COBA, 12 OCB2d 3 (BCB 2019)

(Impasse) (Docket No. I-270-17)

Summary of Decision: The Union filed a Request for Appointment of an Impasse Panel to resolve disputes concerning disciplinary guidelines for violations of use of force regulations. The City objected to the appointment of an impasse panel, arguing that the issues that the Union seeks to have determined are not mandatory subjects of bargaining. The City also argued that the guidelines represent only proposed penalty ranges, that they are required by a Consent Judgment, and that an employer has the prerogative to expand or retract a supervisor's authority without bargaining. The Board found certain demands to be nonmandatory and other demands mandatory. Accordingly, bargaining was ordered over the mandatory portions of the demands. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Impasse Petition

-between-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Union,

-and-

CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT OF CORRECTION,

Employers.

DECISION AND ORDER

On December 12, 2017, the Correction Officers' Benevolent Association of the City of New York, Inc. ("COBA" or "Union") filed a Request for Appointment of an Impasse Panel in which it requested the appointment of an impasse panel to resolve specific disputes concerning disciplinary guidelines for violations of use of force regulations ("Disciplinary Guidelines"). The Union alleges that impasse must be declared pursuant to § 12-311(c) of the New York City

Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") and § 1-05 of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). The City of New York ("City") objects to the appointment of an impasse panel, in part because the issues that the Union seeks to have determined by such panel are not mandatory subjects of bargaining.[1] At the request of the Deputy Director for Dispute Resolution ("Deputy Director"), both parties subsequently submitted position statements regarding whether the Union's demands concern mandatory subjects of bargaining.[2] The Board finds certain demands nonmandatory and certain demands mandatory. Accordingly, it orders bargaining over the mandatory portion of the demands.

BACKGROUND

The Union is the certified bargaining representative for Department of Correction ("DOC") employees in the civil service title of Corrections Officer ("CO"). The City and the Union are parties to a collective bargaining agreement that was entered into on January 6, 2017 and that expires on February 28, 2019. At issue in this proceeding are the Disciplinary Guidelines, which the DOC implemented on October 27, 2017 in order to comply with a Consent Judgment signed

[1] Although the claims here were presented to the Board within the context of an impasse petition and not a scope of bargaining petition, we will not dismiss the petition "simply because of its technical defects." *See COBA*, 10 OCB2d 21, at 12 n. 11 (BCB 2017) (quoting *Local 333, UMD*, 5 OCB2d 15, at 13 (BCB 2012)).

[2] The sole dispute before the Board currently is whether portions of the Disciplinary Guidelines present appropriate issues for impasse. In light of the parties' differing views as to the bargaining obligations addressed in this decision, it is premature to determine whether "conditions are appropriate for the creation of an impasse panel" pursuant to NYCCBL § 12-311(c)(2). *See also* OCB Rule § 1-05(c).

by Judge Swain on October 21, 2015.[3] In relevant part, the Consent Judgment provides that the DOC must establish disciplinary guidelines setting forth "the range of penalties that the Department will seek to impose for different categories of Use of Force Violations."[4] (Request for Appointment of an Impasse Panel ("Pet."), Ex. A at VIII ¶ 2, at 25)[5] In addition, the Consent Judgment imposed numerous changes to methods of employee discipline, including setting certain penalties and penalty ranges for different categories of misconduct.

Specifically, the Consent Judgment mandates that the DOC's disciplinary guidelines shall state that the DOC will take all necessary steps to seek termination of staff members who engage in certain Use of Force violations ("Category One Offenses") by:

> i. Deliberately striking or using chemical agents on an inmate in restraints, in a manner that poses a risk of serious injury to the Inmate, except in situations where the Staff Member's actions were objectively reasonable in light of the facts and circumstances confronting the Staff Member.
>
> ii. Deliberately striking or kicking an Inmate in the head, face, groin, neck, kidneys, or spinal column, or utilizing choke holds, carotid restraint holds, or other neck restraints, in a manner that is punitive, retaliatory, or designed to inflict pain on an Inmate, and constitutes a needless risk of serious injury to an Inmate.
>
> iii. Causing or facilitating an inmate-on-inmate assault or fight, or allowing an inmate-on-inmate assault or fight to continue where it is clearly safe to intervene,

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[3] The City and the DOC engaged in settlement negotiations with a class of plaintiffs and the United States Department of Justice in a case pending in the Southern District of New York, *Nunez v. City of New York,* Index No. 1:11-cv-05845-LTS-JCF ("*Nunez*") (SDNY), concerning allegations of widespread excessive use of force incidents in DOC facilities. The Consent Judgment resulted from these settlement negotiations.

[4] A Use of Force is defined in the Consent Judgment as: "[A]n instance where Staff use their hands or other parts of their body, objects, instruments, chemical agents, electric devices, firearm, or any other physical method to restrain, subdue, or compel an Inmate to act in a particular way, or stop acting in a particular way." (Pet., Ex. A at 5)

[5] Generally, the documents cited to here are either attachments to the Request for Appointment of Impasse Panel or the parties' written submissions addressing whether the issues are mandatory subjects of bargaining: Union letters dated March 27, 2018 ("3/27/18 Letter") and August 9, 2018 ("8/9/18 Letter") and the City letter dated September 7, 2018 ("9/7/18 Letter").

> in order to punish, discipline, or retaliate against an Inmate or as a means to control or maintain order in any area of a Facility.

(Pet., Ex. A at § VIII, ¶ 2.d at 26)

Further, for offenses involving "deliberately providing materially false information in a Use of Force Report or during an interview regarding a Use of Force Incident" or "deliberately failing to report Use of Force by a Staff Member" ("Category Two Offenses"), the Consent Judgment provides that the DOC must take:

> all necessary steps to seek a penalty ranging from, at a minimum either a 30-day suspension without pay (a portion of the 30 days may consist of the loss of accrued vacation days), or a 15-day suspension without pay plus a one-year probation period, up to and including termination. If the penalty imposed is a 15-day suspension without pay plus a one-year probation period, the terms of the probation shall specify that any Use of Force Violation or significant policy violation will result in termination.

(Pet., Ex. A at VIII ¶ 2.c, at 25)

The Consent Judgment also requires that the DOC's disciplinary guidelines "shall include . . . the aggravating and mitigating factors to be taken into account in determining the specific penalty to seek" within articulated penalty ranges. (Pet. Ex. A at VIII ¶ 2.a, at 25) Regarding the Category One and Two penalties described above, the Consent Judgment further states that the disciplinary guidelines "shall provide that the Department will take all necessary steps to seek such penalties . . . unless the Commissioner, after personally reviewing the matter, makes a determination that exceptional circumstances exist that would make [such penalty] an unjust sanction. . . . Any such determination shall be documented by the Commissioner and provided to the Monitor." (*Id*. at VIII ¶ 2.c.iii, ¶ 2.d.iv, at 26)

The October 27, 2017 Disciplinary Guidelines were issued to the DOC's Trials & Litigation Division ("Division") and consist of instructions that outline minimum penalties or penalty ranges to be sought for four categories of misconduct or offenses relating to Use of Force

violations.[6] For Category One Offenses, the Disciplinary Guidelines are consistent with the Consent Judgment and require the Division to seek termination. Similarly, the Disciplinary Guidelines are consistent with the Consent Judgment for Category Two Offenses. For a first occurrence, the Disciplinary Guidelines require the Division to seek:

> [Either] a 30-day suspension without pay [,] or a 15-day suspension without pay and a one-year probation period, and the terms of the probation shall specify that any Use of Force violation or significant policy violation will result in termination.[7]

(Pet., Ex. W, at 3) For a second Category Two Offense, the Disciplinary Guidelines require the Division to seek termination, as set forth in the Consent Judgment.

The Disciplinary Guidelines establish a third category of offenses for "Failure to Intervene," which it defines as a staff member witnessing a clearly excessive Use of Force but not attempting to "stop or reduce the force being used." (Pet., Ex. W, at 3) ("Category Three Offenses"). Category Three Offenses have the same minimum penalties as Category Two Offenses.

The Disciplinary Guidelines also establish a fourth category of offenses involving "[o]ther use of force related misconduct," which are violations of the DOC's Use of Force policy that do not fall into the other categories ("Category Four Offenses"). (Pet., Ex. W, at 4) When introducing Category Four violations, the Disciplinary Guidelines state:

> There are many other potential violations of the Use of Force Directive that do not fall within the categories 1 and 2 set forth above. In those situations, it is important to note that the Department will look into many factors, including, but not limited to: (i) a[n] [employee's] entire service record . . . (ii) strength of the evidence; (iii) falsity and/or deception; (iv) severity of any injuries; (v)

[6] The Disciplinary Guidelines expressly state that they "do not seek to modify the Civil Service Law . . ." (Pet., Ex. W, at 1)

[7] A penalty that includes a probation period requires the agreement of the DOC employee.

> concerted effort to conceal misconduct; (vi) impact on the safety of other staff and inmates; (vii) whether the evidence of misconduct would establish the elements of a crime; and (viii) whether it was a procedural or substantive violation of the Use of Force [policy].

(*Id.* at 4) These factors are followed by a description of procedural versus substantive Category Four misconduct and precede all references to Category Four penalties.[8]

The minimum penalty for a first-time procedural offense is command discipline and one to five suspension days or the equivalent loss of vacation days.[9] Penalties for a second procedural offense are in accordance with progressive discipline. The minimum penalty for a first-time substantive offense is a 10-day suspension or the equivalent loss of vacation days. A second substantive offense carries a minimum penalty of a 30-day suspension or loss of vacation, or a 15-day suspension or loss of vacation plus a one-year probationary period. The terms of the probation provide that any Use of Force violation or significant policy violation during the probationary period will result in termination. For a third substantive violation of a Category Four Offense, the Disciplinary Guidelines call for termination.

The Disciplinary Guidelines also provide:

> The Commissioner and/or his designee is the ultimate decider of discipline for the Department. Thus, the Commissioner may, after a thorough review of the circumstances, evidence, and aggravating and mitigating factors of a case, deviate from the guidelines established herein. Any deviation from the penalty guidelines established herein must be documented to include all the mitigating and aggravating factors and evidence that warranted the deviation

[8] Procedural violations are "those which do not involve physical contact by [an employee] against an inmate." (*Id.*) Substantive violations are those in which the staff member "impermissibly uses objects, instruments, or other parts of the [employee's] own body to make physical contact with an inmate." (*Id.*)

[9] The Disciplinary Guidelines note that the penalty for a first-time procedural offense may be mandated or negotiated.

> and thereafter be approved in writing by the Commissioner and/or his or her designee.

(*Id.* at 1-2)

On or about March 15, 2016, the DOC provided the Union with a draft of the Disciplinary Guidelines. By letters dated April 19 and 26, 2016, the Union articulated its objections to several aspects of the draft. On August 15, 2016, the Office of Labor Relations ("OLR") provided the Union with a revised draft and, on November 2, 2016, the Union responded that provisions of the Disciplinary Guidelines remained objectionable.[10] By email on August 4, 2017, the DOC distributed further revisions to the Disciplinary Guidelines and advised the Union that they needed to be finalized by August 14, 2017. By letter dated August 10, 2017, the Union objected to the August 14 deadline. On August 16, the DOC declined to extend the deadline. On August 24, 2017, the Union articulated its position that the Disciplinary Guidelines are a mandatory subject of bargaining and reserved the right to challenge them if imposed without its approval. DOC implemented the Disciplinary Guidelines on October 27, 2017.

On December 12, 2017, the Union filed its Request for Appointment of an Impasse Panel, and the matter was assigned to OCB's Deputy Director for investigation pursuant to OCB Rules § 1-05(c).[11] The City objected to a declaration of impasse on the basis that the subjects raised by the Union are not appropriate for impasse. After discussions with the Deputy Director, the parties

[10] The parties met several times between November 2016 and August 2017 to discuss the Union's remaining concerns.

[11] OCB Rule § 1-05(c) provides that "the Director may conduct or cause to be conducted an investigation to ascertain if the conditions for an impasse panel have been met, namely, that the collective bargaining negotiations have been exhausted and that the conditions are appropriate for the creation of an impasse panel."

agreed to submit written positions for the Board to determine whether the issues the Union seeks to put before an impasse panel are mandatory subjects of bargaining.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the Disciplinary Guidelines are subject to mandatory bargaining because they contain disciplinary procedures. In a letter to OCB's Deputy Director, the Union identified six specific issues over which it seeks to bargain: (i) the scope of factors that the DOC will examine when determining the penalty it will seek for Category Four Offenses; (ii) the scope of violations that are encompassed within Category Four; (iii) the circumstances that will warrant discipline for Category Three Offenses, as well as the appropriate penalty imposed for such violations; (iv) conduct encompassed within Category Four procedural violations and substantive violations and the appropriate penalties for such violations; (v) the standard of review the Commissioner will utilize to determine whether to deviate from the penalties set forth in the Disciplinary Guidelines;[12] and (vi) the scope of prosecutorial discretion for the DOC's settlement of disciplinary charges covered by the Disciplinary Guidelines.

The Union argues that the Disciplinary Guidelines may contain some mandatory and some nonmandatory subjects of bargaining. Thus, even if the DOC maintains the prerogative to unilaterally issue disciplinary guidelines, the details of such guidelines may nevertheless be subject to mandatory negotiations. It argues that the New York State Public Employment Relations Board

[12] The Union outlined several subsidiary issues relating to this demand, including (a) whether the standard will be "exceptional circumstances," as required by the Consent Decree; (b) the factors that the DOC will utilize when applying the standard; and (c) the factors that will be deemed "aggravating" or "mitigating" circumstances for the purpose of "deviating from" the Disciplinary Guideline's penalties. (*See* 3/27/18 Letter, at 2)

("PERB") has long held that penalty guidelines or disciplinary procedures are subject to mandatory bargaining. Thus, the Union claims that the issues it seeks to bargain over are procedural questions that are appropriate bargaining topics.

Finally, the Union contends that even assuming the Disciplinary Guidelines are not mandatory subjects of bargaining, they have a potential disciplinary impact that warrants bargaining and a declaration of impasse.

City's Position

The City asserts that the Union's Request for a Declaration of Impasse has been improperly submitted under NYCCBL § 12-311(a)(3) because the Disciplinary Guidelines were not changes to discipline or subjects that warrant mid-term bargaining and therefore are not a proper subject for impasse.[13] The City argues that the Union's demands concern instructions to the Commissioner and DOC disciplinary advocates that are not negotiable. Moreover, it asserts that, as required by the Consent Judgment, the Guidelines set forth "proposed" penalty ranges. (*See* 9/7/18 Letter, at 3) The text of the Disciplinary Guidelines also provide that penalties are subject to the "specific facts evidencing the nature of the misconduct and a review of any aggravating and mitigating factors." (*Id.*) They explicitly provide that the Commissioner may deviate from the proposed penalty ranges. In this regard, the City notes that disciplinary penalties can be "negotiated provided they fall within the framework of Civil Service Law 75 . . .." (*Id.*) Therefore, any challenge to the Disciplinary Guidelines' penalties should be made through the disciplinary due processes before the Office of Administrative Trials and Hearings ("OATH").

[13] NYCCBL § 12-311(a)(3) provides, in relevant part: "[P]arties may engage in collective bargaining during such term [of a collective bargaining agreement] on a matter within the scope of collective bargaining . . .."

Further, the City claims that the case law cited by the Union concerning disciplinary penalties is inapposite because the Disciplinary Guidelines do not define the grounds for discipline or "mandate specific penalties." (9/7/18 Letter, at 4) The more pertinent jurisprudence, the City contends, are those cases holding that an employer may expand or retract a supervisor's discretion regarding the performance of supervisory functions without incurring a bargaining obligation. Accordingly, the City asserts that the DOC has no obligation to bargain over the Disciplinary Guidelines.

Finally, the City argues that the Board should not order bargaining over the practical impact of the Disciplinary Guidelines. Citing Board case law, it asserts that the Board may not find a practical impact absent a hearing and that the Union's allegations do not warrant such a hearing.

DISCUSSION

The express policy of the NYCCBL is to favor and encourage "the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations." NYCCBL § 12-302.[14] Consistent with the impasse procedures under the NYCCBL and the OCB Rules, the OCB Chair assigned the Deputy Director to investigate whether the parties had exhausted bargaining regarding the Disciplinary Guidelines. At the time of the issuance of this Decision and Order, the

[14] NYCCBL § 12-302 provides:

> Statement of policy. It is hereby declared to be the policy of the city to favor and encourage the right of municipal employees to organize and be represented, written collective bargaining agreements on matters within the scope of collective bargaining, the use of impartial and independent tribunals to assist in resolving impasses in contract negotiations, and final, impartial arbitration of grievances between municipal agencies and certified employee organizations.

investigation has not been completed because the City's opposition to the request for the appointment of an impasse panel raised a legal issue appropriate to resolve prior to any declaration of impasse.

Pursuant to NYCCBL § 12-311(c)(3)(c), the "report of an impasse panel shall be confined to matters within the scope of collective bargaining." Further, pursuant to NYCCBL § 12-309(a)(2), the Board shall have the power and duty "on the request of a public employer or public employee organization to make a final determination as to whether a matter is within the scope of collective bargaining." Ordinarily, the question of whether a particular demand that has not been resolved in negotiations between the parties is a mandatory subject of bargaining would be raised in a scope of bargaining proceeding pursuant to NYCCBL § 12-309(a)(2). However, here the City has raised the issue in response to the Union's request for declaration of impasse, and both parties now request that the Board resolve this matter. Accordingly, the Board will determine whether the issues over which the Union seeks to negotiate are mandatory subjects of bargaining.

NYCCBL § 12-307(a) provides that parties "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), [and] working conditions." Additionally, mandatory subjects of bargaining generally include "any subject with a significant or material relationship to a condition of employment." *LEEBA*, 3 OCB2d 29, at 5 (BCB 2010); *see also EMS SOA*, 75 OCB 15, at 5 (BCB 2005); *DC 37*, 73 OCB 7, at 15 (BCB 2004). However, as the Court of Appeals has recognized, "[n]o litmus test has . . . been devised that automatically identifies a term or condition of employment, or a management prerogative." *Matter of Levitt v Bd. of Collective Bargaining*, 79 N.Y.2d 120, 127 (1992); *EMS SOA*, 75 OCB 15, at 5-6.

In certain instances where a proposal contains both mandatory and non-mandatory elements, we have examined and advised the parties which elements are mandatory. *See LEEBA*, 3 OCB2d 29, at 6; *EMS SOA*, 75 OCB 15, at 6. This practice is consistent with our authority, under NYCCBL § 12-309(a)(2), to determine whether a matter is within the scope of mandatory collective bargaining.

Here, the central question presented is whether each of the Union's demands concerning the Disciplinary Guidelines are mandatory subjects of bargaining. In light of the fact that the Union's six demands present similar legal issues, we first discuss the applicable jurisprudence and then consider the demands.

The Board has long held that, while it is an employer's prerogative to take disciplinary action, the procedures necessary for the administration of discipline are a mandatory subject of bargaining. *See LEEBA*, 3 OCB2d 29, at 27; *MHI Local Union 1042*, 2 OCB2d 12, at 8 (BCB 2009); *DC 37*, 75 OCB 13, at 11 (BCB 2005); *DC 37*, 65 OCB 36, at 9 (BCB 2000); *see also* NYCCBL § 12-306(b). The "methods, means, and procedures which may be used in effectuating disciplinary action" are subject to mandatory bargaining. *Id.* at 9-10. Thus, we have long held that "disciplinary action manifestly affects working conditions."[15] *Id.* at 10.

Our analysis has also been informed by jurisprudence from PERB holding that determining whether to discipline and the criteria related to that determination are nonmandatory, but disciplinary penalties are mandatory. Indeed, in *Poughkeepsie City School District*, 19 PERB ¶

[15] Cases involving the New York City Police and Fire Departments are analyzed differently because the City Charter and New York City Administrative Code grant broad authority over discipline to the Police and Fire Commissioners. *See, e.g.*, *Patrolmen's Benevolent Ass'n v. Pub. Empl. Rel. Bd.*, 6 N.Y.3d 563 (2006) (analyzing the disciplinary powers of the Police Commissioner); *Roberts v. N.Y. City Office of Collective Bargaining*, 113 A.D. 3d 97 (1st Dept. 2013) (analyzing the disciplinary powers of the Fire Commissioner).

3046 (1986), PERB concluded that the public employer did not violate the Taylor Law when it unilaterally announced that it may initiate disciplinary action against employees who take ten or more days of sick leave during a contract term unless such employees submitted medical documentation. As PERB explained, while sick leave is a mandatory subject of bargaining:

> This announcement has not altered any of the terms or conditions of employment of unit employees. The number of sick leave days available to them has neither been increased nor diminished. All that has happened is that the employees have been put on notice as to the standards that the District will be using in monitoring sick leave and as to circumstances which may persuade it to initiate disciplinary proceedings.

19 PERB ¶ 3046, at 3099; *see also COBA*, 69 OCB 26 (BCB 2002) (relying on *Poughkeepsie City School District* to conclude that the DOC did not violate the NYCCBL when it unilaterally revised its sick leave monitoring program); *County of Orange*, 19 PERB ¶ 4579 (1986) (citing *Poughkeepsie City School District* for the proposition that "the internal standards that might be applied by the employer in determining disciplinary cases" are not mandatory subjects of bargaining); *cf. Suffolk County Correction Officers Ass'n*, 40 PERB ¶ 3022, at 3089 n. 18 (2007) (sick leave use monitoring plan that contained penalties such as denial of overtime assignments and night differentials found to be a mandatory subject of bargaining).

In contrast, PERB has found that specific schedules and ranges of disciplinary penalties, as opposed to standards in determining when to initiate discipline, are mandatory subjects of bargaining. *See NYC Transit Auth.*, 20 PERB ¶ 3037 (1987), *affd.*, 147 A.D.2d 574 (2d Dept. 1989), *order modified*, 156 A.D.2d 689 (2d Dept. 1989). In *NYC Transit Authority*, PERB concluded that the public employer could not unilaterally eliminate a comprehensive schedule of penalty guidelines in favor of a policy by which disciplinary penalties were assigned on a case-by-

case basis.[16] Similarly, in *State of New York (OMH)*, 31 PERB ¶ 3051 (1998), PERB required a public employer to negotiate before modifying its smoking policy to include a system of progressive discipline involving automatic penalties. PERB explained, "[m]oving from a generalized policy of strict enforcement of no smoking rules to a multi-step, nondiscretionary, progressive disciplinary system with automatically applied penalties is a substantive and substantial change in the unit employees' terms and conditions of employment regarding discipline." *Id.* at 3107; *see also County of Nassau*, 31 PERB ¶ 3074, at 3166 (1998) ("An employer which unilaterally changes a general, sporadically enforced discipline policy to a specific, enforced discipline policy violates . . . the Act.").

Applying this precedent to the issues presented here, certain aspects of the Disciplinary Guidelines that the Union seeks to negotiate are nonmandatory, while other aspects are mandatory subjects of bargaining.

UNION DEMAND NO. 1: Description of "the many factors" the DOC will be "look[ing] into" to determine what penalty to request and impose in the "many other potential violations" contemplated by the guidelines.

This demand is limited to Category Four Offenses that are associated with "many other potential violations of the Use of Force [policy] that do not fall within [Categories One and Two]." (Pet., Ex. W, at 4) The Disciplinary Guidelines generally state that "potential violations of the Use of Force Directive" depend on "many factors, including, but not limited to":

> (i) a [staff member's] entire service record commonly referred to as the 22R; (ii) strength of the evidence; (iii) falsity and/or deception; (iv) severity of any injuries; (v) concerted effort to conceal misconduct; (vi) impact on the safety of other staff and inmates; (vii) whether the evidence of misconduct would establish the elements of

[16] Under the old penalty schedule, an employee would receive an "official caution" if he or she committed certain defined offenses. *See NYC Transit Authority*, 31 PERB ¶ 3051. Employees who accumulated three or more official cautions in one year, or two official cautions for the same offense, were subject to a reprimand or up to three days' suspension, following a departmental hearing.

> a crime; (viii) whether it was a procedural or substantive violation of the Use of Force [policy].

(*Id.*) In other words, these eight factors, as well as others, may be considered when the Division is deciding whether to discipline for other violations of the Use of Force Directive. Accordingly, we find that this section of the Disciplinary Guidelines provides guidance to supervisors and managers to use when deciding whether to initiate discipline and does not modify or apply to disciplinary procedures or the determination of the appropriate penalty. Therefore, we find that Union Demand No. 1 is not a mandatory subject of bargaining. *See COBA*, 69 OCB 26, at 11; *Suffolk County Correction Officers Assn.*, 40 PERB ¶ 3022; *Poughkeepsie City School Dist.*, 19 PERB ¶ 3046.

UNION DEMAND NO. 2: The scope or description of the "many other potential violations" contemplated by the guidelines.

Union Demand No. 2 also relates to Category Four Offenses. In essence, the Union seeks to negotiate over the portions of the Use of Force policy that are not otherwise specified in the Disciplinary Guidelines but will be bases for discipline.

We find that this demand is also nonmandatory. The statement that "many other potential violations" will warrant the penalties identified in Category Four does not impact or change any terms and conditions of employment but instead indicates that there are additional provisions of the policy that may result in discipline. Accordingly, the DOC has simply announced that it may take disciplinary action against employees who violate the DOC's Use of Force policy. Therefore, Union Demand No. 2 pertains to when the DOC will initiate discipline. It is well settled that municipal employers need not bargain such an announcement. *See COBA*, 69 OCB 26, at 11; *Poughkeepsie City School Dist.*, 19 PERB ¶ 3046; *see also State of New York (OMH)*, 31 PERB ¶

3051, at 3106 ("All employer directives to employees carry with them, at least implicitly, the possibility of an employment consequence for noncompliance.").[17]

UNION DEMAND NO. 3: The circumstances which will warrant discipline and the appropriate penalties for the "failure to intervene."

This demand seeks bargaining over two distinct elements of Category Three Offenses. With respect to "the circumstances that will warrant discipline," the Disciplinary Guidelines instruct that Category Three applies to "all staff who witness a clearly excessive Use of Force . . . but do not attempt to stop or reduce the force being used." (Pet., Ex. W, at 3) Category Three also provides that "[d]iscipline will only be imposed in incidents where such intervention is practicable and consistent with safety and security." (*Id*.) In these portions of the Disciplinary Guidelines, the DOC has simply provided guidance for supervisors and managers to use when considering whether to initiate discipline for the failure to intervene. *See Poughkeepsie City School Dist.*, 19 PERB ¶ 3046. Therefore, the demand to negotiate circumstances warranting Category Three discipline is not a mandatory subject of bargaining.

The Union also seeks to bargain over the articulated penalties for Category Three violations.[18] The Disciplinary Guidelines provide that, for a first offense, the minimum penalty is a 30-day suspension without pay, or a 15-day suspension without pay and a one-year probation. For a second offense, the minimum penalty is termination. These penalties are a term and

[17] We also do not find, upon this record, that the DOC has an obligation to bargain over potential disciplinary impact. Mere exposure to disciplinary consequences does not give rise to a bargainable impact claim. *See Doctors Council*, 69 OCB 24, at 8-9 (BCB 2002). Moreover, the Union has not alleged the existence of any impact. *See COBA*, 10 OCB2d 21, at 14 ("A petitioner urging the Board to find [a practical] impact must present more than conclusory statements of a practical impact in order to require the employer to bargain, or, indeed, in order to warrant a hearing to present further evidence.") (quoting *CEU, L. 237, IBT*, 2 OCB2d 37, at 18).

[18] Category Three minimum penalties are not mandated by or covered in the Consent Judgment.

condition of employment that is a mandatory subject of bargaining. *See DC 37*, 65 OCB 36, at 10; *see also State of New York (OMH)*, 31 PERB ¶ 3051, at 3107 ("Moving from a generalized policy of 'strict enforcement' . . . to a multi-step, nondiscretionary, progressive disciplinary system with automatically applied penalties is a substantive and substantial change in the unit employees' terms and conditions of employment regarding discipline."); *County of Nassau*, 31 PERB ¶ 3074. Further, the unilateral implementation of the penalties and/or penalty ranges that the Union seeks to bargain here are not *de minimis*. *See UFA*, 9 OCB2d 19, at 10 (BCB 2016) (unilateral implementation of a minimum staffing overtime policy alters the substance of an employee benefit and is therefore not *de minimis*); *DC 37*, 4 OCB2d 47, at 20 (BCB 2011) (the unilateral implementation of a policy restricting use of employer's email was not *de minimis*).

In reaching this conclusion we note that the Disciplinary Guidelines require the Division to adhere to the defined penalties and, therefore, are not merely in the nature of guidance to supervisors in the disciplinary process. *See DC 37, L. 1549*, 7 OCB2d 3, at 20 (BCB 2014) (unilateral changes to a commanding officer's discretion to negotiate penalties was not a mandatory subject of bargaining); *DC 37, L. 3621*, 4 OCB2d 34, at 12-14 (BCB 2011) (rejecting the City's argument that a change in the frequency of performance evaluations only affected supervisors). Further, the penalties for Category Three and Four Offenses were not mandated by or discussed in the Consent Judgment and, therefore, could not have been anticipated prior to the DOC's initiation of discussions over the Disciplinary Guidelines in March 2016. The final Disciplinary Guidelines were not implemented until October 2017, nine months after the parties executed their last collective bargaining agreement. Under these circumstances, mid-term bargaining on the mandatory subject of disciplinary penalties is appropriate. *DC 37, L.437 & 768*, 4 OCB2d 31, at 17 (BCB 2011) (finding that failure to pay scheduled employees whose work

location was inaccessible and closed was a unilateral mid-term change to a mandatory subject of bargaining that could not be anticipated by the parties); *see ADW/DWA*, 3 OCB2d 8, at 15 (BCB 2010) (a significant change in circumstances that cannot be anticipated by the parties creates a duty to bargain midterm over a mandatory subject of bargaining).

UNION DEMAND NO. 4: What conduct falls within the scope of "procedural" and "substantive" violations as those terms are used in the guidelines and the appropriate penalties for each type of violation.

This demand, like Union Demand Nos. 1 and 2, concerns Category Four Offenses. The Disciplinary Guidelines divide Category Four Offenses into procedural violations and substantive violations based upon the conduct at issue.[19] The Disciplinary Guidelines require the Division to determine whether conduct constitutes "a procedural or substantive violation of the Use of Force [policy]" when considering whether a Category Four Offense has occurred. (Pet., Ex. W, at 4) The penalties for procedural and substantive violations differ.

We find that the portion of the Disciplinary Guidelines that defines the two types of Category Four violations - procedural and substantive violations - is not a mandatory subject of bargaining. The language distinguishing procedural from substantive violations does not, standing alone, impact upon any terms and conditions of employment. This portion of the Disciplinary Guidelines simply sets parameters for the disciplinary unit to use when assessing whether a violation has occurred and whether to discipline. At most, this is notification to employees of the standard the DOC will use in determining whether to initiate disciplinary proceedings. *See COBA*, 69 OCB 26, at 11; *Poughkeepsie City Sch. Dist.*, 19 PERB ¶ 3046.

[19] As discussed above, procedural violations are "those which do not involve physical contact by [a staff member] against an inmate." (Pet., Ex. W, at 4). Substantive violations are "those in which the [staff member] impermissibly uses objects, instruments, or parts of the [staff member's] own body to make physical contact with an inmate." (*Id.*)

However, Union Demand No. 4 also seeks to negotiate the appropriate penalties for procedural and substantive Category Four Offenses.[20] Penalties and penalty ranges are mandatory subjects of bargaining. *See DC 37*, 65 OCB 36, at 10; *State of New York (OMH)*, 31 PERB ¶ 3051. Therefore, the portion of the Disciplinary Guidelines that sets forth minimum penalties for Category Four Offenses is mandatorily negotiable for the same reasons we articulated in our analysis of Union No. Demand 3.

> **UNION DEMAND NO. 5: (a) The standard of review that the Commissioner will use to determine whether to deviate from the penalties stated in the Disciplinary Guidelines; (b) whether the standard will, as required by *Nunez,* be "exceptional circumstances"; (c) the factors constituting "exceptional circumstances" or fitting within any alternate standard of review to be applied; and (d) the factors which will be deemed "aggravating" and "mitigating" for the purpose of deviating from the guideline penalties.**

In this demand, the Union seeks to bargain over the following paragraph of the Disciplinary Guidelines:

> The Commissioner and/or his designee is the ultimate decider of discipline for the Department. Thus, the Commissioner may, after a thorough review of the circumstances, evidence, and aggravating and mitigating factors of a case, deviate from the guidelines established herein. Any deviation from the penalty guidelines established herein must be documented to include all the mitigating and aggravating factors and evidence that warranted the deviation and thereafter be approved in writing by the Commissioner and/or his or her designee.

(Pet., Ex. W., at 1-2)

In considering Union Demand No. 5, we find that although it is articulated as four separate requests, Union Demand Nos. (5)(b), (c), and (d) all relate to Union Demand (5)(a), which is a general request to negotiate over the "standard of review" the Commissioner or the Commissioner's designee will apply when considering whether an exception to those penalties

[20] Penalties for Category Four Offenses are not mandated by or covered in the Consent Judgment.

stated in the Disciplinary Guidelines is warranted. We find that Union Demand No. 5 does not seek to negotiate specific penalties or disciplinary procedures. Rather, the demand seeks to only to negotiate a "standard of review" to be used by the DOC Commissioner or the designee in the formal discipline process.

There is no dispute that formal discipline of COs is governed by § 75 of the Civil Service Law.[21] Following a hearing, the Commissioner or the designee reviews the OATH report and recommendations and makes a final determination as to whether discipline should be imposed and what penalty is appropriate. Neither the Consent Judgment nor the Disciplinary Guidelines modify that process. In fact, the Disciplinary Guidelines expressly state that they "do not seek to modify the Civil Service Law . . ." (Pet., Ex. W, at 1) Instead, the relevant Disciplinary Guideline provision merely acknowledges that the Commissioner's role as the "ultimate decider of discipline" includes determining the penalty – the same role and authority that existed prior to the Consent Judgment.

We do not find the issue in *NYC Transit Auth.,* 20 PERB ¶ 3037 (1987), *affd.,* 147 A.D. 2d 574 (2d Dept. 1989), *order modified,* 156 A.D.2d 689 (2d Dept. 1989), to be analogous to the Union's demand here. In that case, PERB found that the public employer could not unilaterally eliminate a schedule of penalty guidelines in favor of a policy by which disciplinary penalties were assigned on a case-by-case basis. Accordingly, the Union's improper practice petition was granted. Here, there has been no change in the disciplinary process or the definition of or the exercise of the Commissioner's discretion to make the final determination over discipline and the penalty. Union Demand No. 5 seeks only to define the circumstances appropriate for the

[21] Under that process the DOC issues disciplinary charges, and a due process hearing is held at OATH.

Commissioner to find an exception to the Disciplinary Guideline's articulated penalties, not the penalties themselves.[22] Accordingly, we find that the City does not have the duty to bargain over Union Demand No. 5.[23]

UNION DEMAND NO. 6: The availability and scope of prosecutorial discretion for the DOC's settlement of disciplinary charges covered by the guidelines.

Finally, the Union seeks to bargain over the "prosecutorial discretion" available to the Division in the settlement of disciplinary actions involving violations of the Use of Force policy. As noted earlier, the NYCCBL provides that a public employer has the right to take disciplinary action. However, we have previously found that the decision to offer a settlement is no different from the decision to initiate discipline and is not subject to negotiation. *See NYSNA*, 51 OCB 20, at 17 (BCB 1993). Accordingly, we do not find Union's Demand No. 6 to be a mandatory subject of bargaining.

In sum, we find that portions of Union Demands No. 3 and 4 concern disciplinary penalties or penalty ranges and therefore are mandatory subjects of bargaining. For all the reasons set forth above, the remainder of the Union's demands do not concern mandatory subjects of bargaining.

[22] To the extent that the Union is dissatisfied with the exercise of discretion, there are formal channels to appeal, such as Civil Service Law §§ 75, 76(1) or Civil Practice Law & Rules Art. 78.

[23] Because we find that Union Demand No. 5 is not a mandatory subject of bargaining, we need not reach the City's arguments concerning the authority of the Consent Judgment.

DETERMINATION

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

DETERMINED, that certain of the demands of the Correction Officers' Benevolent Association of the City of New York, Inc., the negotiability of which was challenged by the City of New York, are within the scope of mandatory collective bargaining between the parties to the extent set forth in this decision.

Dated: February 11, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER