District Council 37, AFSCME, 77 OCB 8 (BCB 2006)

[Decision No. B-8-2006(IP)] (Docket No. BCB-2491-05).

Summary of Decision: The Union claimed that the Department of Transportation was required to bargain over the issuance of a policy concerning cell phone use by members working on road construction and repair. The City argued that the subject is not mandatory, or, even if it were, DOT's interests concerning safety outweighed those of the employees. This Board found that the use of cell phones in this case is a mandatory subject of bargaining and that the unilateral issuance of the Policy violated NYCCBL § 12-306(a)(1) and (4). ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME,

Petitioner,

-and-

THE CITY OF NEW YORK AND THE NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On July 13, 2005, District Council 37 ("Union" or "DC 37") filed a verified improper practice petition against the City of New York and the New York City Department of Transportation ("City" and "DOT") alleging that DOT violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it unilaterally issued a policy concerning use of cell phones in the workplace. The City argues that no bargaining is required over this subject. This Board finds that the use of personal cell phones

by employees working in the field is a mandatory subject of bargaining, and, accordingly, we grant the petition.

BACKGROUND

On March 14, 2005, DOT issued the Roadway Repair and Maintenance Personal Cell Phone Policy ("Policy"). The Policy reads:

> • All personal cellular phones shall be kept off at all times during working hours.
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> • Personal cell phone use shall be limited to authorized off duty/break time.
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> • In the event of an emergency situation, calls to employees should be placed directly to the unit's dispatch office and will be relayed to the employee by the immediate supervisors. (See attached RR&M Emergency List)
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> This policy takes effect immediately.
>
> Employees who are found in violation of this policy will be subject to disciplinary action.

This was the first written policy concerning cell phones for DC 37 unit members working in the field for DOT. On April 13, 2005, DC 37 sent a letter to the Assistant Commissioner for Human Resources at DOT requesting a labor-management meeting to discuss the Policy; however, according to the Union, management did not respond.

The City states that DOT's Roadway Repair and Maintenance Division is responsible for the maintenance, repair, and construction of the city's bridges and roadways. The work includes, among other tasks, milling and paving city streets, surface patching, and pothole repair. Employees assigned to perform these tasks include Highway Repairers, Motor Grader Operators, Tractor Operators, and Gas Roller Engineers, all of whom are required to have Commercial Drivers Licenses and are considered to be within safety-sensitive titles subject to random drug testing. Laborers are also part

of crews, which consist of between 3 to 30 employees who are dispatched to sites together.

There is no dispute that at the work sites, employees do not have access to DOT phones. According to the City, all supervisors at road sites have Nextel direct connect phones and can be reached by a DOT office or dispatch yard. When family members or friends call the office to reach a crew member, a message is relayed by the Nextel device to the field supervisor, who communicates that message to the crew member. In emergency situations, the City states, a similar action is taken. Crew members have in the past used nearby public phones or their personal cells on scheduled breaks. According to the City, this practice has been in place for "a very long time."

The Union counters that the procedures that utilize the Nextel devices are faulty. In an affidavit Gene DeMartino, President of Local 376 of DC 37, writes that it is not uncommon to have periods when nobody at the dispatch office can relay an emergency message. For example, district supervisors visit work sites, borough supervisors regularly attend meetings at different locations, dispatchers must leave the office to check on equipment needs, and clerks usually do not have Nextel phones. DeMartino states that employees in the field were permitted to use their discretion when using cell phones. Most calls, he states, were limited in duration and frequently, though not exclusively, were to communicate with family when an emergency arose. In addition, DOT encouraged employees to carry cell phones when there were not enough radios. Supervisors could then communicate with Highway Repairers concerning work by calling on their personal phones. According to the Union, DOT knew for years that employees were making and receiving calls on their cell phones. Since the conduct was common prior to the implementation of the Policy, DOT, at a minimum, acquiesced to the use of cell phones.

Over the past two years, the City says, DOT became aware that many crew members, while

operating heavy equipment or performing laboring work at road repair sites, have been conversing on their personal cell phones during working hours. Supervisors have expressed concerns about safety since talking on the cell phone diminishes workers' attention. As a result, DOT issued the Policy.

On July 13, 2005, the Union filed the instant petition pointing out that the Policy does not provide for direct communication with DOT employees for emergency calls and does not provide a procedure for relaying non-emergency messages.

As a remedy, the Union requests an order that DOT rescind the Policy and cease and desist from using it in connection with DC 37 members, that DOT bargain in good faith over any procedures it seeks to implement relating to DC 37 members' personal cellular phones, and that DOT post appropriate notices.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that use of cell phones has been a significant benefit to employees in the field, where, in many areas, these phones are the only mode of communication and are certainly the fastest and most convenient means. Because this benefit is a mandatory subject of bargaining, DOT's unilateral issuance and implementation of the Policy interferes with the employees' rights under NYCCBL § 12-305 and violates the duty to bargain in good faith under NYCCBL § 12-306(a)(1) and (4).[1]

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[1] NYCCBL § 12-306(a) provides in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights

According to the Union, under the new Policy, employees are severely limited in their ability to communicate in emergencies because messages sent to the dispatch office and then to the supervisor via Nextel devices are subject to human error and can be inaccurate, delayed, or even missed. Furthermore, by having to get a message from a supervisor, employees lose privacy on issues that are often sensitive. The Policy does not provide, for example, that the supervisor hand the phone to an employee in an emergency situation and is silent on an employee's prerogative immediately to get in touch with family during an emergency. Employees who do not follow the exact protocol may be disciplined. The Policy does not provide for the least intrusive procedures to enforce a work rule.

The Union cites to a balancing test that the Board has used to determine whether a challenged subject is a term and condition of employment. The Union asserts that because the use of cell phones for both emergency and incidental calls creates comfort and predictability and assures privacy, the new Policy, which prohibits employees from using cell phones during work time and threatens discipline, is germane to the working environment. Nor is there a connection between the rule and the core mission of DOT. According to the Union, the City's main contention – that any rules impacting the efficiency or safety of employee tasks affect its core mission – effectively eliminates any need to bargain over terms and conditions of employment even if the City has not

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granted in section 12-305 of this chapter;

* * *

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. . . .

§ 12-305 provides in pertinent part:
Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . .

provided evidence substantiating claims of inefficiency or unsafe conditions.

The Union also asserts that even though DOT maintains that the Policy codifies long-standing unwritten policy, employees were never aware of such policy and any such work rule was never enforced.

Finally, the Union claims that the Policy imposes a practical impact on employees. The Union's arguments include essentially the same ones as it raised concerning good-faith bargaining – the implementation of the new Policy results in a loss of a benefit, including convenience, privacy, and potentially less break time, and, at the same time, adds an increased threat of discipline.

City's Position

The City claims that the practice against using personal phones on the work site has been observed for a long time and that the Policy simply maintains that rule. DOT has never had a practice of allowing use of personal cell phones at the road repair work site; on the contrary, the Policy codifies the long-standing practice of having crew members receive emergency calls via the dispatch office and then supervisor. Because DOT has never provided employees with phones at the work site and never authorized phone use during work time, employees' use of cell phones while on duty has not created a benefit.

The City also asserts that for two years before the Policy was promulgated, DOT was aware that employees were using cell phones for personal calls during working hours, and it was as a response to supervisors' concerns that DOT issued the Policy.

According to the City, it is not required to bargain regarding subjects that are management

rights under NYCCBL § 12-307(b).[2] Like the Union, the City cites to the balancing test that this Board has used in determining whether the promulgation of a policy requires mandatory bargaining over a working condition. The City argues that even if the Policy were found to be germane to the working environment, the prohibition of cell phone use during working time lies at the core of DOT's managerial control, which includes the efficiency and safety of the operations and the productivity of crew members. Since the Roadway Repair and Maintenance Division is directly responsible for road construction and maintenance with heavy equipment, activity that diminishes the workers' alertness creates safety risks, and safety of employees is central to DOT's mission.

The City also argues that the Union cannot establish an independent violation of interference under NYCCBL § 12-306(a)(1). Nor can the Union show a practical impact because there is no allegation of safety impact or unreasonably excessive or unduly burdensome workload.

DISCUSSION

The issue in this case is whether DOT is required to bargain over the use of cell phones by DC 37 unit members who work in the field on road construction and repair. This Board finds that since the use of cell phones in the field is a valuable benefit, the unilateral change in a policy regarding such use is a mandatory subject of bargaining.

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

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[2] NYCCBL § 12-307(b) provides in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies . . . ; direct its employees; take disciplinary action; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted . . . ; and exercise complete control and discretion over its organization. . . .

bargain in good faith on matters within the scope of collective bargaining. *See District Council 37*, Decision No. B-16-91. Under NYCCBL § 12-307(a), mandatory subjects of bargaining are defined as wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment.[3] *See District Council 37*, Decision No. B-8-2005 at 6-7. Since neither the NYCCBL nor the Civil Service Law expressly delineates the nature of "working conditions," or "conditions of employment," both this Board and the Public Employment Relations Board ("PERB") determine on a case-by-case basis the extent of the parties' duty to negotiate. *See Board of Education of the City School District of the City of New York v. New York State Public Employment Relations Board*, 75 N.Y.2d 660, 666 (1990); *District Council 37*, Decision No. B-8-2005 at 7; *Uniformed Fire Officers Ass'n, Local 854*, Decision No. B-5-90 at 8; *District Council 37*, Decision No. B-1-90 at 7-8.

To determine the negotiability of a subject asserted to be a working condition, this Board, like PERB, balances the interests of the City and those of the Union concerning that subject under the circumstances of the particular case. *See District Council 37*, Decision No. B-8-2005 at 7-8; *State of New York (Department of Correctional Services)*, 38 PERB ¶ 3008 (2005). In *District Council 37*, Decision No. B-13-2005 at 8, we noted that some subjects are "prebalanced" by the legislature. *See also State of New York (Department of Transportation)*, 27 PERB ¶ 3056, at 3131 (1994). Thus, NYCCBL § 12-307(b) identifies those subjects that are reserved for managerial

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[3] NYCCBL § 12-307(a) provides in pertinent part:
Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions
. . . .

discretion, such as the right to direct its employees or to maintain the efficiency of government operations.[4] Implementing a policy concerning employees' use of cell phones is not among the rights specifically referred to in the NYCCBL. Therefore, this Board must balance the interests of the employer and of the employees.

In *Correction Officers Benevolent Ass'n*, Decision No. B-16-81 at 67, this Board found in a scope of bargaining case that use of an employer-provided telephone to place and receive emergency calls is a term and condition of employment and, therefore, a mandatory subject of bargaining. The Board did not find that the use of a phone for any purpose was mandatory; however, the parties were required to negotiate over the use of the telephone for emergency calls. Similarly, a PERB administrative law judge ("ALJ") determined that a village's unilateral implementation of a policy restricting the making or receiving of emergency calls on personal cell phones for water treatment employees "in the field" constituted a failure to bargain in good faith. *Village of Blasdell*,

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[4] Although PERB has no statutory management rights clause, PERB employs a similar test. In *County of Montgomery*, 18 PERB ¶ 3077, at 3167 (1985), PERB wrote:

> We have previously stated:
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> > In determining whether a work rule is a mandatory subject of negotiation, the Board must strike a balance between an employer's freedom to manage its affairs and the right of employees to negotiate their terms and conditions of employment. (Citation omitted.)
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> In applying such a balancing test, it is unavoidable that the nature of each work rule under consideration must be fully examined to determine which interest predominates. Implicit in this test is the recognition that simply because a work rule relates to the employer's mission, it does not follow that the employer is necessarily free to act unilaterally in the manner in which it chooses to act. If it is faced with an objectively demonstrable need to act in furtherance of its mission, the employer may unilaterally impose work rules which are related to that need, but only to the extent that its action does not significantly or unnecessarily intrude on the protected interests of its employees. Thus, we must weigh the need for the particular action taken by the employer against the extent to which that action impacts on the employees' working conditions.

See also City of Niagara (Mount View Health Facility), 21 PERB ¶ 3014 (1988).

30 PERB ¶ 4551, at 4604 (1997). Management, which had been aware for three years that these employees used cell phones and had acquiesced to their use, did not provide evidence that carrying cell phones impaired the delivery of service. Applying a balancing test, the ALJ found that the employer violated its duty to bargain when it unilaterally altered that benefit. *Id*. In *County of Saratoga*, 37 PERB ¶ 3024 (2004), *rev'd on other grounds sub nom. County of Saratoga v. New York State Public Employment Relations Board*, 21 A.D.3d 1160 (2005), PERB determined that deputy sheriffs' use of their employer's telephones for several years to make personal phone calls during work time was a benefit added to the employees' terms and conditions of employment. *See also District Council 37*, Decision No. B-16-91 at 9 (employer must bargain over smoking, a working condition).

On the other hand, in another decision concerning benefits, *District Council 37*, Decision No. B-13-2005, this Board determined that DOT did not have to bargain over a policy allowing management to examine lockers it provided to employees in safety-sensitive positions. In the wake of a serious Staten Island ferry accident in 2003, DOT's need to inspect its premises outweighed the employees' privacy interests. The parties were, however, ordered to negotiate over the procedures regarding implementation of the policy on locker inspections.

In the instant case, this Board must harmonize the needs of employees working in the field to make and receive emergency cell phone calls and DOT's needs to assure safety and efficiency. As noted, we have said both that the use of phones for emergency purposes is a mandatory subject of bargaining and that the City's interest in maintaining public safety and a safe workplace may outweigh employee interest. We now find that, under the circumstances of this case, the interests of the employees working in the field to reach and be reached by, for example, their families or

physicians, outweigh those of the employer. We take notice of the fact that many people, especially those who do not have access to a land-line phone, carry personal cell phones. Moreover, public telephones are not often readily accessible to field work locations, and for several years, DC 37 bargaining unit members working in the field have enjoyed the benefit of receiving or responding to emergency and non-emergency phone calls on their personal cellular phones.

DOT has not offered evidence that any employee's use of a cell phone has impaired safety or efficiency. The allegations consist of general statements that use of cell phones may diminish alertness. *See District Council 37*, Decision No. B-8-2005 (insufficient allegations of fact to indicate that unilateral policy was so central to management's mission that it outweighed employees' interests); *State of New York (Department of Correctional Services)*, 38 PERB ¶ 3008, at 3030 (new policy concerning size of food containers adversely impacted unit employees more than it advanced management's mission of ensuring safety); *but cf. District Council 37*, Decision No. B-13-2005 (sufficient allegations of fact to show that employer's need to search its own locker and storage facilities outweighed employees' privacy interests). DOT's unilateral issuance of the Policy was a breach of its duty to bargain in good faith in violation of NYCCBL § 12-306(a)(1) and (4).

We also state that, as a practical matter, there is no way to discern whether an incoming call will be an emergency or not. Therefore, we make no distinction between emergency and non-emergency phone calls. At the same time, the City's concerns regarding the safe use of equipment, the safe movement of traffic, and the efficient completion of jobs are not *de minimis* and must not be disregarded. Safety for the general public and for DOT employees is integral to DOT's mission of road construction and repair. Accordingly, it is reasonable that DOT may seek to assure that calls during work time are not disruptive. There may be other legal limitations of cell phone use. For

example, laws other than the NYCCBL govern the use of phones while a person is driving, and we make no findings concerning their applicability to the employees in this case. We find, however, that any potential abuse regarding cell phone operation does not support elimination of benefits. Rather, in a case of misuse, DOT may bring disciplinary charges under the parties' contractual processes. *See County of Saratoga*, 37 PERB ¶ 4525 at 4598 n.30 (2004), *aff'd*, 37 PERB ¶ 3024, *rev'd on other grounds sub nom. County of Saratoga v. New York State Public Employment Relations Board*, 21 A.D.3d 1160; *Westbury Water and Fire District*, 12 PERB ¶ 4584 at 4671 (1979).

In ordering bargaining, we leave to the parties the manner in which to effectuate the policies and procedures regarding personal communications for employees in the field while fulfilling DOT's mission to provide an excellent road system in a safe and efficient manner. Since we have reached this conclusion, we need not address the Union's other arguments.

ORDER

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

ORDERED, that the improper practice petition, BCB-2491-05, filed by District Council 37, AFSCME, be, and the same hereby is, granted, and it is hereby

ORDERED, that the Department of Transportation rescind the Policy and cease and desist from using it in connection with District Council 37 members, and it is hereby

ORDERED, that the Department of Transportation bargain in good faith over any policies and procedures regarding personal cell phone use by District Council 37 members working "in the field," and it is hereby

ORDERED, that the Department of Transportation post appropriate notices.

Dated: February 28, 2006
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

I dissent. M. DAVID ZURNDORFER
MEMBER

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

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

We hereby notify:

That the Board of Collective Bargaining has issued Decision No. B-8-2006, determining an improper practice petition between District Council 37, AFSCME, and the City of New York and the New York City Department of Transportation.

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, filed as BCB-2491-05, be, and the same hereby is, granted as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over the implementation of the Roadway Repair and Maintenance Personal Cell Phone Policy; and it is further

ORDERED, that the Department of Transportation rescind that policy and cease and desist from using it in connection with District Council 37 bargaining unit members; and it is further

ORDERED, that the City of New York bargain in good faith over any policies and procedures regarding personal cell phone use by District Council 37 members working in the field; and it is further

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

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

The New York City Department of Transportation (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.