# *COBA*, 12 OCB2d 28 (BCB 2019)

(IP) (Docket No. BCB-4272-18)

***Summary of Decision***: The Union argued that the DOC unilaterally changed its uniform policy after some of its members had purchased uniform items that are now not permissible to wear at work. The City argued that determining the uniform policy is a managerial right under NYCCBL § 12-307(b) and that the Union's claims of practical impact are vague and speculative. The Board found that the determination of required uniforms is a managerial prerogative. However, the Board found that to the extent some employees purchased cargo pants that they can no longer wear in reliance on the prior uniform policy, the mid-term change impacted their uniform allowance, a mandatory subject of bargaining. Accordingly, the petition was granted, in part, and denied, in part. ***(Official decision follows).***

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

**In the Matter of the Improper Practice Proceeding**

***-between-***

**CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,**

***Petitioner,***

***-and-***

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

***Respondents.***

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## DECISION AND ORDER

On May 11, 2018, the Correction Officers' Benevolent Association ("Union" or "COBA") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Correction ("DOC") alleging that the DOC unilaterally changed its uniform

policy in violation of § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Specifically, it alleges that the DOC changed its policy regarding when Correction Officers ("COs") can wear cargo pants as part of their uniform. The Union argues that, as a result of the new uniform policy, some of its members had purchased cargo pants in reliance on the old uniform policy that they no longer can wear at work. The City argues that determining the uniform policy is a managerial right under NYCCBL § 12-307(b) and that the Union's claims of practical impact are vague and speculative. The Board finds that the determination of authorized uniforms is a managerial prerogative. However, the Board finds that to the extent that COs purchased cargo pants that they can no longer wear in reliance upon the prior uniform policy, the mid-term change impacted the uniform allowance, a mandatory subject of bargaining. Accordingly, the petition is granted, in part, and denied, in part.

## BACKGROUND

The Trial Examiner held a two-day hearing and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts as set forth below.

The Union is the certified collective bargaining representative for DOC employees in the civil service title of CO. The City and the Union are parties to the Correction Officers 2011-2019 Agreement ("Agreement"), which was executed in January 2017. Article VII of the Agreement

[1] While the Union only listed NYCCBL § 12-306(a)(1) as the section of the law violated, the nature of its claims concern a breach of the duty to bargain in good faith, and therefore we construe the allegations to include a violation of NYCCBL § 12-306(a)(4).

provides that the City shall pay each CO a uniform allowance in the amount of $1,100.00 each December.

The DOC's uniform policy is contained in Directive 2270, titled "Uniform and Equipment Specifications and Regulations." (City Ex. 3) Prior to 2006, Directive 2270 did not provide that COs may wear "Patrol Tactical Trousers," also known as cargo pants.[2] In 2006, Directive 2270 was revised to allow cargo pants as an "optional uniform" item that may be worn "in lieu of the standard uniform duty trousers when performing custodial duties and when assigned to units authorized to wear the [] utility uniform." (Union Ex. C., at 21) On July 20, 2016, the DOC revised its uniform policy to allow COs to wear cargo pants as part of the duty uniform at all times except where the dress uniform is required or when attending ceremonial functions. COs, however, have never been required to purchase cargo pants.

On March 1, 2018, DOC Chief of Department Hazel Jennings issued Teletype HQ-00560-1 ("Cargo Pants Teletype") informing DOC Commanding Officers that as of May 1, 2018, cargo pants were "no longer authorized for wear by uniformed staff as part of the duty uniform, except for uniformed staff assigned to [eleven designated] areas."[3] (Union Ex. A)

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[2] Directive 2270 defines "Patrol Tactical Trousers" pants as "featuring two quarter top pockets, six utility pockets with flaps (4 functional, 2 nonfunctional) and inside reinforced knee pockets designed to utilize removable padding." (Union Ex. C., p. 21A)

[3] The eleven areas are: Canine; Correction Industry Division; Emergency Services Unit; Facility Maintenance and Operations; Fire Safety; Fleet Services and Repair; Inmate Property Unit; Radio Shop; Special Operations Division (Work Detail Staff Only); Special Search Team; and Storehouse.

The City asserts that the change was made in response to recommendations from two reports issued by the City's Department of Investigation ("DOI"). In 2014, DOI issued a report titled "Security Failures at City Department of Correction Facilities" ("2014 DOI Report"). The 2014 DOI Report detailed security lapses at Rikers Island that enabled DOC staff to smuggle weapons and narcotics into the jails, a problem that "endangere[d] the safety of both DOC staff and inmates." (City Ex. 6, at 11). The 2014 DOI Report recommended that the DOC consider eliminating cargo pockets from COs' uniform, as the extra pockets "can facilitate smuggling."[4] (*Id.* at 10) In 2014, the DOC did not follow this recommendation.

In February 2018, the DOI issued a report titled "Investigation Reveals Front-Gate Security Failures at City Detention Centers in Manhattan and Brooklyn" ("2018 DOI Report"). The 2018 DOI Report noted that, wearing cargo pants, one DOI investigator posing as a DOC employee smuggled an estimated $22,000 of contraband and another smuggled scalpel blades and drugs into DOC facilities. The 2018 DOI Report recommended that the DOC should eliminate from uniforms "unnecessary pockets, including those on cargo pants." (City Ex. 5, at 7) It advised that this recommendation "must be implemented immediately." (*Id.*, at 6) The 2018 DOI report further stated that "DOC accepted the DOI's recommendation to remove excess pockets from uniforms, including those in cargo pants generally, but will need to maintain their use for a select number of staff who work in special units." (*Id.*, at 8)

[4] The 2014 DOI Report cited a 2013 memo from DOI to the then-DOC Commissioner that recommended that DOC "change its uniforms to eliminate unnecessary pockets which might conceal contraband." (City Ex. 6, at 4)

The DOC asserts that, after receiving the 2018 DOI Report, it assessed which units would be permitted to continue to utilize cargo pants and developed a plan to otherwise phase them out. Chief Jennings testified that, in making its assessment, the DOC reviewed the DOI Reports, and examined which units were authorized to wear cargo pants in the past and what tools were required to perform the job duties. Chief Jennings further testified that the phase-out plan focused on ensuring the safety and security of staff and inmates and keeping weapons and drugs out of DOC facilities. On March 1, 2018, Chief Jennings issued the Cargo Pants Teletype.

On or about April 27, 2018, the Union emailed the DOC Commissioner requesting that the Cargo Pants Teletype be rescinded pending negotiations with the Union. The Union estimates that 800 COs had purchased cargo pants in 2018 prior to the DOC's change in uniform policy. CO Lascko estimated that 38 to 40 percent of COs wore cargo pants.

CO Lascko testified that cargo pants are preferred by many COs over standard uniform duty pants because the cut of the cargo pants allows for better movement and because they are more durable.[5] Cargo pants are made out of a different material than duty uniform pants.[6] CO Lascko testified about the benefits of cargo pants over standard uniform duty pants in numerous scenarios and posts, including Class A posts (which perform inmate searches as well administrative duties), Class B posts (which have inmate contact), and posts in non-housing

[5] CO Lascko's testimony that many COs preferred cargo pants was buttressed by a petition signed by 77 COs, mostly from the Transportation Division, objecting to the restriction of their use, and by the testimony of Union President Elias Husamudeen.

[6] Directive 2270 requires cargo pants to be made of a 65/35 polyester/rayon blend while duty uniform pants are to be made from 75/25 dacron polyester/worsted wool blend.

support areas, such as Sanitation. He testified that the greater flexibility of cargo pants is beneficial in the numerous posts requiring a significant amount of bending and stretching as well as in use-of-force scenarios and inmate searches. He also testified that cargo pants better retard the penetration of liquids, from rain to cleaning chemicals, and offer better protection from the elements.[7]

CO Lascko is assigned to the Transportation Division.[8] He testified that the extra pockets on cargo pants are helpful because DOC vehicles lack storage spaces for items such as extra handcuffs, medications, and the large amount of paperwork COs must carry when transporting inmates. CO Lascko also testified about the benefits of cargo pants for COs assigned to the Security Operations Division, Canine, Emergency Service Unit, Inmate Property, Radio Shop, Correction Industry Division, Facility Maintenance, Fire Safety, and Storehouse.

Chief Jennings once supervised the Transportation Division and testified that COs in that Division do not require additional pockets because items like handcuffs, medication, keys, and legal paperwork should not be placed in pockets. According to Chief Jennings, legal paperwork should be carried by hand, keys should be kept on the COs' key chains, and other items, such as handcuffs, should be carried in a glove pouch that COs assigned to the Transportation Division are required to wear as part of their uniform. Chief Jennings further testified that in her 30-year career,

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[7] The Union asserts that during 2017 there were 744 incidents of inmates splashing COs with urine and feces and 268 incidents of spitting on COs.

[8] The Transportation Division is distinct from Fleet Services and Repair (which was formally called Transportation Division Garage Detail). COs assigned to Fleet Services and Repair still have had the option of wearing cargo pants under the new uniform policy.

she has not had, nor heard of, concerns regarding the durability or flexibility of duty uniform pants, or problems related to their absorption of liquids.

President Husamudeen testified that cargo pants cost $49 while duty uniform pants cost up to $100. In contrast, Chief Jennings testified that both types of pants cost about $50, and her testimony was supported by an unrebutted document created by the City that compared the prices for cargo and duty pants from nine vendors. Six DOC-approved vendors charged the same for both types of pants, one vendor charged less for cargo pants, and two vendors charged more.

## POSITIONS OF THE PARTIES

### Union's Position

The Union contends that NYCCBL § 12-306(a) creates a "mandate that the City bargain over wages and working conditions" and argues the DOC violated the NYCCBL by unilaterally changing its uniform policy to restrict the ability of COs to wear cargo pants.[9] (Union Br. at 20)

The Union acknowledges that Board precedent holds that determining employees' uniforms is not a mandatory subject of bargaining but argues that this precedent is not controlling

[9] NYCCBL § 12-306(a)(4) provides, in pertinent part, that it is an improper practice "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees[.]"

The Union relies upon NYCCBL § 12-306(a)(1), which provides, in relevant part: "It shall be an improper practice for a public employer or its agents [] to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter." NYCCBL § 12-305 provides, in pertinent part: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing . . . ."

because, in so holding, the Board "was apparently unaware" that the New York State Public Employment Relations Board ("PERB") had found uniforms to be bargainable. (Union Br. at 13) According to the Union, PERB precedent holds that uniforms are a mandatory subject of negotiation where the employee's physical comfort is affected by properties of the uniform. It further argues that, since the Taylor Law requires that the "provisions and procedures" of the Board be "substantially equivalent" to those of PERB, the Board cannot adopt a rule of law inconsistent with that of PERB. (Union Br. at 20)

The Union argues that the Board should reject the City's managerial rights argument. According to the Union, the City's reliance on New York City Administrative Code § 117, which provides that COs' uniforms "shall be prescribed by the commissioner of correction," is misplaced. This quote, the Union notes, is in a general description of the duties of the DOC Commissioner and does not account for the DOC's bargaining obligations. According to the Union, in light of the extensive history of determinations under the Taylor Law holding that uniforms are a mandatory subject of bargaining, the City cannot use this provision as a shield against the countervailing mandate that the City bargain over wages and working conditions. The Taylor Law, the Union insists, supersedes any supposed managerial right contained in the Administrative Code which purports to subvert mandatory bargaining.

The Union asserts that its witness provided a detailed analysis of all potential locations where COs are denied the cargo pants option and, for each location, demonstrated a tangible advantage to wearing cargo pants, in terms of the physical demands of the job, the safety of COs from inmates, chemical and liquid exposure, and exposure to bodily fluids and the elements. The

Union insists that the fact that cargo pants are roomier and more comfortable than the standard duty pants is so obvious that the "issue could be decided on administrative notice." (Union Br. at 18, n. 5) The Union also notes that the difference in materials that cargo pants are made of is codified in Directive 2270. The Union further argues that the City's position that cargo pants are not preferable is inconsistent with the DOC's continued allowance of cargo pants in eleven designated areas.

The Union also argues that the change in the uniform policy has increased employees' uniform costs because members have bought cargo pants that they are no longer allowed to wear. CO Lascko's unrebutted testimony was that under the old uniform policy, 38 to 40 percent of COs wore cargo pants. According to the Union, around 800 COs purchased cargo pants in reliance on the DOC's prior uniform policy. The uniform allowance, the Union insists, only anticipated payment for uniforms permitted by the DOC at the time the allowance was negotiated. According to the Union, since the DOC changed the permitted uniform, the parties must now negotiate over the implications of the change in the uniform policy.

The Union further argues that the Board should reject the City's duty satisfaction argument because the change at issue occurred in the middle of the contract term thereby giving rise to a duty to bargain. Finally, the Union argues that employer changes impacting the health and safety of employees are subject to the duty to bargain.[10]

[10] The Union also referred to a violation of NYCCBL § 12-306(a)(5) but offered no argument in support thereof. Accordingly, we do not address this claim except to note that the Agreement was not in *status quo* at any time pertinent to this decision.

**City's Position**

The City argues that there has not been a change to a term or condition of employment. Cargo pants are still an optional uniform item permitted to be worn on some CO assignments. According to the City, the DOC's modification of its uniform policy regarding an optional item of uniform clothing falls squarely within its managerial prerogative to maintain the efficiency and safety of its operations under NYCCBL §12-307(b).[11] It asserts that this change was made to reduce and/or stop the smuggling of weapons and narcotics into Rikers Island, which threatens DOC's security and operations, and the safety of COs. It further argues that the DOC does not have a duty to bargain over revisions to its uniform policy or the implementation of any restrictions on wearing cargo pants, especially since cargo pants are optional and Union members receive a "robust" uniform allowance of $1,100 per year. (City Br. at 10) Because the Agreement contains a provision regarding a uniform allowance, the City asserts that it has satisfied its duty to bargain.

[11] NYCCBL § 12-307(b) provides, in pertinent part:

> It is the right of the city . . . acting through its agencies, to determine the standards of services to be offered by its agencies; . . . ; direct its employees; . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; . . . ; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city . . . on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

It contends that the "large annual allowance [of $1,100] clearly contemplates" the expense of "a few additional pairs of pants." (City Br. at 19)

The City cites Board precedent consistently holding that uniforms are a management prerogative. It asserts that the Board has recognized that the Union's uniform demands potentially usurp the authority of the DOC Commissioner under the Administrative Code to prescribe uniforms. The City submits that the DOC's interest in combating smuggling and promoting safety and security at DOC facilities outweighs employee concerns over comfort. The City also argues that PERB has held that uniforms worn by public employees in the law enforcement context are not mandatory subjects of bargaining because, as para-military personnel, management concerns outweigh the employees' concerns of comfort and expense.

The City further argues that the Union has not established a practical impact. It maintains that Board precedent requires that a union offer allegations of specific facts in support of its claim of practical impact and that conclusory statements or vague, non-specific allegations are not sufficient. The City notes that cargo pants are an optional item that no CO is required to purchase and that they were and are again restricted to certain assignments. Further, Chief Jennings testified that she had never received complaints about the regular duty pants and their durability. According to the City, the Union has failed to articulate any impact upon working conditions beyond vague and conclusory assertions that COs will somehow be less comfortable in the standard duty trouser and that the restriction on cargo pants will result in an additional financial burden. It describes the Union's claims regarding comfort as "specious." (*Id.* at 13) It notes that CO Lascko did not testify that he wore or purchased cargo pants and asserts that his testimony regarding the exceptional

properties of cargo pants were without foundation, exceeded his expertise and knowledge, and "did not comport with common sense and human experience." (*Id.*)

The City argues that the Union's claim of a financial impact is based solely upon conclusory statements and pure speculation. According to the City, the Union failed to allege or elicit any specific facts showing that cargo pants cost less than standard duty pants, while the City has submitted testimony and pricing for both cargo pants and standard duty pants that establishes that standard duty pants are comparable in cost or less expensive.

Finally, the City also argues that there was no derivative violation of NYCCBL §12-306(a)(1) because the Union failed to establish a violation of NYCCBL § 12-306(a)(4).

## DISCUSSION

The Board finds that the DOC's determination as to the COs' authorized uniform is not a mandatory subject of bargaining. However, it finds that to the extent that COs purchased uniform items in reliance upon the prior uniform policy that they are no longer authorized to wear under the new uniform policy, the mid-term change constituted a modification to the uniform allowance, which is a mandatory subject of bargaining.

The NYCCBL "requires public employers and employee organizations to 'bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment.'" *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014) (quoting *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009)). Failure to do so constitutes an improper practice. *See* NYCCBL § 12-306(a)(4). Further, "[a]s a unilateral change in a term

and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012). For a unilateral change to constitute an improper practice, "[t]he petitioner must 'demonstrate the existence of such a change from the existing policy or practice [and establish] . . . that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *DC 37*, 4 OCB2d 19, at 22 (BCB 2011) (citations omitted). The Board has "long held that uniform allowances are encompassed within the meaning of 'wages.'" *Local 1182, CWA*, 7 OCB2d 5, at 11 (citations omitted); *see also* NYCCBL § 12-307(a) ("public employers . . . shall have the duty to bargain in good faith on wages [] including but not limited to . . . uniform allowances . . . .").

However, while uniform allowances are a mandatory subject of bargaining, the Board has consistently held that "the determination and prescription of authorized uniforms is a management prerogative." *COBA*, 27 OCB 16, at 110 (BCB 1981) (quoting *PBA*, 25 OCB 22, at 7 (BCB 1980)). *See also NYSNA*, 4 OCB2d 23, at 8 (BCB 2011); *LEEBA*, 3 OCB2d 29, at 44-45 (2010); *Local 211, IUOE*, 51 OCB 25, at 4-5 (BCB 1993); *UFA*, 43 OCB 4, at 66-67 (BCB 1989), *affd.*, *Matter of Uniformed Firefighters Assn. of Greater N.Y. v. N.Y.C. Off. of Collective Bargaining*, Index No. 12338/1989 (Sup. Ct. N.Y. Co. Oct. 30, 1989) (Santaella, J.), *affd.*, 163 A.D.2d 251 (1st Dept 1990).

In *COBA*, 27 OCB 16, for example, the Board rejected the Union's argument that "to the extent a uniform affects employee comfort and safety," it is a mandatory subject of bargaining.

*Id.*, at 109.[12] The Board held that the demands relating uniform requirements and design "are clearly not mandatory subjects under [Board] and PERB decisions."[13] *Id.*, at 111. The Board based its holding "on the employer's rights, under the NYCCBL, to determine the methods, means and personnel by which governmental functions are to be performed and to exercise control and discretion over the technology of performing its work." *Id.*, at 110 (citing *PBA*, 25 OCB 22); *see also Local 211, IUOE*, 51 OCB 25, at 5. The Board also noted that the Union's "demands would usurp powers vested in the [DOC Commissioner] by the Administrative Code." *Id.*, at 111; *see also UFA*, 43 OCB 4, at 66, n. 72. Thus, we find that DOC's decision to restrict the use of cargo pants is not a mandatory subject of bargaining. *See NYSNA*, 4 OCB2d 23, at 9 ("[W]e find no basis upon which to deviate from our long-established holding that the determination and prescription of authorized uniforms is a management prerogative . . . .").

We reject the Union's argument that the Board should follow PERB cases that, it argues, hold that the duty to bargain over uniforms arises when an employer chooses a new uniform that

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[12] In *COBA*, 27 OCB 16, the Union's bargaining demands included that its members be permitted to wear short sleeve shirts year-round and not be required to wear ties when assigned to an inside post.

[13] In *COBA*, 27 OCB 16, the Board cited the following PERB decisions: *County of Onondaga and County of Onondaga Deputy Sheriff*, 14 PERB ¶ 4503 (ALJ 1981), *affd.*, 14 PERB ¶ 3029 (1981) (a demand to bargain over the style of deputy sheriff's badges was not mandatorily bargainable because it reasonably concerned the manner and means of sheriffs' delivery of service more than it concerned dress codes and grooming regulations); *Town of Haverstraw*, 11 PERB ¶ 3109 (1978) (a demand to bargain over the cost of cleaning and repairing uniforms is mandatory subject of bargaining); *City of White Plains*, 9 PERB ¶ 3007 (1976) (determining whether to use a piece of equipment and selecting equipment from a number of options is a matter of management prerogative); *City of Albany*, 7 PERB ¶ 3078 (1974) (same as *City of White Plains*).

is less comfortable than the prior uniform.[14] (*See* Union Br. at 20) Our conclusion here is consistent with PERB precedent holding that, "in the case of para-military personnel, such as police, since the management concerns outweigh the employees' concerns of comfort and expense, dress requirements have been found to be nonmandatory." *Village of Waverly*, 21 PERB ¶ 4560, at 4649 (ALJ), *affd.*, 21 PERB ¶ 3048 (1988) (citing *County of Onondaga*, 14 PERB ¶ 3029 (1981); *City of Buffalo*, 15 PERB ¶ 3027 (1982)); *see also County of Suffolk*, 39 PERB ¶ 4603, at 4729 (ALJ 2006) (following *Village of Waverly*); *City of Buffalo*, 23 PERB ¶ 4559 (ALJ 1990), *affd.*, 23 PERB ¶ 3050 (1990) (same).[15]

However, a unilateral change to an employer's uniform policy may also constitute a unilateral change to the uniform allowance if it effectively changes the value of the uniform allowance. *See NYSNA*, 4 OCB2d 23, at 11. The facts here are similar to those in *NYSNA*, 4 OCB2d 23, where the parties' collective bargaining agreement contained a uniform allowance provision. During the term of that agreement, the employer unilaterally changed its uniform policy

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[14] We note that, by statute, only PERB has standing to seek a ruling on the question of the NYCCBL's substantial equivalence to the Taylor Law. *See* Taylor Law § 212(2); *Mayor of the City of N.Y. v. Council of the City of N.Y.*, 9 N.Y.3d 23, 28-29 (2007).

[15] The PERB cases relied upon by the Union to support this proposition are distinguishable. Two of the decisions, *N.Y.S. Canal Corporation*, 30 PERB ¶ 3070 (1997), and *N.Y.C. Transit Authority*, 22 PERB ¶ 6601 (Director's Decision 1989), did not involve law enforcement personnel and thus are factually distinguishable from this case. While the two remaining decisions, *County of Onandaga*, 14 PERB ¶ 3029 (1981), and *City of Buffalo*, 15 PERB ¶ 3027 (1982), involved law enforcement personnel, PERB did not address whether employee comfort would make uniforms for para-military employees a mandatory subject of bargaining because the petitioners failed to establish that the changes at issue affected employee comfort. We cannot, as requested by the Union, take administrative notice of the relative comfort of cargo pants over duty trousers, and the Union has not otherwise established that the change in the DOC's uniform policy affected employee comfort.

from allowing nurses to wear scrubs of any color to requiring a specific color of scrubs. The Board addressed whether there was a duty to bargain over the cost of new uniforms in order to comply with a new uniform policy. We found that the cost created by a midterm change in a uniform policy concerns the uniform allowance, a mandatory subject of bargaining. In so finding, we held that an employer is required to bargain over the unilateral change in a uniform policy if the new uniform policy creates an economic issue that did not exist under the old policy. *See id.*, at 11.

Here, it is undisputed that the DOC changed its uniform policy during the term of the parties' collective bargaining agreement and after the employees' annual uniform allowance had been issued.[16] The cost of replacing cargo pants with duty uniform pants was not contemplated by the parties when the contractual uniform allowance was negotiated. Thus, we find that the DOC violated its duty to bargain over the uniform allowance in violation of NYCCBL § 12-306(a)(1) and (4).[17]

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[16] Contrary to the City's assertion, we do not find that the Union's claim that the new uniform policy changed the value of the uniform allowance for some employees is speculative or unsupported. While it may be true that cargo pants were optional for COs prior to 2018, it is undisputed that COs had elected to wear cargo pants. CO Lasko's testimony that 38 to 40 percent of COs wore cargo pants was unrebutted. Nevertheless, our conclusion here does not reach the question of which COs were affected by the change in the uniform policy; rather this is an issue appropriate for bargaining.

[17] This conclusion is limited to the additional cost some COs must bear to replace cargo pants with authorized duty uniform pants. The record does not support a finding that cargo pants are less expensive to purchase or maintain than duty trousers. The unrebutted price comparison by the City indicates that duty trousers are generally no more expensive than cargo pants. While the Union claims that cargo pants are more durable than duty trousers, no evidence was produced regarding the cost of maintaining cargo pants as compared to duty trousers, or regarding how often cargo pants need to be replaced as compared to duty trousers.

We reject the arguments that the Union waived its right to bargain and that the City satisfied its duty to bargain over the change in uniform policy. A union waives its right to bargain an issue only when the "prior discussions indicate that the matter was fully discussed or consciously explored and the union consciously yielded or clearly and unmistakably waived its interest in the matter." *NYSNA*, 4 OCB2d 23, at 11 (quoting *CEA*, 75 OCB 16, at 10 (BCB 2005)) (internal quotation marks omitted). Here, the City does not claim that the issue of revising the DOC's uniform policy to change the assignments for which COs could wear cargo pants was discussed during the negotiations for the Agreement. *See DC 37*, 15 OCB 21, at 18-19 (BCB 1975), *affd.*, *Matter of City of New York v. Bd. of Collective Bargaining*, Index No. 41993/1975, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 15, 1976) (Nadal, J.) (there can be no waiver as to subjects that had not been fully discussed). In fact, notice of the new policy was given to the Union in or around March 2018, over a year after negotiations concluded. Consequently, we cannot conclude that the City satisfied its duty to negotiate over the new policy because, at best, the 2017 contract "negotiations contemplated the value of the uniform allowance . . . as the uniform policy existed then." *NYSNA*, 4 OCB2d 23, at 11. Therefore, the Union has not waived its right to demand bargaining over this issue, nor has the City satisfied its duty to bargain over the effect of the change in uniform policy on the uniform allowance. *Id.*; *see also Local 1182, CWA*, 7 OCB2d 5, at 13-14. Accordingly, we order the parties to bargain over the uniform allowance for those COs who

purchased cargo pants in reliance on the old uniform policy and cannot wear cargo pants as part of the authorized uniform for their assignments under of the new uniform policy.[18]

[18] To the extent that the Union's pleadings can be read to raise a health and safety practical impact claim, we find that "the record contains insufficient factual allegations to form a basis for a finding of practical impact." *CEU, L. 237, IBT*, 2 OCB 2d 37, at 18 (BCB 2009).

**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 allegation that the City of New York and the New York City Department of Correction violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law by changing its uniform policy regarding cargo pants without first negotiating with the Correction Officers' Benevolent Association, is denied; and it is hereby

ORDERED, that the City of New York and the New York City Department of Correction bargain with the Correction Officers' Benevolent Association over the uniform allowance to the extent that Correction Officers who purchased cargo pants in reliance on the old uniform policy cannot wear cargo pants as part of the authorized uniform for their assignments under the new uniform policy.

Dated: October 2, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER