***Patrolmen's Benevolent Ass'n*, 73 OCB 12 (BCB 2004) [Decision No. B-12-2004 (IP)], *aff'd*, *Patrolmen's Benevolent Ass'n v. NYC Board of Collective Bargaining* , No. 112687/04 (Sup. Ct. N.Y. Co. Aug. 8, 2005).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

PATROLMEN'S BENEVOLENT ASSOCIATION,

Petitioner,

-and-

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

Respondents.

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Decision No. B-12-2004
Docket No. BCB-2350-03

DECISION AND ORDER

On July 8, 2003, the Patrolmen's Benevolent Association ("PBA" or "Union") filed a verified improper practice petition against the City of New York and the Police Department ("City" or "NYPD"). The Union alleges that NYPD 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 implementing a Performance Monitoring Program ("PMP" or "Program") as described in a 2003 manual without bargaining over changes in terms and conditions of employment. The City maintains that bargaining is not required over the PMP and that the manual issued in 2003 merely clarifies those subjects which had been part of the PMP at least since 1991. The City also argues that the petition is untimely. While this Board finds the petition timely, we determine that the elements of the 2003 Program over which the Union

wishes to bargain are either substantially unchanged from the 1991 Program or are not mandatory subjects of bargaining. Accordingly, the petition is dismissed.

BACKGROUND

The PMP is a monitoring program which provides enhanced supervision over police officers who have exhibited misconduct and/or poor work performance or who have been the subject of a specific number of civilian complaints. An officer is identified for monitoring through the daily screening of records by the Performance Monitoring Unit ("PMU"), which oversees the Program, or by supervisors' referrals. A manual describes the responsibilities of those monitoring the police officers in the Program.

The PMP is divided into three tiers of increasing supervision. Level I, or Command Monitoring, is the level with the least supervision. An officer might be placed in Level I if personal or other problems affect performance or result in minor violations or negative behavior. An officer who has received a certain number of complaints within a specified number of years may also be placed in Level I. The Commanding Officer ("CO"), not the PMU, is in charge of daily monitoring and maintains the records of the officer's performance. No entries are made in the personnel file or the Central Personnel Index.

Officers are placed in Level II if their misconduct or poor performance was initially more serious than that for placement in Level I, if they were unable to correct their behavior while in Level I, or if they had negative performance evaluations. The PMU supervises the monitoring. Placement into the PMP is recorded in the personnel file and the Central Personnel Index. The officer's name is circulated to other oversight divisions, such as the Absence Control Unit or

Internal Affairs Bureau ("IAB"), so that these divisions might report any further negative activity to the PMU.

Level III monitoring is the most intense form of supervision and is reserved for those officers who have chronic excessive force, discipline, or performance problems. There are two categories in Level III: Special Monitoring is for those who have not responded to positive or negative intervention, and Dismissal Probation is for officers who are on probation as part of an adjudicated penalty or settlement agreement of formal disciplinary charges. Only a Special Monitoring Committee can place officers in or remove them from Level III supervision.

According to the City, the PMP, as it exists currently, was created in 1991. The City relates that a monitoring program was started in the 1970's to assist officers experiencing personal problems or exhibiting negative behavior. These programs evolved into the Early Intervention Unit on one level and a Performance Monitoring Program on the next. In August 1991, the Special Monitoring Program was added in response to increasing complaints of excessive force. On November 7, 1991, NYPD released an unbound manual comprised of various documents concerning criteria and procedures for supervisors to follow while administering the whole program, the PMP ("1991 Manual"). Attached as an appendix to the 1991 Manual was a press release, which the Union does not dispute it received. On November 7, 1991, *The New York Times* published an article, "Police to Track Brutality Charges Against Officers," which explains the three levels and states: "A cautious Patrolmen's Benevolent Association, the main police union, indicated that it would monitor the monitoring process." Sec. B, at 2, col. 1. Two articles on this subject also appeared in *Newsday* on November 7 and November 19, 1991.

The term "Performance Monitoring" was mentioned in several other public documents before 2003. In 1995/1996 and thereafter, the forms for officers' annual evaluations asked the reviewer to indicate whether the employee was in "Performance Monitoring." A 1999 Board decision concerning the issue of NYPD's evaluating police officers and "banding" them in groups, mentions "Performance Monitoring Systems." *Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 3.

On July 31, 2001, NYPD issued the first bound manual, which was distributed to supervisors overseeing officers in the PMP ("2001 Manual"). The Union asserts that it did not receive a copy at that time.

Stuart London, an attorney hired by the Union to represent individual officers, telephoned NYPD's Deputy Inspector, Donna Jones, approximately five times from about September 2002 until September 2003 concerning interviews she conducted with officers who were being placed in what London calls a "vague" monitoring program. He states that Jones never provided details about the Program, including that an officer was being placed on a specific level of monitoring.

David M. Nicholson, an attorney representing the Union, spoke to Jones about the PMP in about February 2003, at which time Nicholson was investigating a possible improper practice charge. Nicholson states that he learned for the first time the particulars of NYPD's Program. On March 14, 2003, Nicholson sent a letter to Deputy Commissioner John P. Beirne: "In an effort to gain an understanding of the Department's Special Monitoring System, we write to request copies of all of the Department's procedures and policies regarding this program."

On March 20 and 21, 2003, NYPD issued an updated manual for supervisors ("2003 Manual"), which NYPD sent to the PBA on March 27, 2003. On April 4, 2003, the Union wrote

to Commissioner of Labor Relations, James F. Hanley, to demand that the City "negotiate the decision to implement the Performance Monitoring Program and the terms of the Program itself." Hanley responded on April 11, 2003, that since the PMP is part of police discipline, the Program's terms and their implementation were within the exclusive responsibility of the Police Commissioner and, thus, were prohibited subjects of bargaining. In June 2003, the City sent a copy of the earlier 2001 Manual to the PBA.

The Union filed the improper practice petition on July 8, 2003.[1] As a remedy, the Union asks the Board to hold that the City violated the NYCCBL by failing to negotiate over the PMP, to compel the Department to rescind the PMP, and to make whole any officer who was adversely affected by the new PMP by the rescission of all orders, directives, and counseling memoranda issued to these officers.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that by unilaterally adding new procedures to the performance monitoring system, NYPD changed terms and conditions of employment in violation of NYCCBL § 12-306(a)(1) and (4).[2] Focusing its argument in the 2003 Manual, the Union lists the

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[1] The parties supplemented the pleadings with letters dated October 27, 2003 (Union), and November 14, 2003 (City), which were made part of the record.

[2] NYCCBL § 12-306(a) provides, in pertinent part:
It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

(4) to refuse to bargain collectively in good faith on matters within the scope of collective

subjects over which it says NYPD must bargain as: evaluations, counseling, training, assignments, promotions, and integrity tests. According to the Union, the 1991 Program contained no similar provisions on any of these issues. The Union does not compare the 2001 and 1991 Manuals and says that it did not learn about the 2001 Manual until after it learned about the 2003 Manual. Furthermore, while the 2001 and 2003 Manuals list similar criteria for placement in the PMP, the 2003 Manual, unlike its immediate predecessor, contains "stark consequences" such as "mandatory training requirements, absolute prohibitions on transfers, absolute prohibitions on certain work assignments, mandatory integrity checks and mandatory home visits."

The PBA states that it is not challenging the City's right to set criteria for performance, evaluation, and the triggering of disciplinary procedure. Rather, it contests the timing, form, and procedures contained in the Program.

According to the Union, the 2003 PMP is not an extension of management's right to discipline employees for misconduct but is rather an alternative to NYPD's disciplinary procedures governed by the New York City Administrative Code § 14-115 and the New York City Charter § 434.[3] These provisions guarantee due process protections such as notice, charges,

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bargaining with certified or designated representatives of its public employees . . . .

NYCCBL § 12-305 provides, in relevant 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 . . . .

[3] Administrative Code § 14-115 provides, in relevant part:
a. The commissioner shall have power, in his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or

and the right to a hearing before penalties can be imposed. By contrast the 2003 PMP has no such provisions. Rather, officers may be "dumped" into the Program just because they were accused of wrongdoing. Moreover since the 2003 PMP is inconsistent with the local law defined in the Administrative Code and Charter, the PMP loses the safe harbor protection found in the New York Civil Service Law ("CLS") § 76(4),[4] and falls under the general rule that alternatives to existing disciplinary procedures are mandatory subjects of bargaining.

In response to the City's affirmative defense, the Union asserts that the petition is timely.

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disobedience of orders, or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force . . . .
b. Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe. . . .

Charter § 434 provides, in relevant part:
a. The commissioner shall have cognizance and control of the government, administration, disposition and discipline of the department, and of the police force of the department.
b. The commissioner shall be the chief executive officer of the police force. He shall be chargeable with and responsible for the execution of all laws and the rules and regulations of the department.

[4] CSL § 76(4) provides, in relevant part:
Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. . . .

The 1991 PMP was a different Program from the 2003 PMP. Therefore, the fact that the PBA publicly commented about the 1991 Program in newspaper articles does not mean that the PBA had knowledge of the 2003 Manual. The Union learned of the updated Program only after it received the 2003 Manual on March 27, 2003. The City's argument that the 2003 PMP is an extension of the 2001 PMP also fails because the 2001 PMP was kept secret from the PBA. The first time the PBA learned of that Program was in June 2003, when the City sent the 2001 Manual.

The Union maintains that even though officers, sometimes Union delegates, were being placed in the PMP since 1991, the City did not provide notice of the new Program directly to the Union, as is required. Moreover, that PBA attorneys spoke to the City regarding individual employees does not demonstrate that the PBA was aware of the terms or the extent of the Program. As soon as the PBA became aware of the new Program – when the PBA filed an improper practice petition on behalf of a delegate who was placed in Special Monitoring – the Union sent a letter seeking information about the PMP on March 14, 2003. Thus, the petition is timely.

City's Position

The City claims that the petition should be dismissed for untimeliness. For over 30 years, NYPD has used the three-tier monitoring system about which the PBA had knowledge. The City points to the PBA's comments in various newspaper articles published in 1991 when the PMP was formalized. The City also points out that an officer's status in the PMP has been listed on annual evaluation forms since 1990 and that the PMP was noted in a 1999 Board decision.

In addition, all officers placed in Levels II and III meet with the CO of the PMU and may

bring a PBA delegate. Current PBA counsel have had discussions with Deputy Inspector Jones about officers in the PMP, and certain PBA delegates have been placed in the Program. Thus, the PBA, having known about the PMP for years, should be precluded from challenging the Program at this time.

The City contends that the PMP is a form of supervision, which is a management right under NYCCBL § 12-307(b).[5] As a supervisory program, the PMP centralizes the identification and monitoring of officers whose performance or conduct is substandard. Management does not have to negotiate over the standards it sets or over the methods and means it uses to maintain efficiency and control to further its fundamental mission of providing safety and order in the City. Monitoring and counseling officers whose performance is poor or who have engaged in misconduct is a central management prerogative. Therefore, the subjects over which the PBA seeks to bargain are nonmandatory.

In addition, the 2003 Manual has no "absolute prohibitions" or "mandatory requirements," but leaves discretion to supervisors. The requirements are no different from those in the 2001 Manual.

While not a disciplinary program, the PMP, the City says, may serve as a mechanism for gathering information that can be used for formal disciplinary charges. The City argues that to

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[5] NYCCBL § 12-307(b) provides in pertinent part:
It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action . . . ; 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 . . . . Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining . . . .

the extent that the monitoring program serves as a tool for NYPD's disciplinary program, the PMP is a prohibited subject of bargaining. Pursuant to the Administrative Code, the Charter, the CSL, and cases interpreting these, all procedural and substantive issues concerning discipline are left to the discretion of the Police Commissioner and are thus non-negotiable.

Finally, the City states that it has no duty to bargain over the practical impact of the PMP and that the Union has not made out a claim of either an independent or a derivative violation of NYCCBL § 12-306(a)(1).

DISCUSSION

TIMELINESS CLAIM

Under section 12-306(e) of the NYCCBL, a petition alleging that an employer has engaged in an improper practice may be filed with the Board "within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence." *See* § 1-07(b)(4), formerly § 1-07(d), of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1); *District Council 37, AFSCME*, Decision No. B-1-90 at 6-7. When a union does not know about an action taken by the employer, the petition is timely if it is filed within four months of the time the union learned of the action. *See Autorino*, Decision No. B-30-91 at 10; *Patrolmen's Benevolent Ass'n*, Decision No. B-42-88 at 9; *see also Uniformed Fire Officers Ass'n*, Decision No. B-20-92 at 6.

Here, the Union wrote a letter to NYPD on March 14, 2003, seeking copies of NYPD's procedures and policies regarding the special monitoring program. On March 27, 2003, NYPD

sent the Union a copy of the 2003 Manual, issued the previous week, and in June 2003 sent a copy of the 2001 Manual. While we find that the Union had knowledge since 1991 that some kind of Performance Monitoring Program existed, we also find that the Union had no notice of the 2003 Manual and the specifics of this Program until March 2003. Therefore, the petition filed on July 8, 2003, is timely.

CLAIMS OF FAILURE TO BARGAIN

The substantive issue in this case is whether NYPD made a unilateral change in a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1) and (4). This Board finds that the elements about which the Union complains are either unchanged from the 1991 Program or are nonmandatory subjects of bargaining.

Mandatory subjects of bargaining include terms and conditions of employment, which have been defined as wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *See Correction Officer's Benevolent Ass'n*, Decision No. B-26-2002 at 7; *Rensselaer City School District*, 87 A.D.2d 718, 15 PERB ¶ 7003 (3d Dep't 1982). It is an improper practice under NYCCBL § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining. *See District Council 37, Local 1549*, Decision No. B-37-2002. However, the public employer may act unilaterally in certain areas such as determining what duties employees will perform and determining the methods, means, and personnel by which government operations are to be conducted, unless the parties themselves have limited that right in their collective bargaining agreement. *See District Council 37, Locals 2507 and 3621*, Decision No. B-34-99 at 17; *Patrolmen's Benevolent Ass'n*, Decision No. B-39-93 at 14-15; *City School District of Rochester*,

4 PERB ¶ 4509, *aff'd*, 4 PERB ¶ 3058 (1971).

This Board has not directly addressed a question concerning a performance monitoring program, and the parties have not pointed to a decision by the Public Employment Relations Board ("PERB") on this subject. We have said, in agreement with PERB, that management may determine standards and criteria for performance, though it must negotiate over procedural aspects of this subject. *Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 12, 16, *citing Elwood Union Free School District*, 10 PERB ¶ 3107 (1977); *see also State University of New York (Stony Brook)*, 33 PERB ¶ 4593, at 4765 n.7, *aff'd*, 33 PERB ¶ 3045 (2000). In *Patrolmen's Benevolent Ass'n, supra*, the Board found that NYPD's placing police officers in one of three "performance percentage bands" for the purposes of the annual evaluation was part of the standards and criteria – not part of the procedures – for evaluating performance and thus was not mandatorily negotiable. *Id*. at 16.

In an analogous situation, this Board has discussed the issue of monitoring sick leave. In *Correction Officer's Benevolent Ass'n*, Decision No. B-26-2002, the Board found that while the provision of sick leave (unlike performance standards) is a mandatory subject of bargaining, the monitoring of such leave is not. The Corrections Department issued a revised sick leave policy amending certain criteria, listing discretionary assignments that management could revoke or revise, and noting which actions could lead to discipline. This Board found that these modifications were nonmandatory subjects of bargaining. *Id*. at 13, 14; see *also Town of Carmel (PBA)*, 31 PERB ¶ 3023 (1998); *Poughkeepsie City School District*, 19 PERB ¶ 3046 (1986).

Here, the Union states that it is "not challenging the City's right to set criteria for performance, evaluation and the triggering of a discipline procedure. Rather the PBA is

challenging the timing, form and procedures for those evaluations." (Reply Brief at 8.) The Union focuses almost exclusively on the alleged differences between the 2003 and 1991 Manuals and fails to compare the 2001 and 1991 Manuals, claiming that it was unaware of the 2001 Manual when it was issued.[6] Therefore, we will examine the seven issues that the Union claims require bargaining by reference to the 2003 and 1991 Manuals.

1. Evaluations/Performance Profiles

The 2003 Manual mandates that the PMU review the status of officers in Command Monitoring (Level I) after ten months of placement in the PMP. The CO submits a Performance Profile quarterly for each officer in Performance Monitoring (Level II), and monthly for each officer in Special Monitoring (Level III). (4, 6, 7, 10.)[7]

Although the Union says that no similar provisions exist in the 1991 Manual, a review of that manual indicates that COs were required to make regular assessments. For officers in Early Intervention Monitoring (Level I), COs were required to file quarterly reports. ("New York City

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[6] The PBA makes one comparison between the 2003 and 2001 Manuals – that the officer placed in the PMP under the 2003 Manual suffers "stark consequences" which affect terms and conditions of employment and which are not found in the 2001 document. The Union does not point to specific sections, but instead alleges that these consequences include "mandatory training requirements, absolute prohibitions on transfers, absolute prohibitions on certain work assignments, mandatory integrity checks and mandatory home visits." After a reading of the Manuals, we find that the 2003 Manual does not include "mandatory" training requirements or integrity checks. Instead, a CO or the PMU confers with the Deputy Commissioner of Training, to "assess the appropriate training needs" for each officer (2003 Manual at 4, 7, 10), or the IAB "conduct[s] integrity tests, if appropriate." (2003 Manual at 8, 11; 2001 Manual at 7.) In addition, a supervisor must check if an officer's assignment is "appropriate." (2003 Manual at 5, 7, 11; 2001 Manual at 2, 5.) The only "absolute prohibition" on a work assignment is that an officer in Level III is prohibited from working in the "first platoon," the 12:00 midnight to 8:00 a.m. shift. We find this subject to be nonmandatory, for the reasons set forth below in the discussion on assignments. Thus, these claims are without merit.

[7] Numbers in parentheses refer to the 2003 or 1991 Manuals, as noted.

Police Department Use of Performance Monitoring Systems to Address the Use of Excessive Force," in the 1991 Manual Appendix ["Use of PMS"].)[8] For officers in Performance Monitoring (Level II) and Special Monitoring (Level III), COs wrote updates regarding each officer. (Use of PMS, and Manual at 16.)

The Union asserts that the 2003 PMP changes the well-established annual evaluation system by accelerating the timing of reviews for officers in Level I to ten months or of Performance Profiles for those in the Levels II and III to a quarterly or monthly system. The Union claims as well that the frequency of assessments in the 2003 Manual is different from the frequency in the 1991 Manual and that the 2003 PMP directs officers in the Program to participate in new procedures for assessments. The requirement that an officer in Level I meet with a CO to "develop a plan that will correct" negative behavior (2003 Manual at 1) indicates that the officer must participate in his or her own assessment. The Union equates the PMU review and the COs' Performance Profiles to an evaluation process, the timing and procedures for which are mandatorily bargainable.

The City responds that the 2003 PMP does not create a new annual evaluation process but clarifies the criteria supervisors must employ for monitoring officers in the Program, criteria that are nonmandatory subjects of bargaining. While management admittedly has to bargain over changes to evaluation procedures, there are no procedural changes in the 2003 PMP. Nor do the officers in the PMP participate in the assessment process or sign an "evaluation." Since the assessment falls only on the supervisor, management has no duty to bargain.

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[8] Although the 1991 Manual includes three tiers, it does not use the term, "Level," which we use here for convenience.

We find first that the reviews or Performance Profiles that the PMU or COs submit are different from annual evaluations. Nothing in the record indicates that the timing of the annual evaluation has changed, and nothing in the record supports the Union's conflating the annual evaluations, required for all officers, with the reviews or Performance Profiles, required only for officers in the PMP.

Second, we address the issue concerning revisions of the Performance Profiles. Generally, criteria for performance evaluations are nonmandatory subjects of bargaining. *See Patrolmen's Benevolent Ass'n*, Decision No. B-2-99 at 16; *Elwood Union Free School District*, 10 PERB ¶ 3107, at 3185. When procedural revisions, such as timing issues, are made to performance evaluations, they are mandatorily negotiable unless they pertain only to supervisory functions. *County of Nassau (PBA)*, 35 PERB ¶ 4566, at 4721-4722 (2002); *see also Correction Officer's Benevolent Ass'n*, Decision No. B-26-2002 at 16. In *Town of Carmel (PBA)*, 31 PERB ¶ 3023, at 3051, PERB wrote: "An employer may extend to or retract from a supervisor discretion with respect to the performance of supervisory functions without incurring a decisional bargaining obligation in that regard." Specifically, the implementation of a new evaluation form is deemed a nonmandatory subject to the extent that it imposes new requirements only for supervising employees, not for the employees being evaluated. *See County of Nassau (PBA)*, 35 PERB ¶ 4566, at 4722; *County of Ulster*, 16 PERB ¶ 4646, at 4828 (1983).

The timing of the assessments for those in the PMP has been revised: Under the 2003 Manual, the PMU must review an officer in Level I ten months after placement in the PMP, rather than have the CO file quarterly reports, as required by the 1991 Manual. For officers in Level II, a CO must submit quarterly Performance Profiles, and for those in Level III, monthly

Profiles rather than the unspecified "updates" under the 1991 Manual. However, the 2003 Manual dictates the requirements only for supervisors in assessing officers in the PMP and does not necessitate any participation by the employees. The PBA makes no allegation that an officer signs the Performance Profile (*see County of Nassau*, 35 PERB ¶ 4566, at 4721, and *Port Jefferson Administrators Ass'n*, 33 PERB ¶ 3047, at 3127 (2000)), or even knows the content of the Performance Profile. Furthermore, we disagree with the Union's claim that an officer participates in the assessment because he or she meets with a CO to develop a plan. The PBA does not indicate how this point is linked to assessment rather than to counseling, a separate category which we address below. Thus, we find that the requirements for supervisors completing Performance Profiles are nonmandatory subjects of bargaining.

2. Counseling

Under the 2003 Manual, a CO counsels an officer placed in Level I monitoring regarding poor performance. Together they develop a plan to correct the behavior. (1, 5.) For officers in Levels II and III, the CO of the Performance Analysis Section of the PMU interviews the member, describes the program, and explains the ramifications on the officer's career. (6, 7, 10.) The 1991 Manual indicates that officers in all levels were informed of their placement and its ramifications and were subject to interviews. (Use of PMS, "Performance Monitoring Systems," in Appendix, Manual at 3, 14, 16, 18, 19.)

According to the Union, the 1991 Manual contains no provisions for counseling similar to those in the 2003 Manual. Involuntary counseling without negotiation is a violation of the NYCCBL. The words, "together they [the CO and officer] develop a plan," in the 2003 Manual indicate that the officer is compelled to participate in an interview.

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. *See Social Service Employees Union, Local 371*, Decision No. B-10-2002; *Town of Stony Point (PBA)*, 26 PERB ¶ 4650 (1993). In *City of Buffalo (Police Dep't)*, 23 PERB ¶ 4559*, aff'd*, 23 PERB ¶ 3050 (1990), though the union showed certain unilateral revisions, it failed to demonstrate that other new rules issued by the police department were indeed changes from the prior regulations. The latter claims were deemed nonmandatory.

Here, the 1991 Manual indicates that officers in the PMP were subject to interviews to learn that they became part of the Program and to understand the ramifications of their placement. We find that the PMP's basic counseling requirements have not changed. In both the 1991 and 2003 Programs, officers take part in interviews, which, by their very nature, always include the participation of the employee. The effect of the words in the 2003 Manual: "together they develop a plan," is *de minimus*. Thus, the subject of counseling in this case is nonmandatory.

3. <u>Training</u>

With respect to all levels in the 2003 Program, the CO or the PMU confers with the Deputy Commissioner of Training to determine the appropriate needs of each officer in the PMP. A Borough Commander or the Special Monitoring Committee may make recommendations for training. (4, 7, 9, 10, 11.) The 1991 Manual mentions career guidance interviews, in-house learning courses, Precinct Unit Training, and Post Entry Level Training for those in the Early Intervention Unit. (16, 18, Use of PMS.)

According to the Union, training is a mandatory subject, and no similar provisions on

training exist in the 1991 Manual.

As to the first contention, this Board and PERB have held that training is a nonmandatory subject of bargaining. *Uniformed Firefighters Ass'n*, Decision No. B-19-2003 at 11; *Uniformed Firefighters Ass'n*, Decision No. B-4-89 at 167, *aff'd, Uniformed Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dep't 1990); *State Supreme Court Officers Ass'n*, 32 PERB ¶ 3063 (1999); *Dobbs Ferry Police Ass'n*, 22 PERB ¶ 4516, *aff'd*, 22 PERB ¶ 3039 (1989). In *Communications Workers of America*, Decision No. B-7-72 at 6, we wrote that the "City has the management right to determine the quantity and quality of the services to be delivered to the public, and, therefore, also the quantity and quality of the training required to achieve that service." The Board has recognized exceptions which are inapplicable here. *See, e.g., District Council 37, AFSCME*, Decision No. B-20-2002 (unilateral change in crediting employer-sponsored courses necessary for promotion violates requirement to bargain in good faith).

We find that NYPD may utilize its expertise to establish unilaterally the kind of training it will provide an officer in the PMP in order to maintain the quality of service to be delivered to the public. *See Uniformed Firefighters Ass'n*, Decision No. B-43-86 (City could unilaterally determine the level of training provided to Fire Marshals). Moreover, the Union has failed to indicate any procedures over which it would bargain concerning training. Thus, in this case, the City has no obligation to bargain over training.

4. Assignments

The 2003 Manual directs a CO to review the assignment/tour of an officer placed in Level II, confer with the PMU, and make appropriate adjustments. Similarly, an officer in Level III is

subject to reassignment. The Manual further "recommends" that officers in Level III be assigned to enforcement duties "if applicable" and prohibits officers in Level III from assignment in the first platoon. (7, 9, 10.) According to the 1991 Manual, whenever an officer was considered for transfer, NYPD checked the personnel file to see if the officer had been placed in the PMP. (Use of PMS.)

The Union asserts that involuntary assignments to shifts and tours are "classic" mandatory subjects because they affect "when and where" an employee will work. The Union also reads the 2003 PMP to "require" that an officer in the Program be placed in "enforcement duty only" and not get favorable assignments. Furthermore, the prohibition from being assigned to the first platoon violates the NYCCBL. On the other hand, the City claims that it has no duty to bargain over assignments. Nor does the 2003 Manual contain "absolute prohibitions" on transfers or work assignments. Rather, the 2003 PMP provides discretion for the CO or the PMU to make decisions on the deployment of personnel.

In order to maintain the efficiency of governmental operations, management may make appropriate assignments within the general job description for an employee's title. *See Lieutenants Benevolent Ass'n*, Decision No. B-14-92 at 7-8; *Uniformed Firefighters Ass'n*, Decision No. B-61-91 at 9; *Seneca Falls Teachers Ass'n*, 23 PERB ¶ 3032 (1990). Management may vary the assignments of its employees as long as the duties are part of the essential function of the job, *Waverly Central School District*, 10 PERB ¶ 3103, at 3177 (1977); *see State University of New York (Stony Brook)*, 33 PERB ¶ 3045, at 3122, or as long as the changes of assignments "do not alter the essential character of [an employee's] position." *Norwich City School District*, 14 PERB ¶ 3059, at 3097 (1981).

This Board has found that an employer was permitted to reassign police personnel who had worked at desk jobs to traditional law enforcement activities. *See Patrolmen's Benevolent Ass'n*, Decision No. B-39-93 at 15; *Patrolmen's Benevolent Ass'n*, Decision No. B-26-80 at 16, *aff'd, Patrolmen's Benevolent Ass'n v. McGuire*, No. 8238/80 (Sup. Ct. N.Y. Co. Apr. 13, 1981). In these cases, the Board noted that the reassignments were to duties that were fundamental to the basic direction of NYPD. *See also District Council 37, Locals 2507 and 3621*, Decision No. B-34-99 (management right to reassign Emergency Medical Service employees on light or modified duty to other assignments).

Moreover, management may decide which employee, specifically, is to be assigned to a particular duty. *See Corrections Officer's Benevolent Ass'n*, Decision No. B-26-2002 at 14; *Niagra Falls Police Captains and Lieutenants Ass'n*, 33 PERB ¶ 3058 (2000); *Patrolmen's Benevolent Ass'n,* 21 PERB ¶ 3022, at 3050 (1988). Even the case cited by the Union to support its claim that assignments are mandatory subjects, *Buffalo Patrolmen's Benevolent Ass'n*, 9 PERB ¶ 3024 (1976), notes that the criteria for assignments are not mandatorily negotiable even if the procedures are. PERB wrote: "For example, an employer may unilaterally decide that it requires a detective with unique skills or attributes such as the ability to speak or even to look Chinese." *Id*. at 3040 n.5.

Accordingly, we find that reassigning officers in the PMP is not a mandatory subject of bargaining. The PBA does not allege that possible assignment of an officer in Level III to enforcement duties would alter the essential character of the officer's position. Enforcement duties are part of the fundamental mission of NYPD. Moreover, the Union has not indicated any procedures over which it seeks to bargain.

Finally, management has the right not to assign an officer in Level III to work in the 12:00 midnight to 8:00 a.m. shift, the first platoon. In *Amherst Police Club*, 12 PERB ¶ 3071, at 3126 (1979), PERB ruled not mandatorily negotiable a union demand that employees pick a shift or platoon assignment. *See Corrections Officers' Benevolent Ass'n*, Decision No. B-26-99; *Correction Officer's Benevolent Ass'n*, Decision No. B-16-81 at 44 (management may reschedule shifts to accommodate its needs). We find that NYPD may limit officers in the PMP from certain shifts to maximize the effectiveness of services. Thus, the subject of assignments and tours is nonmandatory.

5. Promotions

Pursuant to the 2003 Manual, when an officer in Level II or III is being considered for "career movement," the supervisor must confer with the PMU. The Career Advancement Review Board also reviews any recommendation for promotion of an officer in Level III. (7, 9, 10.) The 1991 Manual states that when an officer is being considered for promotion, management refers to the personnel file, which records an officer's placement in Level II or III. (Use of PMS.)

The Union contends that the 2003 PMP excludes officers from promotional opportunities, a mandatory subject of bargaining, and that no similar provision exists in the 1991 Manual.

This Board and PERB have held consistently that management may unilaterally set standards for individual promotions. *See Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120 (1992), *aff'g in part and modifying in part, Uniformed Fire Officers Ass'n, Local 854*, Decision No. B-7-87 (questionnaire for promotional candidates); *Uniformed Fire Officers Ass'n, Local 854*, Decision No. B-6-2003 (educational requirements prior to promotion); *City of Buffalo*

(Police Dep't), 29 PERB ¶ 3023 (1996) (procedures for promotions from civil service list); *West Irondequoit Teachers Ass'n*, 4 PERB ¶ 4511 (promotional policy for teachers' job titles), *aff'd in part and modified in part*, 4 PERB ¶ 3070 (1971), *aff'd on other grounds sub nom. West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46 (1974). In *Patrolmen's Benevolent Ass'n,* Decision No. B-24-87*, aff'd sub nom. Caruso v. Anderson,* 138 Misc. 2d 719 (Sup. Ct. N.Y. Co. 1987), *aff'd,* 145 A.D.2d 1004 (1st Dep't 1988), the Union argued that the creation of a point system that gave more points to officers in certain positions than others was a term and condition of employment. This Board found that the point system established standards and criteria for promotion, a managerial prerogative, over which NYPD was not obligated to negotiate.

In this case, the requirement in the 2003 Manual that the PMU or the Career Advancement Review Board participate in recommendation for promotion is not a mandatory subject of bargaining. The PBA incorrectly characterizes the statement in the Manual as a "prohibition" of career movement. The language simply requires the centralized monitoring units to review the record and to discuss with a supervisor a possible promotion for an officer in the PMP.

6. Integrity Tests

IAB, according to the 2003 Manual, makes field observations and conducts integrity tests; the Absence Control Unit may conduct visits to PMP members on sick leave. (8, 9, 11.) The 1991 Manual explains that the object of the Field Unit of Internal Affairs is to ensure integrity and monitor staff performance for compliance with Departmental rules and guidelines. The Unit also investigates allegations of serious misconduct and corruption by making unannounced visits, monitoring sick leave abuse, and monitoring the activities of officers suspected of misconduct.

An Absence Control Unit makes visits to check on sick leave abuse. (6, 7, 22, 24.)

According to the Union, the 2003 Manual added "mandatory" integrity checks and at-home sick visits, for the 1991 Manual contains no similar provision. Furthermore, procedures for investigations and interviews are mandatory subjects of bargaining.

A petitioner must allege with specificity the changes it alleges have been made in a revised policy. *See Social Service Employees Union, Local 371*, Decision No. B-10-2002. Here, the Union has not indicated how integrity tests as noted in the 2003 Manual are substantially different from those in the 1991 Manual. In both Manuals, a unit in Internal Affairs oversees personnel and conducts field tests to assure that employees comport with NYPD's standards of behavior. The Absence Control Unit has the same function in 2003 as it did in 1991; the Union fails to mention any revised procedures. Since this Board finds no unilateral change in a term or condition of employment, the subject of integrity tests is not mandatorily negotiable. *See City of Rochester (Police Club)*, 35 PERB ¶ 4601 (2002).

7. Discipline

This Board finds that the revisions in the 2003 Manual do not establish a new disciplinary system, as the Union submits. First, the Union does not identify new procedures over which the parties should have bargained. Our review of the disciplinary nature of the underlying Programs as manifested in the 1991 and 2003 Manuals indicates that the subject is treated in essentially the same way in both Programs. Second, the PMP is not an alternative to a statutory discipline system since the Program is supervisory and does not impose penalties. In *Correction Officer's Benevolent Ass'n*, Decision No. B-26-2002, concerning chronically absent employees, this Board found that management's revoking a preferential assignment, for example, was not an imposition

of a penalty but a part of management's authority to determine standards of service. The PMP's essential purpose is oversight, and no new system of discipline has been established.

However, to the extent that the Program could be construed as a vehicle for the furtherance of disciplinary action, both the substance and the procedures of the PMP are prohibited subjects of bargaining. Charter § 434 confers upon the Police Commissioner "control of the . . . discipline of the . . . police force of the department" and responsibility for the execution of "all laws and the rules and regulations of the department." Administrative Code § 14-115 empowers the Commissioner to discipline members of NYPD in his discretion for a wide range of infractions and impose penalties from reprimand to dismissal. Under that section, due process may be exercised "in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe. . . ." CSL § 76(4) prohibits the negotiation of agreements the effect of which would modify or replace any local law relating to the discipline of police officers.

The courts and the Board have recognized that certain statutes may remove from bargaining particular subjects that might otherwise be mandatorily negotiable. Specifically, Charter § 434, Administrative Code § 14-115, and CSL § 76(4) have been construed as limiting bargaining on the issue of discipline for City police officers. In *City of New York v. MacDonald*, 201 A.D.2d 258 (1st Dep't), *leave denied*, 83 N.Y.2d 759 (1994), the court held that demands to establish arbitral disciplinary procedures for tenured officers and to confer grievance rights on probationary officers were prohibited subjects because any attempts to impose these procedures would repeal or modify the Commissioner's discretion under the Administrative Code in violation of CSL § 76(4).

The Court of Appeals specifically endorsed *MacDonald* in *Montella v. Bratton*, 93 N.Y.2d 424 (1999). The court determined that the Civil Service Commission had no jurisdiction to hear an appeal by a City officer because punishment pursuant to Charter § 434, Administrative Code § 14-115, and CSL § 76(4) does not fall within Civil Service provisions. Limitations under the Administrative Code, the court said, demonstrate legislative intent that the Police Commissioner's disciplinary determinations be accorded "substantial deference 'because he . . . is accountable to the public for the integrity of the Department.'" *Id*. at 430 (citations omitted). *See also Town of Greenburgh v. Ass'n of the Town of Greenburgh*, 94 A.D.2d 771 (2d Dep't), *leave denied*, 60 N.Y.2d 551 (1983) (discipline of officers was prohibited subject of bargaining since Westchester local law mandated procedures).

Recently, in *Patrolmen's Benevolent Ass'n v. New York State Public Employment Relations Board*, ___ Misc. 2d ___, 36 PERB ¶ 7014 (Sup. Ct. Albany Co. 2003), *appeal pending* (Ind. No. 7417/02), the court, relying on *MacDonald*, affirmed PERB's interpretation of CSL § 76(4) in a case involving New York City police officers. PERB wrote: "While disciplinary procedures and aspects of discipline are not always prohibited subjects of bargaining, where there is a special or local law relating to police discipline, demands or contract provisions relating to police discipline or disciplinary procedures will be held to be prohibited subjects of bargaining." *Patrolmen's Benevolent Ass'n of the City of New York*, 35 PERB ¶ 3034, at 3097 (2002).

This Board followed *MacDonald* in *Sergeants Benevolent Ass'n*, Decision No. B-22-98 at 20, in which petitioners sought to bargain over changes to a Bill of Rights/Guidelines for Interrogation of members of NYPD. We held that since the language of CSL § 76(4) removes

from collective bargaining procedural disciplinary issues concerning officers, NYPD did not violate NYCCBL § 12-306(a)(4) by refusing to bargain over the changes to the Guidelines.

This Board finds that the cases noted above are controlling here. Thus, to the extent that the PMP is related to discipline, it is a prohibited subject of bargaining.

CONCLUSION

NYPD, a public employer and paramilitary organization, has a legitimate governmental interest in identifying employees with behavioral or performance difficulties to assure that these members are effective in their jobs and to assist members at risk. For years, the PBA has been aware of a monitoring program to advance these goals. Here, the Union has not provided sufficient allegations to indicate that changes were made on certain issues from the 1991 to the 2003 PMP Manuals written for supervisors. Where changes do exist, the subjects over which the PBA seeks to negotiate are nonmandatory. Insofar as the PMP involves discipline, the subject is prohibited. Therefore, we hold that the City is not required to bargain over the 2003 Manual describing the PMP.

Because we have found no violation of NYCCBL § 12-306(a)(4), there is no derivative violation of § 12-306(a)(1), and because the Union has failed to state a *prima facie* case of an independent violation of § 12-306(a)(1), we dismiss that charge.

ORDER

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

ORDERED, that the improper practice petition, BCB-2350-03, filed by the Patrolmen's Benevolent Association, be, and the same hereby is, dismissed.

Dated: July 29, 2004
New York, New York

MARLENE GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M.DAVID ZURNDORFER
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER