

PBA, 11 OCB2d 20 (BCB 2018)

(IP) (Docket No. BCB-4211-17)

Summary of Decision: The Union alleged that the City and the NYPD violated NYCCBL § 12-306(a)(1), (4), and (5) when it unilaterally implemented changes to the performance evaluation process for Police Officers. The City argued that it had no duty to bargain, that the NYPD did not modify the existing performance evaluation procedures, and that to the extent that it did, the changes were *de minimis*. The Board found that certain changes were not bargainable because they were incidental to the transition from a paper to an electronic performance review process or did not constitute a change from an existing policy. However, the Board found that the NYPD unilaterally changed a mandatory subject of bargaining by increasing the frequency by which certain Police Officers were evaluated and by introducing a requirement that all Police Officers electronically accept or appeal their quarterly performance evaluations. Accordingly, the petition was granted in part and denied in part. (*Official decision follows.*)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

**PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK, INC.,**

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On May 4, 2017, the Patrolmen's Benevolent Association of the City of New York, Inc. ("Union"), filed a verified improper practice petition against the City of New York ("City") and

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the New York City Police Department (“NYPD”). The Union alleges that the City and the NYPD violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by failing to bargain over changes to performance evaluation procedures for Police Officers. The City argues that it had no duty to bargain over the changes because the NYPD has the authority, pursuant to NYCCBL § 12-307(b), to unilaterally adopt them. In the alternative, the City argues that the NYPD did not modify the existing performance evaluation procedures and that to the extent that it did, the changes were *de minimis*. The Board finds that certain changes are not bargainable because they are incidental to the transition from a paper to an electronic performance review process or do not constitute a change from an existing policy. However, the Board finds that the NYPD unilaterally changed a mandatory subject of bargaining by increasing the frequency by which certain Police Officers were evaluated and by introducing a requirement that all Police Officers electronically accept or appeal their quarterly performance evaluation. Accordingly, the petition is granted in part and denied in part.

BACKGROUND¹

The Trial Examiner held three days of hearing and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts set forth below.

The Union is the duly certified collective bargaining agent for all members of the NYPD holding the rank of Police Officer. The Union and the NYPD are parties to a collective bargaining agreement (“Agreement”) covering the period of August 1, 2010, to July 31, 2012, which remained

¹ City exhibits entered into evidence as City 1-1 through 1-9 are referred to in the Decision as City Exhibits 1 through 9.

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in *status quo* pursuant to NYCCBL § 12-311(d) until the parties entered into a successor agreement, which was ratified on February 27, 2017.

Police Officers are either permanently assigned to enforcement duties or administrative duties. Police Officers assigned to enforcement duties are employed in enforcement commands (“Enforcement Police Officers”).² Police Officers permanently assigned to administrative duties (“Administrative Police Officers”) are employed in either administrative bureaus or enforcement commands.³ While Administrative Police Officers in administrative bureaus are assigned exclusively to administrative duties, those in enforcement commands may also be assigned enforcement duties.⁴

The performance evaluation process for Police Officers consists of monthly, quarterly, and annual evaluations. Effective November 4, 2015, through February 2, 2017, Interim Order 70 (“IO-70”) set forth the NYPD’s monthly and quarterly performance evaluation procedures for Enforcement Police Officers and Administrative Police Officers in enforcement commands. Pursuant to IO-70, the NYPD required Enforcement Police Officers and Administrative Police Officers in enforcement commands temporarily assigned to enforcement duties to be assessed monthly using the Police Officer’s Monthly Conditions Impact Measure Report (“POMCIMR”).⁵

² Enforcement activities include making arrests, issuing summonses, and responding to 911 calls. Enforcement assignments include: “precinct, police service area (PSA), transit district, Strategic Response Group.” (City Ex. 5)

³ Administrative positions include: “(a) community affairs officer; (b) traffic safety officer; (c) crime prevention coordinator; (d) auxiliary police coordinator; and (e) planning officer.” (City Ex. 5)

⁴ Four Administrative Police Officers in enforcement commands testified that prior to January 4, 2017, they were assigned enforcement responsibilities between one to eight times a month.

⁵ IO-70 provides that “[u]niformed members assigned to an enforcement command . . . will be

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The POMCIMR is a paper form on which police officers documented on a daily basis the two identified conditions that they were assigned and the enforcement activities performed to address these conditions, such as arrests, summonses, and reports.⁶ (City Ex. 5) IO-70 also mandated that Enforcement Police Officers and all Administrative Police Officers in enforcement commands participate in Quarterly Performance Evaluations (“QPR”).⁷

On January 4, 2017, the NYPD issued Operations Order 2 (“OO-2”), titled “Implementation of the Officer Profile Report.” (City Ex. 3) Its stated purpose is to “redesign [] the [POMCIMR] for police officers and detective specialists not assigned to an investigative Bureau (e.g. precinct, police service area, transit district, Strategic Response Group, etc.)” (emphasis in original) (*Id.*) OO-2 introduced three electronic forms into the performance evaluation process for Police Officers: the Officer Profile Report Form, the Supervisor Feedback Form, and the Officer Self-Report, which are described in detail below.

On February 2, 2017, the NYPD issued Interim Order 9 (“IO-9”), which modified IO-70. It incorporates the Officer Profile Report Form, the Supervisor Feedback Form, and the Officer

assessed monthly using the [POMCIMR] and rated quarterly utilizing the “Supervisor’s Quarterly Performance Review’ located on the rear of the [POMCIMR]. . . Uniformed members of the service whose duties do not include enforcement activity will not prepare a [POMCIMR] unless those members have been temporarily assigned to perform enforcement duty. . . .” (City Ex. 5) (emphasis in original)

⁶ An officer’s identified conditions changed daily and were determined by the “uniformed members of the service, in consultation with the patrol supervisor and based on the Command Conditions Report, which [contained statistical information] on crime and disorder conditions within a particular command.” (City Ex. 5)

⁷ IO-70 provides that QPRs are required for “[o]nly those uniformed members of the service [] assigned to a patrol precinct, PSA, transit district or Strategic Response Group or other enforcement units . . . and [who] primarily perform enforcement duties.” (City Ex. 5)

Self-Report into the monthly and quarterly evaluation process.⁸ IO-9 also modified the scope of Police Officers for whom monthly and quarterly evaluations were required to “[a]ll police officers/detective specialists assigned to non-investigative Bureaus and non-investigative administrative Bureau/Deputy Commissioner commands.” (City Ex. 4) (emphasis in original)⁹

According to the City, I-O9 was in development since 2015 as part of the NYPD’s Quest for Excellence Program “to embrace qualitative, rather than quantitative policing.” (City Ex. 2) Its purpose is to “update the Performance Evaluations from being paper-based to an electronic format.” (*Id.*)

It is undisputed that the parties did not bargain over any changes to the performance evaluation procedures, resulting in the filing of the instant improper practice. At the hearing, a Lieutenant and nine Police Officers, who also served as Union delegates, described the evaluation process under IO-70 and the changes resulting from the implementation of IO-9.¹⁰ The descriptions of IO-70 and IO-9 below incorporate their testimony.

⁸ Since IO-9 incorporates OO-2 in its entirety, references to IO-9 also refer to OO-2.

⁹ IO-9, in relevant part, provides that “[a]ll police officers/detective specialists assigned to non-investigative Bureaus (e.g. precinct, police service area [PSA], transit district, Strategic Response Group, etc.) will be assessed monthly utilizing the Officer Profile Report and evaluated quarterly using the Supervisor’s Quarterly Evaluation. All police officers/detective specialists assigned to non-investigative Bureau/Deputy Commissioner commands (e.g. Personnel Bureau, Deputy Commissioner, Collaborative Policing, etc.) will be evaluated quarterly using the Supervisor’s Quarterly Evaluation. (City Ex. 4) (emphasis in original)

¹⁰ Lieutenant Coffey was involved in developing and implementing IO-9. The nine Police Officers are: William Coccodrilli, an Administrative Police Officer in an administrative bureau; Matthew Falkovic and Michael Bonneanne, Enforcement Police Officers in enforcement commands; and Brian Pelligrino, Leslie Grant, Thomas McGlyn, Robert Andersen, Joseph Reale, and Miguel Garcia, Administrative Police Officers in enforcement commands.

Frequency of Performance Evaluations of Administrative Police Officers

IO-9 modified the frequency of performance evaluations for Administrative Police Officers. It is undisputed that prior to 2017, Administrative Police Officers in administrative bureaus were only evaluated annually. It is also undisputed that effective January 2017, in addition to the annual evaluation, IO-9 now requires that Administrative Police Officers in administrative bureaus participate in quarterly performance evaluations and that Administrative Police Officers in enforcement commands, regardless of whether they are assigned enforcement duties, participate in monthly and quarterly evaluations.¹¹

The parties disagree over the extent to which IO-70 required Administrative Police Officers in enforcement commands to participate in monthly and quarterly evaluations. The City did not submit any POMCIMRs or quarterly performance evaluations performed prior to January 1, 2017, of Administrative Police Officers in enforcement commands. Instead, Lieutenant Coffey testified that during her tenure as a Sergeant in the 109th Precinct between 2010 and 2015, Administrative Police Officers in her enforcement command and officers she observed in other enforcement commands submitted POMCIMRs and participated in quarterly evaluations, regardless of whether they were assigned enforcement duties. However, six Administrative Police Officers in six different enforcement commands testified that they and the Administrative Police Officers they represented as delegates were only evaluated annually between 2012 and 2016.¹² Further, four of

¹¹ On the first hearing date, the City acknowledged that IO-9 increases the frequency of performance evaluations for Administrative Police Officers in administrative bureaus from once to five times per year. *See* Tr. 8.

¹² The six Administrative Police Officers represented Transit District 33 and the 20th, 61st, 72nd, 110th, and 121st Precincts. During their testimony, the Union submitted into evidence 19 of their annual performance evaluations from calendar years 2012 through 2016 and six QPRs from 2017.

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these Administrative Police Officers testified that they were temporarily assigned to enforcement duties between 2012 and 2016, and that they were only evaluated annually during this time.¹³

Police Officer and Supervisor Comments in the Monthly and Quarterly Evaluation Process

IO-9 is similar to IO-70 in that it provides Police Officers and their supervisors with opportunities to submit comments relating to performance as part of the monthly and quarterly performance evaluation process. Under IO-70, Police Officers and their supervisors submitted comments on both the POMCIMR and QPR that summarized what a Police Officer did to address the identified conditions.¹⁴ Finally, supervisors previously documented any violations of NYPD regulations by Police Officers within or outside their command that did not rise to the level of formal discipline, such as lateness for roll call or dress code violations, in a Minor Violations Log.¹⁵

Pursuant to IO-9, the Officer Self Report Form and Supervisor Feedback Form replaced the supervisor and Police Officer comments on the POMCIMR and supervisor entries in the Minor Violations Log. The Officer Self Report Form provides Police Officers with the opportunity to “document notable actions which they consider to be positive” in the Cops Rapid Assessment

¹³ The four Administrative Police Officers represented the 20th, 61st, 72nd, and 121st Precincts.

¹⁴ Supervisors documented their comments in the “Officer’s Impact on Declared Conditions” section of the POMCIMR. Police officers documented their comments in the area titled “MOS additional comments pertaining to actions taken to impact conditions” on the POMCIMR. (City Ex. 6)

¹⁵ It is unclear whether there was an appeal process to challenge entries in the Minor Violations Log. Police Officer Falkovic testified that officers could object to an entry by initialing next to it, but did not further elaborate on an appeal process. Lieutenant Coffey testified that there was no “formal” process for challenging entries, but did not address whether officers could initial entries that they found objectionable. (Tr. 154)

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Feedback Tool (“CRAFT”) application as part of the monthly and quarterly performance evaluation process.¹⁶ (City Ex. 3) The Supervisor Feedback Form provides supervisors with the opportunity “to highlight commendable actions by a police officer[,] . . . note areas that may need improvement and indicate what actions were taken to address the deficiency” for Police Officers within or outside their command. (*Id.*) Unlike the POMCIMR and the QPR, the new forms can be accessed at any time through CRAFT on a computer or mobile phone. In addition, comments on the Supervisor Feedback and Officer Self Report forms are not expressly limited to enforcement actions taken by Police Officers to address identified conditions. Instead, comments on these forms can relate to a wide-range of QPR Performance Categories, including positive feedback or negative comments that were previously documented in the Minor Violations Log.¹⁷ (Union Ex 17-1)

Monthly Performance Evaluation Process

There are several differences between the monthly performance evaluation procedures under IO-9 and IO-70. Under IO-70, a monthly performance evaluation was initiated by a Police Officer’s submission of a POMCIMR to his or her supervisor by the second day of the following month. Police Officers carried the POMCIMR during tours and manually recorded enforcement actions or conditions contemporaneously with their occurrence. For each enforcement action

¹⁶ Examples of such actions include “achievements in crime prevention, problem-solving, community engagement, etc.” (City Ex. 3)

¹⁷ IO-9’s 12 QPR Performance Categories are “(1) Problem Identification/Solving; (2) Adaptability & Responsiveness; (3) Judgment; (4) Integrity; (5) Application of Law and Procedures; (6) Community Interactions; (7) Department Interactions; (8) Professional Image and Maintenance Equipment; (9) Quality and Timeline of Written Reports; (10) Initiative; (11) Leadership; (12A) Implementation of Proactive Policing Strategies; and (12B) Competence in Supporting Unit’s Squad’s Mission.” (Union Ex 17-1)

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indicated on the POMCIMR, a Police Officer submitted an enforcement report, such as an on-line booking sheet for an arrest, a complaint report for a crime, or a summons, all of which were entered and maintained in NYPD databases. At the end of each month, Police Officers tallied their enforcement activities, submitted comments on how their enforcement actions addressed the identified conditions, signed and dated the POMCIMR, and submitted it to their supervisor.

Pursuant to IO-70, the supervisor reviewed the POMCIMR and the Activity Log and verified the accuracy of the information submitted on the POMCIMR against information in the NYPD databases.¹⁸ This review was intended “to provide the supervisor with an opportunity to evaluate the [Police Officer’s] performance in proactively addressing sector conditions.” (City Ex. 5) After this review, the supervisor documented the effectiveness of the Police Officer’s monthly activity in addressing the identified conditions and the justification for their determination. The supervisor then signed and delivered the completed POMCIMR to the platoon commander/special operations lieutenant.

Pursuant to IO-9, the Officer Profile Report replaced the POMCIMR. Under the new procedure, Police Officers do not use the POMCIMR. Instead, a Police Officer can access the Officer Profile Report anytime on a mobile phone or computer through a performance evaluation application, called “PERF.” The Officer Profile Report is “populated automatically utilizing information from NYPD databases” that maintain the enforcement reports and summonses, and includes “much of the same information” as the POMCIMR. (Tr. 91-92; Union Ex. 1-B) For instance, the Officer Profile Report automatically tallies the enforcement activities that were

¹⁸ The Activity Log provided Enforcement Police Officers with the opportunity to document information not captured on the POMCIMR or Officer Profile Report ascertained from arrests, summonses, or other actions to address conditions. IO-9 did not eliminate the Activity Log.

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manually recorded and tallied by a Police Officer on the POMCIMR.

Unlike the POMCIMR, the Officer Profile Report does not require that Police Officers list two identified conditions to address daily. Instead, it includes statistical information on the top crime and accident categories, to inform Police Officers what conditions to address.¹⁹ This statistical information is the same as the information contained in the Command Conditions Report, previously used to identify the two daily conditions to address on the POMCIMR. Further, the Officer Profile Report includes data used to compare a Police Officer's enforcement activities against others in their squad, platoon, and Citywide when assessing their performance.

A monthly performance assessment is now initiated when a Police Officer prints, reviews, and submits the Officer Profile Report to their supervisor by the second day of the following month. As part of the monthly assessment, the supervisor reviews the Supervisor Feedback Form and Officer Self Report comments, compares the individual's monthly activity to the enforcement statistics of other squad, platoon, and Citywide officers, and "provides positive feedback" and "guidance and direction for improvement." (City Ex. 4) The supervisor then signs the Officer Profile Report for the prior month and delivers it to the platoon commander.

Quarterly Performance Evaluation Process

The quarterly performance evaluation procedures under IO-9 are the same as those of IO-70 in several ways. First, both procedures require a supervisor to conduct a QPR of Police Officers assigned to them in January, April, July, and October of each year. They also require the

¹⁹ The crime and accident categories include "shootings," "seven major crimes (murder, rape, robbery, felony assault, burglary, grand larceny, and grand larceny of motor vehicle)," "top 311 locations," "top 911 locations," "top 911 shots fired locations," "top 911 narcotics locations," and "top collision locations." (Union Ex. 8)

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supervisor to privately interview the Police Officer, discuss his or her activity and overall performance for the quarter based on a review of the three prior monthly assessments, comment on any outstanding actions, achievements or deficiencies on the QPR, and deliver the finalized QPR to the platoon commander by the seventh day of the month following the reporting period.²⁰ Finally, IO-70 and IO-9 both provide for a Police Officer to appeal a QPR up to their “commanding officer (in the rank of captain or above).” (City Ex. 4)

The QPR under IO-70 and IO-9 differ in certain ways. IO-70 required a supervisor to assign a numerical QPR rating to a Police Officer on a scale of one to three in five categories, and on a scale of one to two in one category, and to manually tally the ratings. IO-9 requires supervisors to rate a Police Officer as “exceptional, exceeds standards, meets standards, or needs improvement” in twelve performance categories, and automatically tallies the ratings. Further, while IO-70 did not require the Police Officer to sign and date the QPR, IO-9 requires the supervisor to “direct [the Police Officer] to sign off on [the] evaluation.” (City Ex. 3) This requires the Police Officer to log into PERF to “accept or appeal” their QPR. (Tr. 158). Once a Police Officer “sign[s] off” on the QPR, PERF automatically calculates the Police Officer’s quarterly performance rating as a score out of 100 points.

Annual Performance Evaluation Process

It is undisputed that prior to IO-9, Police Officers were evaluated annually and that a Police Officer could appeal the evaluation up to the individual holding a rank above a commanding

²⁰ Under IO-70, the supervisor’s comments are documented in the “Additional Comments” section of the QPR. (City Ex. 5) Whereas, under IO-9, the identical comments are documented in the “Supervisor Comments” section of the QPR. (City Ex. 4)

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officer.²¹ The parties disagree as to whether IO-9 modifies the annual evaluation and its appeal process. At a December 20, 2016 meeting with the Union, the NYPD announced that the QPR “[r]eplaces [the] annual evaluation.”²² (Union Ex. 7) IO-9 does not expressly modify the annual evaluation process. However, its implementation resulted in a new annual evaluation form.²³ The revised form, like its predecessor, continues to provide for comments from the supervisor and Police Officer, requires the supervisor to interview the Police Officer and discuss their performance rating with them, and requires that the supervisor and Police Officer sign it. Unlike its predecessor, which rated Police Officers on a scale of one to five in 12 performance areas, and 16 behavioral categories, and determined an overall annual evaluation rating by adding the QPR numerical ratings and converting them to a number between zero and five, the revised annual evaluation calculates the overall annual evaluation score by averaging the four QPR scores. Lieutenant Coffey testified that the NYPD has not discontinued the annual performance evaluation and that its December 2016 announcement was intended to inform the Union that it was changing the way it was using the QPR ratings to calculate the overall annual evaluation rating.

Dispute Regarding the Production of Documents

On September 20, 2017, the Union subpoenaed documents it claimed were relevant to its

²¹ Patrol Guide (“PG”) 205-48 is titled “Evaluations – General – Members of the Service,” and requires that each uniformed member of the NYPD be evaluated at least once per year. (City Ex. 7) PG 205-58 is titled “Appeal of Evaluation – Uniformed Members of the Service” and provides for an appeal of the annual evaluation, with a final determination made by the “Borough/Bureau Commanding Officer.” (City Ex. 9). IO-9 does not modify any procedures in PG 205-48 or PG 205-58.

²² The NYPD made two other similar announcements on January 13, 2016 and on December 13, 2016. (Union Exs. 5 & 6)

²³ The Union submitted two examples of a 2017 annual evaluation with its post-hearing brief that were not available at the hearing.

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petition. On November 8, 2017, the City responded to the subpoena by providing the Union with 16 documents. In its response, the City provided several reasons for not producing additional documents responsive to the subpoena. At the direction of the Trial Examiner, on November 22, 2017, the City submitted a privilege log of an additional 666 documents for which it asserted the deliberative process privilege. After extensive efforts to resolve the parties' dispute regarding the document production, on December 4, 2017, the Trial Examiner ordered the City to submit the documents listed in the privilege log for an *in camera* review. The City refused and the Union moved to strike the City's Answer and preclude testimony from City witnesses. The Trial Examiner reserved decision on the Union's motion, and the parties proceeded to hearing.

POSITIONS OF THE PARTIES**Union's Position**

The Union argues that the Board should exercise its authority, under § 1-11(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), to strike the City's Answer and Lieutenant Coffey's testimony or, alternatively, to draw an adverse inference against the NYPD for its refusal to comply with the subpoena and the Trial Examiner's orders, and its failure to promptly remedy a material misrepresentation in its Answer.²⁴

²⁴ OCB Rule § 1-11(d), in pertinent part, provides:

If a witness, party or agent thereof refuses or fails, without reasonable excuse, to . . . obey any subpoena duces tecum, the trial examiner may strike from the record the pleading and/or all testimony and evidence offered on behalf of such party at a hearing, . . . or strike those portions of the pleading which are related to the matter(s) called for in the subpoena. . . .

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The Union argues that the NYPD's unilateral implementation of IO-9 during a *status quo* period created "an entirely new [performance] evaluation process" for Police Officers, in violation of NYCCBL § 12-306(a)(1), (4), and (5).²⁵ (Tr. 8) It maintains that procedural aspects of a performance evaluation system are mandatory subjects of bargaining and that the changes effectuated by the NYPD's implementation of IO-9 significantly altered Police Officer participation in the process.

The Union claims that the NYPD implemented the following new procedures for Police Officers, all of which it contends this Board has previously held are mandatory subjects of bargaining: (1) Administrative Police Officers must participate in monthly and quarterly evaluations; (2) Police Officers must "sign off" on their QPR following their quarterly performance review meeting; (3) Police Officers must self-report on their performance on a new Officer Self Report Form; and (4) Supervisors must submit comments on Police Officers' performance on a new Supervisor Feedback Form. In addition, the Union contests the elimination of the POMCIMR; and the replacement of the annual performance evaluation and its appeal

²⁵ 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 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;

(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization

process.

The Union argues that any reduction or increase in Police Officer participation in their performance evaluation is a mandatory subject of bargaining. It maintains that this Board has found mandatorily negotiable not only “changes to performance evaluations which require an employee to take additional actions, [but also those] that implicate an expectation or action by an employee.” (Rep. ¶ 81)

The Union further argues that IO-9 expressly expands the scope of Police Officers required to participate in monthly and quarterly evaluations. It asserts that prior to IO-9, Administrative Police Officers were only evaluated annually, whereas IO-9 now requires that Administrative Police Officers in administrative bureaus participate in quarterly evaluations and that Administrative Police Officers in enforcement commands participate in monthly and quarterly evaluations. The Union also asserts that pursuant to IO-9, Police Officers’ participation in the monthly evaluation process is significantly reduced from maintaining, commenting upon, signing and submitting their POMCIMR to just printing and submitting an automatically populated Officer Profile Report.

The Union argues that the NYPD’s implementation of IO-9 also increases Police Officer participation in other aspects of the performance evaluation process. First, it asserts that Police Officers are now required to print their monthly Officer Profile Reports. Second, it argues that IO-9 requires that Police Officers electronically sign their QPRs, which it asserts “has the same validity and effect” as a physical signature. (Union Br. ¶ 102) Third, it maintains that the new Officer Self-Report form solicits comments on a broader scope of subjects than the POMCIMR because these comments are “intended to document performance that has traditionally fallen outside the parameters of traditional evaluation criteria.” (City Ex. 3) Whereas IO-70 asked Police

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Officers to comment on “actions taken to address declared conditions,” they are now asked to submit comments that “document notable actions that they consider positive.” (City Exs. 4; 5) Finally, the Union argues that the implementation of the Supervisor Feedback Form eliminates the procedure for challenging negative comments previously recorded in the Minor Violations Log. As such, it argues that these changes are mandatory subjects of bargaining.

The Union additionally contends that the NYPD’s December 20, 2016 announcement, that the QPR replaces the annual performance evaluation, and changes Police Officers’ performance evaluation appeal rights. It argues that the elimination of the annual evaluation performance categories and the averaging of the QPR scores to calculate the overall annual evaluation rating elevates the significance of the QPR above the annual evaluation, and makes the annual evaluation appeal process less significant than before. It argues that this change constitutes a “significant loss of due process” because the QPR can only be appealed to a commanding officer whereas the annual evaluation can be appealed to a rank above a commanding officer. (Pet. ¶ 43)

As a remedy, the Union requests an order directing the City and the NYPD to (1) rescind OO-2 and IO-9; (2) restore the *status quo* until the changes are negotiated; (3) cease and desist from making any further unilateral changes to Police Officer performance evaluations; (4) make whole any member aggrieved by OO-2 and IO-9; (5) post notices of the violation in all precincts and commands accessible to police officers; and (6) grant any other relief as deemed just and proper by the Board.

City’s Position

The City argues that it complied with the Union’s subpoena. It asserts that it conducted an adequate search for documents and provided the Union with documents not covered by the

deliberative process privilege.²⁶ Therefore, the City argues, the Board must deny the Union's request to strike testimony or its pleadings, or draw any adverse inferences against it.

The City argues that the petition must be dismissed because the Union's claims relate to issues that fall within the NYPD's express managerial rights under NYCCBL § 12-307(b).²⁷ The City contends that NYCCBL § 12-307(b) guarantees the NYPD's right to determine the "methods, means and personnel by which government operations are to be conducted." (Ans. ¶ 65) It argues that this statutory provision also provides the NYPD with the right to act unilaterally in certain areas that fall outside the scope of mandatory bargaining. The City asserts that the implementation of IO-9 constitutes a mechanical change intended to modernize the performance evaluation process from a paper to a digital format "without altering employee participation in it." (Ans. ¶ 91) Consequently, it argues that the NYPD's implementation of IO-9 was an exercise of its rights under NYCCBL § 12-307(b).

²⁶ The City's post-hearing brief does not address its noncompliance with the Trial Examiner's order to produce documents for an *in camera* review.

²⁷ 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 technology of performing its work.

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The City acknowledges that its implementation of IO-9 now requires Administrative Police Officers in administrative bureaus to participate in new quarterly evaluations. However, it argues that the claims raised by the Union concern either non-mandatory subjects of bargaining, do not constitute a change from IO-70's procedures, or are *de minimis*.

The City asserts that IO-9 does not modify the frequency of performance evaluations for Administrative Police Officers in enforcement commands. It argues that Lieutenant Coffey's testimony coupled with the express language in IO-70 establishes that Administrative Police Officers in enforcement commands participated in monthly and quarterly evaluations before IO-9 was issued.

The City also maintains that mandatorily negotiable procedural changes to performance evaluations require increased participation by employees. It argues that the elimination of the POMCIMR decreases employee participation and, thus, does not require negotiation. It further argues that the requirement to "sign off" on the evaluation requires clicking a button on a computer or smartphone and is distinguishable from the physical signature this Board previously found to be a mandatory subject of bargaining.

As to its implementation of the Officer Self Report, the City argues that its solicitation of comments from Police Officers under IO-9 is not a mandatory subject of bargaining because the submissions are voluntary and any change to the scope of solicited comments relates to performance evaluation criteria. Even if deemed a mandatory subject of bargaining, the City asserts that the Officer Self Report does not modify any evaluation procedures under IO-70. It argues that Police Officers have the same opportunity now to submit comments on their performance on the Officer Self Report Form as with the POMCIMR. Consequently, it argues that its implementation of the Officer Self Report is not a mandatory subject of bargaining.

Similarly, the City argues that its implementation of the Supervisor Feedback Form is not a mandatory subject of bargaining. It argues that the form only requires action by a supervisor and does not increase Police Officer participation in the performance evaluation process. Further, the City argues that IO-9 does not replace the annual performance evaluation and its appeal procedure. It contends that the Union has no factual basis to establish its asserted replacement of the annual evaluation and its appeal process. The City maintains that the change to the annual evaluation is limited to how the QPR scores are used to calculate the overall annual evaluation rating, which it claims is not a mandatory subject of bargaining.

Finally, the City argues that to the extent the Board finds that the NYPD changed a mandatory subject of bargaining relating to the performance evaluation process, such changes are *de minimis*.²⁸

DISCUSSION

As a preliminary matter, we address the dispute that arose over the Union's subpoena for documents. The NYPD refused to provide documents that it asserted were privileged notwithstanding the Trial Examiner's order that it do so. Nevertheless, we do not strike the City's Answer or Lieutenant Coffey's testimony as requested by the Union. In light of the case put forth by the City and the conclusions reached below, it is unnecessary to decide that issue. The City presented only one witness, and striking her testimony or the City's Answer would not impact our legal analysis or conclusions. The Board cautions, however, that in the event of any such failure in the future, it is fully prepared to exercise its authority to strike all or a portion of the pleadings,

²⁸ The City also argues that, because there is no violation of NYCCBL § 12-306(a)(4), there can be no violation of NYCCBL § 12-306(a)(1) and (5).

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testimony, or evidence.

We next address the substantive claims. It is well established that a public employer may not unilaterally implement a change in a mandatory subject of bargaining before bargaining has been exhausted. *See PBA*, 6 OCB2d 36, at 14 (BCB 2013) (citing *DC 37, L. 3631*, 4 OCB2d 34, at 12 (BCB 2011); *UMD, L. 333*, 2 OCB2d 44, at 24 (BCB 2009); *DC 37, 77 OCB 34*, at 18 (BCB 2006); *COBA*, 63 OCB 26, at 9 (BCB 1999)). When a petitioner asserts that an employer's failure or refusal to bargain in good faith has resulted in a unilateral change to a term or condition of employment, the petitioner must first demonstrate that the matter over which it seeks to negotiate is or relates to a mandatory subject of bargaining. *See UFOA*, 1 OCB2d 17, at 9 (BCB 2008). Under NYCCBL § 12-307(a), mandatory subjects of bargaining generally include wages, hours, and working conditions, as well as "any subject with a significant or material relationship to a condition of employment." *Municipal Highway Inspectors L. Union 1042*, 2 OCB2d 12, at 8 (BCB 2009).

In addition, the petitioner "must demonstrate the existence of such a change from the existing policy or practice." *DC 37*, 4 OCB2d 43, at 8 (BCB 2011) (quoting *SSEU*, 1 OCB2d 20, at 9 (BCB 2008)). In determining whether a change took place, "we have distinguished between a 'material' change and one which is *de minimis* - that is, a change in form only, which does not require increased participation on the part of the employee or alter the substance of the benefit to the employee. . . ." *Id.* at 8-9. We have held that *de minimis* changes do not suffice to establish an improper practice. Thus, in *DEA*, 2 OCB2d 11, at 16 (BCB 2009), we deemed the requirement that an employee seeking a parking permit complete a form eliciting the same information as was previously required as "not a significant enough" increase in employee participation to require bargaining. If a unilateral change is found to have occurred in a term and condition of employment

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that is a mandatory subject of bargaining, the Board will find that the change constitutes a refusal to bargain in good faith and, therefore, an improper practice. *See PBA*, 6 OCB2d 36, at 14; *PBA*, 6 OCB2d 33, at 9 (BCB 2013); *DC 37, L. 376*, 79 OCB 20, at 9 (BCB 2007).

It is well-established that the procedural aspects of employee performance evaluations are mandatory subjects of bargaining. *See* 6 OCB2d 36, at 14; *PBA*, 6 OCB2d 33, at 10; *DC 37, 75 OCB 13*, at 11 (BCB 2005); *PBA*, 63 OCB 2, at 13 (BCB 1999). *See also City of Yonkers*, 39 PERB ¶ 4580, at 4660 (2006) (Maier, ALJ) (“it has long been held that procedures for the evaluation of employees are mandatory subjects of bargaining”), *affd.*, 40 PERB ¶ 3001 (2007). By contrast, establishing criteria used for evaluation, and substantive changes to those criteria, are not mandatory subjects of bargaining. *See PBA*, 6 OCB2d 36, at 15; *DC 37, L. 1508*, 79 OCB 21, at 25 (BCB 2007) (citing *Matter of Patrolmen’s Benevolent Assn. of the City of NY v NY City Bd. of Collective Bargaining*, Index No. 112687/04, at 4 (Sup Ct New York County Aug. 17, 2005) (Friedman, J.), *affd* 38 AD3d 482 (1st Dept 2007)).

We have held that changes to the performance evaluation process that require employees to “take additional actions or implicate an expectation or action on the part of the employee” are deemed procedural and do not fall within the managerial prerogative. *See PBA*, 6 OCB2d 36, at 15; *see also DC 37, L. 3631*, 4 OCB2d 34, at 13 (BCB 2011); *DC 37, L. 1508*, 79 OCB 21, at 23 (citing *Matter of Patrolmen’s Benevolent Assn., supra*, at 6) (“where an employer imposes a new requirement that an employee meet with a supervisor as part of an evaluation process, this requirement is a procedure that is subject to mandatory bargaining”) (emphasis in original).

Here, it is undisputed that the NYPD implemented IO-9 without first negotiating with the Union during a period when the Agreement was in *status quo*. *See UFA*, 9 OCB2d 19 at 2 (BCB 2016) (*status quo* includes time period between the expiration of a collective bargaining agreement

and the successor agreement). Therefore, the issue before us is whether the implementation of IO-9 resulted in material changes to a mandatory subject of bargaining.

This Board has adopted PERB's holding that the introduction of a new form into a performance evaluation process is not a procedural change where the performance review process itself remains unchanged. *See DC 37, L. 1508, 79 OCB 21, at 23; PBA, 63 OCB 2, at 12-14 (BCB 1999) (citing Genesee Educational Association NEA/NY v. Genesee Community College, 29 PERB ¶ 4594 (ALJ 1996))*. Here, IO-9 replaced the POMCIMR, a paper form, with the electronic Officer Profile Report, which incorporates the Officer Self Report and Supervisor Feedback forms. We find that replacing the POMCIMR with the Officer Profile Report was incidental to the transition from a paper to electronic performance review process and does not trigger an obligation to bargain. The evidence shows that the tallying of enforcement activities previously performed by Enforcement Police Officers on the POMCIMR is now automatically populated on the Officer Profile Report. The evidence also establishes that Enforcement Police Officers retained the opportunity to submit comments relating to their performance, including actions taken to address sector conditions on the Officer Self Report, as they previously did on the POMCIMR and QPR. Finally, similar to the POMCIMR, Enforcement Police Officers submit the Officer Profile Report to their supervisor monthly. We find that such changes are not mandatory subjects of bargaining.²⁹

²⁹ We have previously found that the obligation to carry the POMCIMR, record conditions contemporaneously on it, and/or present it to a supervisor are not terms and conditions of employment but are additional tasks or responsibilities that are within the NYPD's right to determine. *See PBA, 6 OCB2d 36, at 21* (such requirements are "managerial directives which have only an indirect impact on the performance evaluation process"). For the same reason, we find that the requirement to print the Officer Profile Report is not a mandatory subject of bargaining. Similarly, we find that the implementation of the Supervisor Feedback Form is not a mandatory subject of bargaining because it requires action only on the part of the supervisor. *See PBA, 73 OCB 12, at 15 (BCB 2004)* (finding that a procedural change that only requires action by a supervisor is substantive in nature). Finally, we find that the evidence in the record does not

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See DC 37, L. 1508, 79 OCB 21, at 23 (“[w]here nothing additional is required of the employee, the changes are deemed ‘substantive’ and within managerial prerogative”) (citation omitted).

We reject the Union’s assertion that an expansion of the scope of comments solicited for the Officer Self-Report Form increases Enforcement Police Officer participation in the performance evaluation process. To the extent Enforcement Police Officers are now able to submit comments on a broader range of performance categories under IO-9, this change relates to performance criteria by which they are evaluated, a nonmandatory subject of bargaining.³⁰ *See DC 37, L. 1508, 79 OCB 21, at 22* (citing *Matter of Patrolmen’s Benevolent Assn. of the City of N.Y. v. N.Y. City Bd. Of Collective Bargaining*, Index No. 112687/04, at 4 (Sup. Ct. N.Y. Co. Aug. 17, 2005) (Friedman, J.), *affd.*, 38 A.D.3d 482 (1st Dept. 2007)) (“[I]mposition of criteria used for evaluation, and substantive changes to those criteria, are areas of managerial prerogative which need not be bargained with an employee organization.”)

As to the alleged elimination of the annual evaluation or its appeal process, we find no violation of NYCCBL § 12-306(a)(4). While the Union may have been told that the annual evaluation process was being replaced by the quarterly evaluations, such a change is not reflected in IO-9. Neither the text of IO-9 or nor its implementation establish that the appeal process for the annual evaluation has been eliminated or reduced in significance as alleged. The effect of IO-9 on the appeal process is, on this record, speculative, and is insufficient to merit a finding of a unilateral change. The only changes in the annual evaluation process established by the record relate to the

establish the existence of an appeal process prior to 2017 to challenge negative comments previously entered in the Minor Violations Log.

³⁰ We reject the City’s argument that the voluntary nature of a change in a mandatory subject renders it non-negotiable. *See DC 37, 79 OCB 37, at 12* (BCB 2007) (finding that voluntary participation in mediation procedures does not change the obligation to negotiate over them).

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number of performance categories, i.e. evaluation criteria, and the manner in which the overall annual performance rating is calculated. It is well established that these are substantive changes, not evaluation procedures, thus they are not mandatory subjects of bargaining. *See DC 37, L. 1508*, 79 OCB 21, at 23; *PBA*, 63 OCB 2, at 15 (BCB 1999) (finding that criteria by which an employee is reviewed is not a mandatory subject of bargaining).

We reach a different conclusion with regard to the frequency by which Administrative Police Officers must participate in performance evaluations and the requirement that Police Officers electronically “sign off” on their QPR following their quarterly performance review meeting. (Tr. 158) We find that, by unilaterally increasing the frequency by which Administrative Police Officers are evaluated, the NYPD made procedural changes to the performance evaluation process that violated NYCCBL § 12-306(a)(4) and (5). The City acknowledges that IO-9 increased the frequency of evaluations for Administrative Police Officers in administrative bureaus from once per year to five times per year. We also find that the NYPD similarly increased the frequency of evaluations for Administrative Police Officers in enforcement commands. The testimony of six Administrative Police Officers, four of whom were temporarily assigned enforcement duties, in six different enforcement commands establishes that they and the Administrative Police Officers they represented as delegates were only evaluated annually between 2012 and 2016. While Lieutenant Coffey testified that Administrative Police Officers in the 109th Precinct and others that she observed in other enforcement commands submitted a POMCIMR and were evaluated quarterly, this testimony was not borne out by the record. The City did not provide any pre-2017 POMCIMRs or quarterly evaluations of Administrative Police Officers in any enforcement commands to support this testimony. That the best evidence to rebut the Union witness’ testimony was in the City’s possession and was not produced, weighs in favor of crediting the Union’s

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witnesses, and we do so here. *See UFA*, 1 OCB2d 10, at 23-24 (BCB 2008) (crediting the contents of an email over testimony regarding its substance). Therefore, even if IO-70 required quarterly evaluations for Administrative Police Officers in enforcement commands, we find that they were only evaluated annually prior to 2017. *See UFT*, 7 OCB2d 12, at 20 (BCB 2014) (finding existing practices, not an unenforced written rule, determines the *status quo*). IO-9 requires that Administrative Police Officers in enforcement commands participate in monthly and quarterly evaluations, which increased the frequency of their participation in the performance evaluation process. We find these requirements to be procedural changes and mandatory subjects of bargaining. *See PBA*, 6 OCB2d 36, at 16 (finding that increasing frequency in which employees must participate in a performance review meeting is a mandatory subject of bargaining).

For similar reasons, we find that by requiring Police Officers to electronically “sign off” on their QPR following their quarterly performance review meeting, the NYPD violated NYCCBL § 12-306(a)(4) and (5). While Police Officers were previously not obligated to sign their quarterly evaluation, IO-9 now requires that Police Officers electronically accept or appeal their QPR following a performance review meeting with their supervisor. (City Ex. 4) This is achieved by hitting one of two buttons in PERF that connotes either a Police Officer’s agreement with the QPR or a desire to appeal it. In *PBA*, 6 OCB2d 36, we found that the NYPD violated the NYCCBL by requiring police officers to sign their QPR following a performance review meeting with their supervisor because it increased police officer participation in the evaluation process. *Id.* at 17. *See also DC 37, L. 3631*, 4 OCB2d 34, at 13-14. In doing so, we noted that the signature “connotes more than the mere acknowledgement that a meeting took place.” *PBA*, 6 OCB2d 36, at 17 fn. 6. Here, the electronic “sign off” on the QPR connotes agreement with the evaluation or notice of intent to appeal it and is also not merely an acknowledgement of the quarterly review meeting.

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Accordingly, we find that unilaterally requiring Police Officers to electronically accept or appeal their QPR constitutes a procedural change to a mandatory subject of bargaining in violation of the NYCCBL. *See PBA*, 6 OCB2d 36, at 17.

In reaching these conclusions, we reject the City's argument that the modifications to the frequency of evaluations for Administrative Police Officers and the requirement to electronically accept or appeal the QPR are *de minimis*. The procedural changes that we deem to be unilateral changes to performance evaluations procedures require additional acts and increased participation on the part of the Police Officer. These changes alter a condition of employment and thus, by definition, are not *de minimis* changes. *See DC 37*, 4 OCB2d 43, at 9-10.

Accordingly, we find that the City breached its duty to bargain by changing the frequency of Administrative Police Officers' participation in performance evaluations and by requiring Police Officers to electronically sign their QPR, in violation of NYCCBL § 12-306(a)(1), (4), and (5).³¹

³¹ When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37, L. 461 & 508*, 8 OCB2d 11, at 21 (BCB 2015); *Local 621, SEIU*, 2 OCB2d 27, at 14 (BCB 2009); *USCA*, 67 OCB 32, at 8 (BCB 2001).

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, docketed as BCB-4211-17, filed by the Patrolmen's Benevolent Association of the City of New York, Inc. against the City of New York and the New York City Police Department, be, and the same hereby is, granted, in part, and denied, in part; and it is hereby

ORDERED, that the New York City Police Department cease and desist from enforcing the provisions of Interim Order 9 that require: (1) police officers in administrative bureaus to participate in monthly and quarterly performance evaluations; and (2) all police officers to electronically accept or appeal their Quarterly Performance Review; and it is further

ORDERED, that the New York City Police Department refrain from making any further change to such provisions unless or until such time as the parties negotiate either to agreement or the dispute is resolved; and it is hereby

ORDERED, that the New York City Police Department restore the *status quo* under Interim Order 70 with regard to the changes to the performance evaluation procedures referenced above; and it is hereby

ORDERED, that the City post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain conspicuously posted for a minimum of thirty days.

Dated June 14, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI

MEMBER

PAMELA S. SILVERBLATT

MEMBER

CAROLE O'BLNES

MEMBER

CHARLES G. MOERDLER

MEMBER

GWYNNE A. WILCOX

MEMBER



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Monu Singh
Steven Star

**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 6 OCB2d 36 (BCB 2013), in final determination of the improper practice petition between the Patrolmen's Benevolent Association of the City of New York, Inc., and the City of New York and the New York City Police Department.

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

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The City of New York
(Department)

Dated: _____ (Posted By)
(Title)