PBA had merely proposed their continuation.

The Court's decision affirmed the Recommended Ruling and Decision of PERB Administrative Law Judge Philip L. Maier. The ALJ's decision, holding that these proposals were prohibited subjects, concluded in pertinent part, as follows:

> [T]he procedures for investigations are reserved to the discretion of the Commissioner by virtue of the special law enactments.
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> * * *
>
> The interrogation of police officers is an essential aspect of the disciplinary process. The Code specifically reserves to the Commissioner's discretion the right to determine the manner of an investigation. This demand therefore falls plainly with the realm

> of the Commissioner's power, and is a prohibited subject of bargaining. 35 N.Y.P.E.R. (LRP) ¶ 6603 (2002).

The ALJ's decision relied on Section 434(a) of the New York City Charter and Section 14-115 of the New York City Administrative Code. Section 14-115 of the Code expressly authorizes the Police Commissioner to investigate, and to determine the manner of investigating, police misconduct:

> Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner or one of his or her deputies upon such reasonable notice to the member or members charged, ***and in such manner or procedure, practice, examination and investigation*** as such commissioner may, by rules and regulations, from time to time prescribe.

N.Y.C. Admin. Code § 14-115(b) (emphasis added).

The Court of Appeals' decision affirming this determination cited with approval the First Department decision in *City of New York v. MacDonald*, 201 A.D.2d 258, 607 N.Y.S.2d 24 (1st Dep't), *appeal denied*, 83 N.Y.S.2d 759, 615 N.Y.S.2d 876 (1994). There, the court held that a demand for arbitration of disciplinary actions was a prohibited subject of bargaining, noting specifically the "legislative intent and public policy to leave the disciplining of police officers, including the right to determine guilt or innocence of breach of disciplinary rules . . . to the discretion of the Police Commissioner." *Id.* at 259, 607 N.Y.S.2d at 25.

Consistent with the rule enunciated by the courts, this Board has previously held that the Fire Commissioner's "'decision to take disciplinary action and ***the preliminary investigation*** of an employee which may result in a decision to take such action ***are matters of management prerogative*** under § 12-307b. of the NYCCBL.'" *Uniformed Fire Officers Assn. Local 854*, Decision No. B-25-96 at 11 (1996) (upholding unilateral issuance of revised substance abuse policy by Fire Commissioner, who has essentially the same statutory responsibility for the discipline of the department as the Police Commissioner) (emphasis added, footnote omitted).

In sum, it is clear under the Court of Appeal's decision in *Patrolmen's Benevolent Association* that the Commissioner's authority over matters of discipline includes the selection of the tools to be employed in the investigation of disciplinary issues. To the extent that any of the decisions cited in the Board's Decision are to the contrary, it must be noted that they all predate the Court of Appeals' decision, and none of them address the impact of the Police Commissioner's statutory responsibility over disciplinary matters. It is questionable, therefore, whether the distinction they purport to find between a decision to test for drugs (not mandatory) and the procedure to be utilized to test for drugs (mandatory) could now be sustained in those jurisdictions such at the City of New York which have a special or local law relating to police discipline.

The Board's decision attempts to distinguish the *Patrolmen's Benevolent Association* case on the grounds that "the drug testing procedures at issue here [do not] involve elements of the exercise of disciplinary power" because these procedures "are utilized before any basis for discipline is determined by the Commissioner to exist." (Dec. p. 20) However, this purported distinction cannot be reconciled with the Court of Appeals' decision. Among the proposals held to be prohibited subjects of bargaining by the Court of Appeals were proposals that concerned the conduct of departmental investigations of possible misconduct. These investigatory procedures are necessarily utilized before the Commissioner determines that there is any basis for discipline. The result of an investigation may be a conclusion that no misconduct occurred or a determination that misconduct occurred and disciplinary action is warranted. Similarly, the Commissioner's random drug tests are conducted for the purpose of investigating the possible misconduct of officer use of an illicit drug. As a result of the test, it may be determined that no such misconduct occurred; or the test result may establish that misconduct occurred — that the officer had used an illicit drug — and that disciplinary action is warranted. The investigatory procedures utilized — whether interrogation procedures or biochemical assays — are an element of the Commissioner's disciplinary decisions, and as such, under the *Patrolmen's Benevolent Association* case, are not proper subjects of bargaining.

Thus, the distinction that the Board's Decision articulates and relies upon is pure semantics. One simply cannot separate random drug testing from the resulting discipline. Random drug testing is utilized to investigate and detect the misconduct at issue; and detecting that misconduct is the sole purpose for giving the random test. To say that the Commissioner has the authority to take disciplinary action for drug use but not the authority to ascertain who is using drugs is simply nonsensical.

Furthermore, the instant charge could just as well have been filed on behalf of an officer who had been terminated for failing the random hair test that is at issue in this case. In that circumstance, it would be clear that the test was an element of the Commissioner's exercise of his disciplinary power, and the testing procedure would therefore clearly be a prohibited subject of bargaining under the Court of Appeals' decision. But surely the result of this case cannot turn on whether the charge was filed before or after an officer was disciplined as a result of a random drug test.

In any event, it is not necessary for the Board to reach this issue. The very narrow question presented here is whether the New York City Police Department can choose which of the two drug testing procedures already in place to use in any particular situation. Under *Patrolmen's Benevolent Association*, that question must be answered in the affirmative. In light of the Court's decision in that case affirming PERB's determination that the Commissioner's authority over discipline includes "the right to determine the manner of an investigation," the choice among existing investigatory tools to uncover drug abuse must surely be a prohibited subject of bargaining.

III. Conclusion.

The Board Decision mischaracterizes the nature of the NYPD's challenged action and fails to take into account the recent pronouncement of the Court of Appeals. On a more basic level, the Decision is intuitively wrong. A motorist pulled over for speeding would not be able to

escape punishment with the argument that the police never patrolled that stretch of road before. The police would not accept that faulty logic from the public, and the public should not accept equally faulty arguments from the police.

Police who use illegal substances have no legally protected right to get away with it. Here, the City has for years had in place — and all of the employees represented by this Union have been subject to — two drug testing procedures. The decision to shift from predominant use of one test to predominant use of the other plainly does not constitute a material change in terms or conditions of employment, and it is clearly an exercise of the Commissioner's authority over discipline. The NYPD has not committed an improper practice.

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 *Captains Endowment Association, Decision No. B-38-2006* (Docket No. BCB-2514-05):

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-2514-05, filed by the Captains Endowment 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.