COBA, 14 OCB2d 4 (BCB 2021)

(IP) (Docket No. BCB-4365-19)

Summary of Decision*:** The City filed a motion to dismiss the Union's improper practice petition alleging that the City did not bargain prior to the Board of Correction's publication of proposed rules that will have a *per se* safety impact on Correction Officers. The City asserted that the Board of Collective Bargaining lacks jurisdiction to interfere with the Board of Correction's quasi-legislative duties and that the petition was untimely, failed to state a cause of action, and was premature. The Board found that it has jurisdiction over the dispute and dismissed the petition as premature. ***(Official decision follows.)

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,

Respondent.

DECISION AND ORDER

On December 4, 2019, the Correction Officers' Benevolent Association ("Union") filed an improper practice petition against the City of New York ("City") pursuant to § 12-306 and §12-307 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The Union claimed that the City refused to bargain in good faith,

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[1] The Union also articulated a scope of bargaining claim even though it did not cite NYCCBL §12-307. This Board "look[s] beyond statutory citations to the essence of the claims asserted in resolving improper practice claims." *Local 621, SEIU*, 5 OCB2d 38, at 2 n. 1 (BCB 2012) (quoting

in violation of NYCCBL § 12-306(a) (1) and (5), when it did not negotiate with the Union prior to the Board of Correction's publication of proposed rules regarding restrictive housing ("Proposed Rules"). In addition, the Union argued that the Proposed Rules are within the scope of bargaining under NYCCBL §12-307(b) because they will have a *per se* safety impact on Correction Officers upon implementation. On February 10, 2020, the City filed a motion to dismiss the petition on the grounds that this Board lacks jurisdiction to interfere with the Board of Correction's rule-making duties and that the petition was untimely, failed to state a cause of action, and was premature.[2] The Board found that it has jurisdiction and dismissed the petition as premature.

BACKGROUND

The Union is the certified bargaining representative of Correction Officers, who are employed at the New York City Department of Correction ("Department" or "DOC").[3] The DOC is responsible for housing inmates within its jurisdiction. The Board of Correction is authorized by the City Charter to "establish minimum standards for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the [D]epartment" and to "promulgate such minimum standards in rules and regulations after giving the mayor and commissioner an opportunity to review and comment on the proposed standards, or

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SSEU, L. 371, 1 OCB2d 20, at 12 (BCB 2008)) (internal quotation marks omitted). Accordingly, we address the Union's scope of bargaining claim in addition to its decisional bargaining claim.

[2] In accordance with § 1-12(l) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1), the City sought and received prior approval to file a motion to dismiss in lieu of an answer.

[3] We take administrative notice that the parties are subject to a collective bargaining agreement covering the period of November 1, 2011, through February 28, 2019, which remains in *status quo* pursuant to NYCCBL § 12-311(d).

amendments or additions to such standards."[4] NYC Charter § 626(e). The Board of Correction consists of nine members selected by the Mayor, the City Council, and the presiding justices of the First and Second Departments of the Appellate Division of the New York State Supreme Court. *See* NYC Charter § 626(a). It has the power to appoint an executive director and staff "with appropriations for such purpose." NYC Charter § 626(b). The Commissioner of the DOC may attend meetings but is not permitted to be a member. *See id.*

In 2015, the Board of Correction amended its rules and regulations to limit the use of punitive segregation.[5] *See* §§ 1-16 & 1-17 of Title 40 of the Rules of the City of New York (effective February 20, 2015).[6] Specifically, § 1-16 established "Enhanced Supervision Housing" ("ESH") to separate "highly assaultive" inmates from "more compliant" inmates, excluded adolescents and young adults from ESH, and capped the number of inmates in ESH. (Pet. ¶ 9) Section 1-17 eliminated punitive segregation for adolescents and young adults, limited the amount of time eligible inmates could be placed in punitive segregation, and prohibited punitive segregation for re-incarcerated inmates based solely on prior incarcerations. (*Id.*)

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[4] The rules and regulations of the Board of Correction are subject to the City Administrative Procedure Act ("CAPA") and are contained in Title 40 of the Rules of the City of New York. *See* NYC Charter Ch. 45. CAPA sets forth the rule-making process that all City agencies must follow in order to enact or amend their rules. *See id.* § 1043. It requires, among other things, that an agency provide notice of its proposed rules, a public hearing, and an opportunity to submit written comments. *See id.* The "final rule may include revisions of the proposed rule, and such adoption of revisions based on the consideration of relevant agency or public comments shall not require further notice and comment." NYC Charter Ch. 45 § 1043(e). The final rule is not effective until 30 days after it is published in the City Record. *See id.* § 1043(f)(3).

[5] An inmate in punitive segregation can be locked in a cell for up to 23 hours a day, receives meals through food slots designed to prevent interference from inmates, and is subject to heightened and frequent searches and behind-the-back handcuffing when leaving the cell. According to the City, the consensus among experts is that punitive segregation can cause severe psychological harm to inmates and stimulates violence instead of decreasing it.

[6] According to the City, the Union submitted written comments regarding the proposed amendment and gave testimony in hearings before the Board of Correction in December 2014.

According to the Union, since 2015, the DOC has failed to use punitive segregation even when available. As a result, the Union asserts that the number and severity of violent assaults by inmates against Correction Officers has increased.[7]

On October 29, 2019, the Board of Correction published Proposed Rules to further amend its rules and regulations.[8] The Proposed Rules would create a new chapter of the Board of Correction's rules pertaining to restrictive housing. In particular, the Union identifies five provisions of the Proposed Rules that it alleges will affect Correction Officers: (1) the maximum punitive segregation sentence will be reduced from 30 to 15 days; (2) good behavior will be grounds to reduce punitive segregation time; (3) lock-out time will increase from one to four hours for adults and from seven to ten hours for young adults;[9] (4) a punitive segregation sentence will be forfeited if the DOC fails to enforce it for 30 days; and (5) the $25 automatic fine issued to inmates for infractions will be eliminated.

In its petition, the Union asserts that the Proposed Rules will create periods of time in which inmates otherwise eligible for punitive segregation will interact with staff without the enhanced

[7] In 2016, the Union filed and subsequently withdrew an improper practice petition and request for injunctive relief regarding §§ 1-16 and 1-17.

[8] Pursuant to the CAPA, the Board of Correction must consider whether to revise the Proposed Rules based on the public testimony and written comments and give the Mayor and the DOC's Commissioner the opportunity to review and comment on the Proposed Rules before it votes on the final rules. According to the City, public hearings were held in December 2019, and the public comment period ended on January 31, 2020. At its May 12, 2020 meeting, the Board of Correction indicated that diverse opinions had been raised in the public comment period and that it would finalize the rules in the upcoming months. On June 29, 2020, its Chair and the Mayor announced the formation of a working group to find a path to "eliminate punitive segregation." (Rep. ¶ 10) They indicated that the Union's President had been invited to join and that the working group's recommendations would be incorporated into the Board's rules on restrictive housing and voted on in the fall of 2020.

[9] According to the City, in 2019, the New York State Commission of Correction adopted a rule that requires it to provide inmates in punitive segregation at least four hours out of their cell per day.

security precautions of punitive segregation. The Union identifies the dates, locations, names of inmates and Correction Officers involved, and injuries sustained, in over 20 assaults that it alleges would not have occurred but for § 1-17 because, under the rules prior to 2015, the inmates involved would have been "eligible for" punitive segregation on the dates of the assaults.[10] (Pet. ¶ 12-18)

In addition, it cites the City's Mayoral Management Reports ("MMR") indicating that inmate assaults on staff have increased every year from 2015 to 2019 even though the average inmate population decreased during this time. For example, the 2018 MMR reported a 9.5% increase in assaults on staff and a 75% increase in the serious injuries caused by those assaults. The 2017 MMR noted that the increase in inmate violence "developed alongside the implementation and modification of ambitious initiatives including punitive segregations reform." (Union Ex. D) In light of the history of increased assaults since 2015 by inmates who would have been in punitive segregation under the pre-2015 rules, the Union argues that the Proposed Rules will have a *per se* safety impact on its unit members that requires advance negotiations.

[10] In addition, the petition names one inmate responsible for dozens of violent assaults against staff and inmates over a period of several years, including 40 violent acts over a 14-month period, following the elimination of punitive segregation. According to the Union, many of these attacks occurred at times when, but for § 1-17, this inmate "would have been segregated." (Pet. ¶ 19)

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union's improper practice petition must be dismissed because the Board lacks the jurisdiction and power to grant the relief requested by the Union.[11] The Board cannot interfere with the Board of Correction's statutory obligations, usurp the powers of the Board of Correction, or annul lawfully adopted rules. Essentially, the Union is trying to substitute its own judgment for that of the Board of Correction. However, the City argues that the Board of Correction's exercise of its "quasi-legislative" duties is a non-mandatory subject of bargaining and cannot be deemed an improper practice as a matter of law. (Memo at 6) (quoting *Legal Aid Soc. v. Ward*, 91 A.D.2d 532, 533 (1st Dept. 1982), *affd.*, 61 N.Y.2d 744 (1984)) The Proposed Rules were promulgated pursuant to the Board of Correction's authority under § 626(e) of the Charter and, once finalized, will be codified in Title 40 of the Rules of the City of New York and have the force of law under § 1041(4) of the Charter.

According to the City, the Board of Correction is an independent correctional oversight board, not a "public employer" under the NYCCBL. It does not employ Correction Officers, is not a named party, and has not entered into a collective bargaining agreement with the Union. Further, it is not an agent of the DOC, which is the employer and is also not named as a party in the petition. To the extent that the Board considers the improper practice petition a scope of bargaining claim seeking a finding of safety impact, the City argues that placing a bargaining obligation on the Board of Correction would nullify its mission of establishing minimum standards

[11] Although the Union asserts that it is not seeking injunctive relief, the City argues that the Union's requested remedy, a cease and desist order, is tantamount to trying to enjoin the Board of Correction and maintain the *status quo*. The City contends that the Union's request must be denied because it has not made a case for injunctive relief or a writ of prohibition. According to the City, the Union must file an Article 78 proceeding or a declaratory judgment action to challenge Board of Correction policies.

for the care and custody of inmates. In addition, the City asserts that the DOC also has no bargaining obligation because it can take no action on the Board of Correction's Proposed Rules.

The City argues that the petition is untimely to the extent that it is based on §§ 1-16 and 1-17, which took effect in 2015 and were the subject of a 2016 improper practice petition that the Union subsequently withdrew. The City asserts that the Union had actual knowledge of those rules limiting punitive segregation in December 2014, when it submitted written comments and gave testimony in hearings before the Board of Correction. The City contends that the Union cannot revive its expired claims or assert that they constitute a continuing violation.

To the extent that the petition is based on the Proposed Rules, the City argues that the claims are not ripe for review. The City contends that the DOC did not need to negotiate with the Union prior to the Board of Correction's publication of its Proposed Rules because there has been no "definitive statement" by the employer. (Memo at 14) The Proposed Rules are not final and will not become effective until the CAPA requirements are satisfied. The City asserts that the Board of Correction is in the midst of ongoing deliberations. Contrary to the Union's expectations, it has not voted to adopt the Proposed Rules in the months since the petition was filed. Until the Board of Correction adopts final rules and the DOC implements them, the City claims that the Union is at most potentially aggrieved and that any impact is purely hypothetical.[12] The DOC has not made any unilateral changes based on the Proposed Rules or issued any statement of its intent to implement rules that are not final. Further, this Board cannot assume that any changes to the Proposed Rules will adversely impact the Union or that mitigation or alternatives to punitive segregation will be inadequate.

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[12] The City contends that the Union's claim that the Proposed Rules will lead to violence is speculative since its factual support consists of incidents following the implementation of the 2015 rules.

Further, the City argues that the implementation of the finalized rules is not a mandatory subject of bargaining because it is an exercise of management's right to determine the standards of service and the means and methods by which the housing and care of inmates will be effectuated while ensuring the safety of both staff and inmates. Moreover, it asserts that there is no *per se* safety impact triggering an automatic right to bargain. There is no specific data linking the 2015 rules on punitive segregation or any future implementation of the Proposed Rules to assaults on Correction Officers or their safety. According to the City, the Union presented no evidence that punitive segregation deters violence or makes Correction Officers safer, and experts have provided research to the Board of Correction demonstrating that punitive segregation stimulates violence. The City asserts that the Union selectively cited the MMRs, which contained aggregate data, and reached unfounded conclusions. Regarding the assaults identified by the Union, the City asserts that there was no specific analysis indicating whether other factors might have caused or contributed to the assaults. In addition, the City claims that the Union's conclusory allegations, which did not specify facts demonstrating a safety threat, are insufficient to warrant a hearing. Accordingly, the City argues that the petition must be dismissed with prejudice.

Union's Position

The Union argues that the City must bargain prior to adopting or implementing any rules that restrict or eliminate punitive segregation, which it contends is "a valuable safety tool." (Pet. ¶ 1) It contends that the City's motion to dismiss must be denied because the alleged bases for dismissal lack merit. The Union argues that the Board of Correction's rulemaking authority is subject to the NYCCBL. According to the Union, the premise that the Department is the relevant public employer is also faulty. The Union's collective bargaining agreement is with the City, and it is certified to represent employees of the City, which is a public employer. Further, the Board of Correction satisfies the NYCCBL's definition of a municipal agency because it is created by

Charter § 626, which grants it appointive powers, and the City reimburses its members for expenses. Accordingly, the Board of Correction is a public employer covered by the NYCCBL and prohibited from engaging in improper practices. In addition, the Union asserts that the Board of Correction is not shielded from review because it acts as an agent of the City in creating conditions under which City employees must work. Further, the Union argues that the Board of Correction's rule-making authority does not immunize it from improper practice charges. The NYCCBL does not expressly exclude rule-making bodies, and the case law does not support the conclusion that quasi-legislative functions place the Board of Correction beyond the reach of the Board.

According to the Union, the City's statute of limitations claim is based on a false premise. The Union challenges the Proposed Rules that further limit officers' ability to protect themselves from the most dangerous inmates. Since the Proposed Rules are under consideration by the Board of Correction, the Union asserts that it has raised a current dispute that arose when the Proposed Rules were docketed for consideration by the Board of Correction.

Further, the Union argues that it has stated a claim that the City violated the duty to bargain in good faith.[13] According to the Union, the City's reliance on the management rights clause is misplaced.[14] It contends that the City's argument that the petition lacked sufficient data to find an adverse impact on Correction Officers is not appropriate on a motion to dismiss. The issue is

[13] The Union claims that it is not seeking a preliminary injunction. Since the Board has the authority to issue cease and desist orders, the Union argues that its request for a cease and desist order is an appropriate remedy and is not grounds for dismissal.

[14] The Union argues that "intricacies of punitive segregation" are not analogous to facts in *COBA*, 27 OCB 16 (BCB 1981) (Opp. at 5), in which the Board found that a proposal that the City support "all members who are assaulted or threatened by inmates" by permitting members to make arrests while on duty and facilitating arrest procedures was a non-mandatory subject of bargaining. *Id*. at 104.

reserved for an evidentiary hearing as it goes to the weight and credibility of the allegations. Similarly, the City's argument that punitive segregation is harmful to inmates is inappropriate on a motion to dismiss and unavailing as the NYCCBL does not exempt "good ideas" from collective bargaining. (Rep. at 6) The Union further asserts that there is a demonstrable *per se* impact on safety and that the City's claim to the contrary fails since the Union's factual allegations must be accepted as true when considering the motion to dismiss.

Lastly, the Union contends that the City's ripeness argument is based on the faulty assumption that there cannot be an action with legal consequences until the Board of Correction votes on the final language of the Proposed Rules. According to the Union, history shows that the Proposed Rules will be adopted in their current form or with even more restrictions on the use of punitive segregation. The Union asserts that based on the 2015 rules, the Board of Correction's practice is to disregard the opinions of the unions representing DOC employees. It claims that the Proposed Rules are a definitive statement by the employer and that a submission of final language and the formality of a vote will not mitigate the fact that Correction Officers will be in harm's way the moment the rules go into effect. Accordingly, the Union asserts that there is no reason filing should be delayed.

DISCUSSION

In evaluating a motion to dismiss, this Board "'must deem the factual allegations of the petition to be true and limit our inquiry to whether, taking the facts as alleged by the petitioner, a cause of action under the NYCCBL has been stated.'" *PBA*, 12 OCB2d 22, at 10 (BCB 2019) (quoting *UFA*, 45 OCB 39, at 13 (BCB 1990)). Considering the "essence of the claims" articulated by the Petitioner, we find that the Union is asserting two distinct claims regarding the Proposed

Rules.[15] *SSEU, L. 371*, 1 OCB2d 20, at 12; *see SSEU, L. 721*, 43 OCB 59, at 19-20 (BCB 1989); *DC 37*, 43 OCB 26, at 21-22 (BCB 1989). First, it asserts an improper practice claim that the City breached its "duty to bargain over the decision" to further restrict punitive segregation in violation of NYCCBL § 12-306(a)(5) and (a)(1), when it did not negotiate prior to the Board of Correction's publication of the Proposed Rules.[16] (Pet. at 14) In addition, the Union argues that the Proposed Rules will have a *per se* impact on the safety of Correction Officers, which is a scope of bargaining claim under NYCCBL §12-307(b). While the Board has jurisdiction over these claims, we find that neither claim is ripe for review.

This Board has exclusive jurisdiction to determine whether "a public employer or its agents" has committed an improper practice in violation of the NYCCBL and whether matters are

[15] We do not find that the Union is alleging an improper practice claim based on §§ 1-16 and 1-17, effective in 2015. Instead, the Union uses examples of post-2015 assaults against Correction Officers as support for its claim that restrictions on punitive segregation have a safety impact on Correction Officers. *See* Pet. at 14 (arguing that "the restrictions contained in the [Proposed Rules] present a *per se* safety situation in light of the extensive history of inmates who otherwise would have been in a heightened security environment assaulting officers and causing serious injury"). Thus, we need not address whether such a claim would be timely.

[16] The Union did not specify which subsections of NYCCBL § 12-306 it asserts were violated, but we find that it articulated a violation of NYCCBL § 12-306(a)(5) and, derivatively, (a)(1). *See Local 621, SEIU*, 5 OCB2d 38, at 2 n. 1; *SSEU, L. 371*, 1 OCB2d 20, at 12. NYCCBL § 12-306 provides, in relevant part, that "[i]t 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; …
>
> (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 as defined in subdivision d of section 12-311 of this chapter.

within the scope of bargaining. NYCCBL § 12-306(a); *see* NYCCBL § 12-309(a)(2) and (4).[17] It is undisputed that the City is a public employer within our jurisdiction. *See, e.g., Matter of City of New York v. New York State Nurses Assn.*, 29 N.Y.3d 546 (2017).

Correction Officers are employed at the DOC, which is obligated to comply with the "minimum standards in rules and regulations" promulgated by the Board of Correction. NYC Charter § 626(e); *see Matter of Jackson v. Horn*, 27 Misc. 3d 463, 472 (Sup. Ct. N.Y. Co. 2010). However, this mandate does not eliminate this Board's jurisdiction. *See PBA*, 39 OCB 41, at 6 (BCB 1987), *affd. sub. nom. Matter of Caruso v. Anderson*, Index No. 25827/1987 (Sup. Ct. N.Y. Co. Feb. 19, 1988) (Rubin, J.), *affd.,*150 A.D.2d 994 (1st Dept. 1989). In *PBA*, we rejected the argument that we lacked jurisdiction over an improper practice petition involving compliance with a Local Law that amended the City Charter to change the composition of the Civilian Complaint Review Board. Although we noted that the Board was "without general authority to review acts of the City Council," we found that "this does not leave us without jurisdiction [when] the petition presents a question for which we have direct responsibility under the NYCCBL." *Id*. (holding that the composition of the Civilian Complaint Review Board was not a mandatory subject of bargaining).

It is well established that a public employer has an obligation to bargain over matters within the scope of bargaining even if it is complying with a law, regulation, or directive that it did not

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[17] NYCCBL § 12-309(a) provides, in relevant part, that the Board of Collective Bargaining "shall have the power and duty":

> (2) on the request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining; …
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> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. . . .

promulgate. *See, e.g.*, *DC 37*, 77 OCB 34, at 14 (BCB 2006) (citing *DC 37*, 75 OCB 14, at 13 (BCB 2005); *Doctors' Council*, 69 OCB 31, at 10-11 (BCB 2002); *City of New York v. Lieutenants Benevolent Ass'n*, 285 A.D.2d 329 at 334-335 (1st Dep't 2001)). For instance, in *COBA*, 41 OCB 31, at 25 (BCB 1988), the Board found that, even though it was the DOC that promulgated a directive regarding security restraints for inmate patients outside its facilities, the New York City Health and Hospitals Corporation would have a duty to bargain with its employees if the Board determined that the directive has a practical impact on their safety. Similarly, in *PBA*, 41 OCB 34, at 1-3, 10-11 (BCB 1988), the Board ordered a hearing regarding whether a directive issued by the Office of the Administrative Judge of the New York City Criminal Court, which increased the number of unhandcuffed prisoners over which police officers maintain custody and control during arraignment at the Kings County Criminal Court, had a practical impact on the safety of police officers that required bargaining.

However, in all these cases, the law, regulation, or directive at issue had been enacted. *See City of New York v. Lieutenants Benevolent Ass'n*, 285 A.D.2d 329; *DC 37*, 77 OCB 34; *DC 37*, 75 OCB 14; *Doctors' Council*, 69 OCB 31; *PBA*, 41 OCB 34; *COBA*, 41 OCB 31. *See also Matter of City of Watertown v. State of NY Pub. Empl. Rels. Bd.,* 95 N.Y.2d 73 (2000); *Local 333, United Marine Division, ILA*, 3 OCB2d 11, at 9-10 (BCB 2010); *Dist. No. 1, PCD, MEBA, ILA*, 3 OCB2d 4, at 18-19 (BCB 2010); *United Marine Division, L. 333, ILA*, 2 OCB2d 44, at 17-18 (BCB 2009). Indeed, a prior case before the Board that involved rules and regulations promulgated pursuant to CAPA was filed after the final rule was published and became effective. *See DC 37*, 5 OCB2d 8, at 7-8 (BCB 2012) (ordering the Conflicts of Interest Board to cease and desist from enforcing an adopted rule that unilaterally changed the financial disclosure appeals procedure in violation of the NYCCBL).

This is the first time that that the Board has been presented with the issue of whether a claim concerning the duty to bargain in good faith can be raised prior to the enactment of a rule, regulation, or law, the implementation of which is the subject of the bargaining claim. Under the circumstances presented here, we find that the issues are not ripe for review.

Notably, the determination of whether and how to utilize punitive segregation goes to the heart of the Board of Correction's mission to "establish minimum standards for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the [D]epartment." NYC Charter § 626(e). Accordingly, a decision by the Board of Correction to limit the use of punitive segregation would be an exercise of its governmental authority and would not be within the scope of bargaining. *See* NYCCBL § 12-307(b);[18] *Matter of County of Erie*, 12 N.Y.3d 72, at 78 (2009) ("A public employer's decisions are not bargainable as terms and conditions of employment where 'they are inherently and fundamentally policy decisions relating to the primary mission of the … employer.'"); *West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 51 (1974); *COBA*, 27 OCB 16, at 104-105 (finding that a demand involved a non-mandatory subject of bargaining because it sought bargaining "not on procedure[s] for employee protection but on the areas of government authority over[,] and responsibility for[,] incarcerated persons").

The NYCCBL provides that "questions concerning the practical impact" that policy decisions have "on terms and conditions of employment, including, but not limited to, questions of … employee safety, are within the scope of collective bargaining." NYCCBL § 12-307(b); *see*

[18] NYCCBL § 12-307(b) provides that "[i]t is the right of the city . . . to determine the standards of services to be offered by its agencies" and "determine the methods, means and personnel by which governmental operations are to be conducted." NYCCBL § 12-307(b). Thus, "[d]ecisions … on those matters are not within the scope of bargaining." *Id*.

COBA, 49 OCB 40, at 18-19 (BCB 1992) (ordering bargaining over the alleviation of a safety impact); *UPOA*, 41 OCB 69, at 13 (BCB 1988) (noting that impact bargaining, if ordered, could not disturb the City's decision to prohibit the carrying of firearms while on-duty). However, there is no duty to bargain unless and until the Board determines that a practical impact exists." *UFA*, 5 OCB2d 3, at 10 (BCB 2012) (citing *SBA*, 41 OCB 56, at 15-16 (BCB 1988)).

A petitioner need not wait until a contested action is implemented before filing a safety impact claim. *See UFA*, 47 OCB 25, at 30 ("[E]ven if there is a factual question to be decided by this Board, upon a finding of safety impact we may order bargaining prior to implementation of the plan."); *UFA*, 47 OCB 6, at 28; *PBA*, 15 OCB 5, at 13 (BCB 1975). However, there must be a statement by the employer announcing its intentions. *See, e.g., UFA*, 47 OCB 61, at 8 (BCB 1991) (finding that an improper practice petition was not premature because the employer sent a letter to the union announcing its intention to assign Fire Marshals to the Social Club Task Force).

Here, the parties dispute whether the Board of Correction's publication of the Proposed Rules constitute a definitive statement of the DOC's intentions. We find that it does not. It has been more than a year since the Proposed Rules were published, and we take administrative notice that the Board of Correction has not voted to adopt them. While the Union speculates that modifications to the Proposed Rules, if any, would have even greater restrictions on punitive segregation, there has been no announcement of what rules the DOC will be required to implement. The Board cannot properly assess whether there would be a practical impact on the safety of Correction Officers without knowing the extent to which punitive segregation will be restricted or if it will be eliminated entirely. In these circumstances, the dispute is "hypothetical at this point in time."[19] *Local 1455, DC 37*, 4 OCB2d 56, at 8 (BCB 2011) (dismissing a claim as not yet ripe

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[19] We do not opine on whether a petition could be filed at this stage of the CAPA process under

because the Economic Development Corporation's request for proposals regarding financial advisory services did not constitute an announcement that the Department of Transportation planned to contract out bargaining unit work).

Accordingly, the Union's petition is dismissed without prejudice to refile.

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other circumstances.

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 City's motion to dismiss the petition docketed as BCB-4365-19 is granted.

Dated: February 2, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I concur (see attached opinion). M. DAVID ZURNDORFER
MEMBER

I concur (see attached opinion). CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

GWYNNE A. WILCOX
MEMBER

CONCURRING OPINION OF CAROLE O'BLENES AND M. DAVID ZURNDORFER IN DOCKET NO. BCB-4365-19

We concur with the Board's decision dismissing the Union's petition as premature. We write separately to emphasize two points.

First, a safety impact claim against the Department of Correction ("DOC") will not be ripe for review until the Board of Correction ("BOC") has issued its rules, and there has been a definitive statement by the DOC that it will implement those rules and how it will do so. As stated in the Board's opinion, the "Board cannot properly assess whether there would be a practical impact on the safety of Correction Officers without knowing the extent to which punitive segregation will be restricted...." There must be "a definitive statement of the DOC's intentions." (Slip op. at 15) Nor can the Board make that assessment without considering any measures adopted by the DOC "that offset any potential threat to safety" stemming from its implementation of the rules "and whether the employees' adherence to management procedures and guidelines would obviate any safety concerns." Uniformed Firefighters Association, Local 94, 5 OCB2d 2, at 22 (BCB 2012).

Second, if and when the hypothetical dispute presented here is ripe for review, any issue with respect to bargaining obligation must be limited to the DOC's implementation of the BOC rules, not the issuance of the rules by the BOC. The BOC is an independent board, a majority of whose members are designated by the City Council and the presiding Justices of the Appellate Division of the Supreme Court. And the rules under consideration are not self-enforcing but rather must be implemented by the DOC, the employing entity. In these circumstances, the BOC — as regulator — has no duty to bargain with a union that does not represent any of its employees.