

DC 37, 14 OCB2d 16 (BCB 2021)

(IP) (Docket No. BCB-4367-19)

Summary of Decision: The Union alleged that the City and DOF violated NYCCBL § 12-306(a)(1) and (4) by refusing to bargain over the introduction and use of GPS-enabled iPads to track field employees' locations, the potential use of this data to discipline employees, and privacy concerns arising from GPS tracking of off-duty employees. The City argued that the introduction of GPS-enabled iPads to verify the location of field employees falls within the City's management rights, that there has been no change to terms and conditions of employment because the iPads are an updated version of GPS-enabled tablets already utilized by employees, and that their use does not establish a new basis for discipline. The City also denied that location data is tracked when employees are off duty. The Board found that neither the replacement of previously issued GPS-enabled tablets with iPads nor the use of GPS data to conduct yearly Field Integrity Checks constituted a change to a mandatory subject of bargaining. Accordingly, the petition was dismissed.

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

In the Matter of the Improper Practice Proceeding

-between-

**DISTRICT COUNCIL 37, AFSCME,
AFL-CIO,**

Petitioner,

- and-

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

Respondents.

DECISION AND ORDER

On December 20, 2019, District Council 37, AFSCME, AFL-CIO ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Department of Finance ("DOF"). The Union alleges that DOF violated § 12-306(a)(1) and (4) of

the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) by refusing to bargain over the introduction and use of GPS-enabled iPads to track field employees’ locations, the potential use of this data to discipline employees, and privacy concerns arising from GPS tracking while employees are off duty. The City argues that the introduction of GPS-enabled iPads to verify the location of field employees falls within management rights, that there has been no change to terms and conditions of employment because the iPads are an updated version of GPS-enabled tablets already utilized by employees, and that their use does not establish a new basis for discipline. The City also denies that location data is tracked when employees are off duty. The Board finds that neither the replacement of previously issued GPS-enabled tablets with iPads nor the use of GPS data to conduct yearly Field Integrity Checks constitutes a change to a mandatory subject of bargaining. Accordingly, the petition is dismissed.

BACKGROUND

DOF is responsible for administering the City’s tax and revenue laws. It conducts property valuations, maintains property records, and administers exemption and abatement programs. Property valuations are performed by DOF employees in the civil service titles of City Assessor and Assistant City Assessor (collectively, “assessors”) assigned to offices in each of the five boroughs. Assessors are represented by Local 1757, an affiliated local of the Union. Among other duties, assessors conduct physical inspections of real properties in the field. These property inspections include performing physical examinations, taking measurements, writing descriptions, and compiling other data relevant to property valuation.

Assessors are issued a mobile tablet for recording data and images in the course of their physical examination of properties. Assessors were previously issued a Panasonic Toughpad, which is GPS-enabled and runs a software application known as Mobile Assessor. Using Mobile Assessor, data and images taken during a property examination are automatically stored. This data can be used to verify an inspection if a valuation is challenged. The Toughpad was capable of wireless communication with DOF's central database by means of NYCWin, a wireless network maintained by the Department of Information Technology and Telecommunications ("DOITT").

In June 2019, DOF began issuing Apple iPad tablets, which also run the Mobile Assessor application, to assessors in all five boroughs, with the goal of transitioning all assessors from the Panasonic Toughpads to iPads. City asserts that the iPads have a better camera, more accurate GPS capabilities, and communicate with DOF's central database by means of the faster and more reliable 4G cellular network.¹ According to the City, both the Panasonic Toughpads and the iPads are GPS-enabled, which automates the recording of location information in the course of a field inspection. GPS location information is only recorded when the Mobile Assessor application is running.

In or around 2012, DOF implemented a program of field integrity checks ("FICs"), which involve spot checks by supervisors to ensure that assessors are conducting property inspections at the locations they are scheduled to visit. The City asserts that DOF began conducting FICs at the recommendation of a New York City Department of Investigation ("DOI") Task Force Report following the arrests in 2002 of some DOF personnel for accepting bribes to change the assessed values of properties. When conducting a FIC, a supervisor contacts an assessor on their DOF-

¹ DOITT is currently in the process of decommissioning the NYCWin network used by the Toughpads.

issued beeper or personal cell phone with an instruction to call the supervisor to meet for a face-to-face meeting at a location in their assigned district. The assessor must then meet the supervisor at the specified location within 30 minutes. This process is colloquially known as a “beep and meet.” DOF’s goal was to conduct at least one such “beep and meet” per year for every assessor, but in some years that goal was not met.

At a Labor-Management meeting on August 8, 2019, DOF informed the Union that it would be distributing the GPS-enabled iPads to assessors. The Union objected to DOF’s use of GPS-enabled iPads at this meeting.

On August 20, 2019, DOF’s Director of Quality Assurance for Property sent an email to supervisors stating that DOF was starting a pilot program to conduct FICs remotely by GPS. It stated:

We are working diligently to make sure that that all boroughs will meet their required amount of [FICs] this year by accessing the assessor’s locations using the mobile assessor [application] and [comparing the GPS data to the assessor’s] projected field sheet, where possible. This feature will save time and secure additional field checks that, due to time and staff constraints, may not be completed in person.

(Pet., Ex. A) The email noted that in 2018 some boroughs had not met the goal of completing one FIC for every assessor. *Id.* It then instructed supervisors:

Over the next several months please try to use the Administrative Console/Mobile Assessor to perform integrity checks on [assessors] who do not have a completed Beep & Meet so far this year.

Please note that all [assessors] who have been issued iPads should routinely log into Mobile Assessor as soon as they start work in the field.”

Id.

The “Draft Supervisor Instructions” for conducting FICs with the iPad and Mobile Assessor application state that “[w]e are testing the process of performing [FICs] using CAMA

Cloud and tablets.”² (Pet., Ex. B) They instruct supervisors to compare an assessor’s projected or actual field sheet documenting property inspections with the GPS locations recorded by their iPad, which “will ping (register) every 5 minutes a location within the area that the tablet is in while logged on.” *Id.* “The supervisor will confirm the location and enter the findings into SharePoint Beep and Meet.” An assessor’s status is then documented according to the following categories:

- Successful - If the assessor’s location corresponds with their field sheet.
- Late - The Assessor reached the destination after the admissible time; a follow-up is required.
- No Show - If the assessor’s coordinates are not displayed within their designated area.
- Cancelled - If the Assessor is not at fault for the unsatisfactory Beep and Meet, the Supervisor can cancel the Beep and Meet and no follow-up is needed.

(Pet., Ex. C)

The Draft Supervisor Instructions also state that “[M]obile [A]ssessor must be activated as soon as the assessor reaches their scheduled destination.” *Id.*

On October 23, 2019, the Union wrote the New York City Office of Labor Relations (“OLR”) regarding the “[d]istribution of GPS-enabled iPads that will be used to track Local 1757 bargaining unit members during work hours and during unpaid meal periods.” (Pet., Ex. D) The letter stated that, “[t]he Union objects to the surveillance of our Local 1757 members and asks for [DOF] to immediately stop using this feature and remove the GPS from these iPads. In addition, the use of this tracking on and off hours, including unpaid meal periods, raises serious privacy concerns.” *Id.* The record does not reflect whether OLR responded to this letter.

Supervisors may still opt to perform FICs via in-person “beep and meets,” and the City asserts that neither the frequency of FICs nor the scope of the supervisor’s review have changed

² While it is not clear from the record, it appears that the Draft Supervisor Instructions were sent as an attachment to the August 20, 2019 email.

under the pilot program. DOF's Director of Quality Assurance for Property and its Director of Property Assessment Technology both affirm by affidavit that assessors are instructed during training that they are only required to run the Mobile Assessor app when they are conducting property assessments. However, the Union submitted the affidavit of an assessor who states that, at the time iPads were distributed, assessors were told they were GPS-enabled in order to perform FICs and that no further explanation or training was given regarding the iPad's tracking capabilities.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the City and DOF violated NYCCBL § 12-306(a)(1) and (4) by failing and refusing to bargain with the Union regarding the use of GPS-enabled iPads equipped with the Mobile Assessor application.³ The Union "[does] not dispute [the City's] right to

³ NYCCBL § 12-306(a)(1) and (4) provide, in pertinent part, as follows:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in [§] 12-305 of this chapter;

* * * *

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

§ 12-305 provides, in pertinent part, as follows:

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 . . .

implement new technology related to bargaining unit members' [property] assessment related duties," but it argues that the use of GPS data from the iPads as a basis for the imposition of discipline constitutes a mandatory subject of bargaining. (Rep. ¶ 15) The Union also alleges that the City has violated NYCCBL § 12-306(a)(1) and (4) by failing and refusing to bargain regarding privacy concerns arising from the use of the GPS-enabled iPads. The Union asserts that the iPads "have the ability to access the assessors' locations during duty-free meal breaks and during off hours when assessors are not performing job duties within the daily course of business." (Pet. ¶ 21) The Union argues that DOF's use of GPS tracking data does not fall within the City's discretion under NYCCBL § 12-307(b) regarding the "methods, means and technology of performing its work" because it has a substantial impact on employees' terms and conditions of employment when used as a basis to discipline employees and as evidence in disciplinary proceedings.⁴ In addition, the Union asserts that the City has not adequately explained why daily real-time tracking of assessors is needed when FICs are only conducted on a yearly basis.

⁴ NYCCBL § 12-307(b) provides, in pertinent part, as follows:

It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . take all necessary actions to carry out its mission in emergencies; 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 . . . 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.

City's Position

The City argues that DOF's use of the GPS-enabled iPads falls within its management rights under NYCCBL § 12-307(b) to "determine the method, means and personnel by which governmental operations are to be conducted" and to "exercise complete control and discretion over its organization and the technology of performing its work." The use of iPads "merely represents the application of an updated technology to an existing task performed by [assessors] that does not affect terms and conditions of employment." (Ans. p. 4) According to the City, the iPad tablets and the Panasonic Toughpads that they replace are functionally equivalent in that they both have GPS capability and run the Mobile Assessor software application. Therefore, the City argues, the introduction of the iPads does not constitute a change to terms and conditions of employment. The City further contends that this technology does not represent a new basis for discipline that is subject to mandatory collective bargaining because there has been no change to the work tasks assigned to assessors or to the standards by which their performance is evaluated. The City asserts that the use of iPads to perform FICs does not constitute a substantive change but instead only automates the process by eliminating the need for supervisors to travel to the field to conduct "beep and meets." This in fact reduces assessors' involvement in the review process. The City says it has the right to initiate discipline against assessors for failing to properly execute their duties regardless of whether the violation is discovered via an in-person "beep and meet" or through a supervisor's review of GPS data. It asserts that discipline could occur in any instance where the employer becomes aware of misconduct.

Regarding the Union's asserted privacy concerns, the City denies that the iPads will be used to track off-duty employees. It avers that employees have been informed that their location data is tracked when the Mobile Assessor application is running and instructed that they are only

required to use Mobile Assessor when conducting property inspections. Therefore, the City argues, the Union has not identified any privacy concern that might require the Board to conduct a balancing of interests to determine bargainability.

DISCUSSION

It is well established that “a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith.” *UFA*, 10 OCB2d 5, at 13 (BCB 2017) (citations omitted). To prove that a violation has occurred, a petitioner “must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy.” *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37, 79 OCB 20*, at 9 (BCB 2007)).

NYCCBL § 12-307(a) provides that the City must bargain regarding wages, hours, and working conditions.⁵ See NYCCBL § 12-307(a). As we have often stated, “[s]ince neither the NYCCBL nor the Civil Service Law expressly delineates the nature of ‘working conditions,’ or ‘conditions of employment,’ both this Board and [the State Public Employment Relations Board] determine on a case-by-case basis the extent of the parties’ duty to negotiate.” *DC 37, L. 1457*, 77

⁵ NYCCBL § 12-307(a) provides, in relevant part, as follows:

Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law . . .

OCB 26, at 12 (BCB 2006) (citations omitted). This determination “takes the form of a balancing test which weighs the interests of the public employer and those of the union with respect to that subject under the circumstances of the particular case.” *CEU, L. 237, IBT*, 2 OCB2d 37, at 14 (BCB 2009) (citations omitted); *see also State of New York (Dept. of Corr. Serv.)*, 38 PERB ¶ 3008 (2005) (Public Employment Relations Board (“PERB”) applies the balancing test under the Public Employees’ Fair Employment Act (“Taylor Law”)); *Matter of Levitt v. Bd. of Collective Bargaining of the City of New York*, 79 N.Y.2d 120 (1992) (upholding Board’s use of balancing test). Some subjects require no further analysis by this Board because they have been “‘pre-balanced’ by the Legislature . . . [including those] identified in NYCCBL § 12-307(b) as reserved for managerial discretion.” *CEU*, 2 OCB2d 37, at 14-15 (citations omitted).

The petition alleges that DOF failed to engage in bargaining regarding the decision to use GPS-enabled iPads, which the Union contends is a mandatory subject of bargaining because of privacy concerns and the potential use of GPS data as a basis for discipline. The Union appears to allege two related changes in terms and conditions of employment: the overall introduction of the GPS-enabled iPads and, more specifically, the use of these GPS-enabled iPads to conduct FICs. We consider these allegations in turn.⁶

The Union asserts that the introduction of the GPS-enabled iPads in or about August 2019 is a change concerning a mandatory subject of bargaining due to the potential use of GPS data to discipline employees, as well as privacy concerns. In particular, the Union asserts that the iPads may potentially be used to monitor the location of employees when they are off duty. However,

⁶ The petition did not allege that the City refused to engage in impact bargaining, and the pleadings do not reflect that the Union has requested impact bargaining regarding any of the issues identified in the petition. We therefore only address the Union’s claims that DOF has violated the NYCCBL by failing to engage in decisional bargaining.

the evidence shows that the Panasonic Toughpads, which were replaced by the iPads, were also GPS-enabled and utilized the same Mobile Assessor software application.⁷ “In a claim that the promulgation of a new policy, rule, or action violates the duty to bargain in good faith, the charging party has the burden to prove that a change, in fact, occurred.” *PBA*, 73 OCB 12, at 17 (BCB 2004) (citing *L. 371, SSEU*, 69 OCB 10 (BCB 2002); *Town of Stony Point*, 26 PERB ¶ 4650 (1993)). The Union does not assert that the City’s alleged ability to track employees while off duty via the iPads differs in any way from the Toughpads. Based on the evidence presented, the primary difference between the two tablets in regard to GPS tracking seems to be that the iPads provide more accurate location tracking and transmit data faster. In determining whether a unilateral change took place, this Board distinguishes between a material change and one which is merely *de minimis*, “that is, a change in form only, which does not require increased participation on the part of the employee, or alter the substance of the benefit to the employee.” *DC 37*, 4 OCB2d 43, at 8-9 (BCB 2011) (citing *CEU, L. 237*, 2 OCB2d 37, at 12-13 (BCB 2009); *UFA*, 4 OCB2d 3, at 7 (BCB 2011)); *see also PBA*, 11 OCB2d 20, at 22 (2018) (finding that the replacement of a paper form used in the performance evaluation process with an electronic version was not a mandatory subject of bargaining). Accordingly, we find that the replacement of the Toughpads with iPads that are also GPS-enabled and equipped with the same software application

⁷ We note that the Trial Examiner offered the Union the opportunity to submit evidence concerning any factual disputes between the parties that had been identified at the pre-hearing conference. This included a request for any evidence addressing the City’s assertion in its answer, supported by a sworn affidavit, that the Toughpads had the same tracking capabilities as the iPads. The affidavit subsequently provided by the Union did not identify any alleged differences between the Toughpads and the iPads or rebut the City’s assertions that the Toughpads had the same tracking capabilities as the iPads.

does not constitute a material change in a term or condition of employment.⁸ We therefore dismiss the Union's claims that the introduction of the iPads constitutes a violation of NYCCBL § 12-306(a)(1) and (4).

We now turn to the narrower issue of the use of the GPS-enabled iPads to conduct FICs. The City has commenced a pilot program to conduct FICs remotely using GPS data obtained from assessors' iPads. The record reflects that these FICs are conducted approximately once a year, and the City asserts that the frequency of FICs has not increased under the pilot program. These FICs have been previously performed by supervisors via in-person "beep and meets." The Union asserts that this constitutes a material change in terms and conditions of employment because the GPS data can be used to discipline employees and has a potential impact on employee privacy. Consistent with our case law, we apply a balancing test to determine whether this change constitutes a mandatory subject of bargaining. *See CEU, L. 237, IBT, 2 OCB2d 37*, at 14 (citations omitted); *Matter of Levitt v. Bd. of Collective Bargaining of the City of New York*, 79 N.Y.2d 120 (1992).

We first consider employees' interests in this matter. The potential use of GPS data collected for FICs to discipline employees may affect employees' job security, which bears a relationship to employees' terms and conditions of employment under the NYCCBL. *See DC 37, L. 1457, 77 OCB 26*, at 16 ("This Board must balance the interests of the employees in preserving their privacy, reputation, and job security and the interest of [the Department of Juvenile Justice] in assuring the safety of the youth under its care."); *see also Nanuet Union Free School District*,

⁸ Having found that the replacement of GPS-enabled ToughPads with GPS-enabled iPads does not constitute a change in a term or condition of employment, we need not address whether it relates to a mandatory subject of bargaining. *See, e.g., UFADBA, 12 OCB2d 30*, at 20 n.12 (BCB 2019) (declining to address whether an alleged change was related to a mandatory subject of bargaining where the petitioner had not met its burden of establishing a change in past practice).

45 PERB ¶ 3007 (2012) (PERB held that workplace video surveillance generally “intrudes upon employee interests [under the Taylor Law] including job security, privacy and personal reputation.”).⁹

On the other hand, we consider the importance to DOF’s core mission of the use of GPS data to conduct FICs. *See DEA*, 12 OCB2d 7, at 13 (BCB 2019) (NYPD’s installation of cameras in the work area of its Crime Scenes Unit (“CSU”) held to not be a mandatory subject of bargaining because the cameras were integral to the NYPD’s core mission of securing evidence for law-enforcement purposes). DOF is responsible for administering the City’s tax and revenue laws. A core element of this responsibility is conducting and recording valuations of more than one million properties. FICs are utilized to ensure that field assessors are conducting property inspections in their assigned districts. According to the City, DOF’s goal was to conduct at least one in-person FIC per year for every assessor, but in some years that goal was not met. Hence, DOF instituted its pilot program to conduct FICs remotely.

Under the circumstances, and consistent with our case law, we conclude that the City’s interest in remotely conducting FICs approximately once a year outweighs the employee interests asserted by the Union. *See DEA*, 12 OCB2d 7, at 16 (NYPD’s interest in securing evidence via placement of cameras in CSU work area found to outweigh employee privacy interests); *DC 37*, 1 OCB2d 32, at 33-34 (BCB 2008) (City Department of Juvenile Justice’s (“DJJ”) use of canines to search employees for narcotics held to not be a mandatory subject of bargaining because DJJ’s interest in its core mission of providing a safe environment for juveniles outweighed employees’

⁹ While the Union claimed that the use of GPS data could potentially affect employees’ privacy interests, it did not assert any concrete ways in which the conduct of FICs via GPS records instead of “beep and meets” impacts their privacy interests. In addition, no evidence was presented that employees are required to have the Mobile Assessor application, which records GPS location data, activated when not conducting property inspections.

interests); *DC 37, 75 OCB 13*, at 10 (BCB 2005) (City Department of Transportation's ("DOT") decision to search its storage facilities, including employee lockers, was not a mandatory subject of bargaining because DOT's interest in its core mission of providing safe transportation outweighed employees' interests).

The petition is therefore denied as to all claims.

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 verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, against the City of New York and the New York City Department of Finance, docketed as BCB-4367-19, is hereby dismissed in its entirety.

Dated: June 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

I dissent (see attached dissent)

GWYNNE A. WILCOX
MEMBER

I concur in the dissent (see attached dissent)

PETER PEPPER
MEMBER

Dissenting Opinion of Gwynne A. Wilcox in which Peter Pepper Concur

The City's decision to upgrade from GPS-enabled Panasonic Toughpads to GPS-enabled iPads improved GPS and camera capabilities and improved the speed and reliability of communications with the central database of the Department of Finance ("DOF"). Pursuant to directives to supervisors in light of the distribution of iPads, the new devices provided them with improved options to conduct field integrity checks ("FICs") of City Assessors. Also, they were directed to compare the GPS locations recorded on the City Assessors' iPads with their field sheets. The broader use of GPS during working hours gave rise to a bargaining obligation over the potential increase of discipline under broader circumstances than had been implemented since 2012. Further, since the GPS was improved, there was a bargaining obligation over the expanded oversight by supervisors that had not been previously utilized and the need for guidance to the Assessors over their concerns as to when the GPS could be turned off during their shifts and after hours and whether GPS could actually be disconnected. This is not a *de minimis* change in terms and conditions of the employees, especially in view of their privacy considerations and the potential for further discipline, which does not undermine the City's business and financial needs.

May 13, 2021

GWYNNE A. WILCOX

Gwynne A. Wilcox

PETER PEPPER

Peter Pepper