

**PBA, 11 OCB2d 37 (BCB 2018)**  
(IP) (Docket No. BCB-4196-17)

**Summary of Decision:** Petitioner alleged that the Police Department violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally promulgating Operations Order 54, which provides that officers on Modified Assignment may not earn overtime compensation. The City argues that it has no duty to bargain because the Operations Order was issued pursuant to the Police Commissioner's exclusive authority over discipline. The Board found that the Police Department violated the NYCCBL because the Operations Order pertains to the distribution of overtime, which is a mandatory subject of bargaining. Therefore, the improper practice petition was granted. (*Official decision follows.*)

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

**In the Matter of the Improper Practice Petition**

*-between-*

**PATROLMEN'S BENEVOLENT ASSOCIATION  
OF THE CITY OF NEW YORK, INC.,**

*Petitioner,*

*-and-*

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

*Respondents.*

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**DECISION AND ORDER**

On February 27, 2017, the Patrolmen's Benevolent Association of the City of New York, Inc. ("Union") filed an improper practice petition against the City of New York ("City") and the New York City Police Department ("NYPD"). The Union alleges that the NYPD violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally promulgating Operations

Order 54 (“OO 54”), which provides that officers on Modified Assignment may not earn overtime compensation, except in exigent circumstances. The City argues that it has no duty to bargain because Operations Order 54 was issued pursuant to the Police Commissioner’s exclusive authority over discipline. The Board finds that the Police Department violated the NYCCBL because the Operations Order pertains to the distribution of overtime, which is a mandatory subject of bargaining. Therefore, the improper practice petition is granted.

### **BACKGROUND**

The Union is the certified collective bargaining representative of all members of the NYPD in the rank of Police Officer. The Union and the NYPD are parties to a collective bargaining agreement (“Agreement”) covering the period 2010 to 2012, as modified by a Memorandum of Understanding (“MOU”), dated February 1, 2017, covering the period August 1, 2012 to July 31, 2017.

Modified Assignment is a status in which police officers are temporarily assigned to non-enforcement duties “pending determination of the officer’s fitness to perform police duties.” (Pet., Ex. C) Non-enforcement duties may include assignment to an administrative or support command. Patrol Guide Procedure No. 206-07 details when a unit member may be placed on Modified Assignment. It provides:

A captain or above may place a uniformed member of the service on modified assignment or suspension when a member: (i) is indicted by a grand jury; (ii) is arrested; (iii) is served with Charges and Specifications alleging serious misconduct; (iv) is unfit for duty due to the effects of an intoxicant or drug or after effects thereof; (v) patronizes an unlicensed premises . . . where the only apparent illegal activity is the sale of alcoholic beverages, except in the performance of duty.

(Pet., Ex. B). Placement on Modified Assignment is generally imposed through consultation between the initiating officer and the Borough Commander. Members may also be placed on modified assignment when deemed necessary by certain other personnel, such as the Police Commissioner, a deputy commissioner, or a hearing officer assigned to the Office of Deputy Commissioner – Trials. Additionally, the Patrol Guide provides that “a captain or above may assign a uniformed member of the service to administrative duties in the next higher command without placing the member on suspension or modified assignment, when there is no disciplinary action contemplated and facts or circumstances indicate such assignment would be in the best interests of the Department.” (Pet., Ex. B)

The procedures associated with placement on Modified Assignment are set forth in Patrol Guide Procedure No. 206-10. Unit members on Modified Assignment must surrender their firearms, shield, and identification cards. Such items may only be returned to the unit member with the approval of the First Deputy Commissioner, unless directed by the Police Commissioner. They are then issued identification cards providing access to One Police Plaza that clearly indicate their modified status. Members on Modified Assignment continue to accrue vacation and may take authorized leave. Patrol Guide Procedure No. 206-10 also states that officers on Modified Assignment “will not perform an extended tour and no overtime is authorized.” (Pet., Ex. C) Nevertheless, there is no dispute that, prior to the enactment of OO 54 in 2016, unit members on Modified Assignment routinely performed non-enforcement overtime as assigned by their command-level supervisors.

On October 28, 2016, the Police Commissioner issued OO 54 entitled “Overtime Policy – Uniformed Members of the Service on Modified Assignment.” (Ans., Ex. 4) OO 54 provides, in relevant part:

1. Effective immediately, uniformed members of the service on modified assignment will not be eligible for overtime. Uniformed members on modified assignment will be prohibited from “ordered” and “non-ordered” overtime as defined in *Patrol Guide 205-17*, “Overtime,” including, but not limited to Field/Incident Command Posts, barriers and building maintenance assignments. Any overtime allotted to members placed on modified assignment must be the result of exigent circumstances when all other alternatives for filling the assignment have been exhausted or, due to the nature of the incident, time does not allow for a thorough review of the options.

(*Id.*) (italics in original). OO 54 also outlines required documentation procedures in the event a unit member on Modified Assignment is assigned to perform overtime.

“Ordered” and “non-ordered” overtime, both impacted by OO 54, are defined in Patrol Guide 205-17. “Non-ordered” overtime is an “[e]xtension of schedule tour of duty by 15 minutes or more to prevent interruption of services being performed, e.g., processing an arrest, aided case, court appearance, etc. Non-ordered overtime is not authorized for administrative duties at any level.” (Ans., Ex. 3) “Ordered” overtime is “[e]xtra duty required for on-going to future operational situations, demonstrations, parades, etc., or overtime of an administrative nature for extra duty required of an on-going or future operational situation. (May only be authorized by Police Commissioner, First Deputy Commissioner or Chief of Department).” (*Id.*)

According to the Union, since the promulgation of OO 54, overtime assignments for unit members on Modified Assignment have ceased.<sup>1</sup>

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<sup>1</sup> On March 14, 2018, the City withdrew its claim that there had been no changes to overtime eligibility for unit members on Modified Assignment. The parties also resolved an issue concerning information requested by the Union.

## POSITIONS OF THE PARTIES

### Union's Position

The Union contends that the NYPD's decision to restrict overtime for unit members on Modified Assignment is a unilateral change to a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1), (4), and (5).<sup>2</sup> It asserts that the distribution of overtime and the imposition of overtime eligibility criteria are mandatory subjects of bargaining. It claims that OO 54 concerns only the eligibility of unit members for overtime assignments, which is a matter of overtime distribution.

The Union also contends that the City has failed to establish how a prohibition on overtime for officers on Modified Assignment affects the Police Commissioner's authority to administer the disciplinary process. While acknowledging that certain disciplinary procedures may be prohibited subjects of bargaining when they are within, or inextricably intertwined with, the Police

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<sup>2</sup> NYCCBL § 12-306(a)(1), (4), and (5) provide, in pertinent part, that:

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;

(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.

Commissioner's authority over discipline, the Union argues that such authority must be balanced against New York State's well-established presumption in favor of collective bargaining.

With respect to OO 54, the Union claims that any connection between overtime while on Modified Assignment and discipline is merely "tangential" or "ancillary" and thus does not overcome the presumption in favor of collective bargaining. (Rep. ¶ 42) The Union further contends that OO 54 impacts no part of the disciplinary process, as the investigation, prosecution, and penalty of unit members on Modified Assignment are unchanged by the new policy. Thus, it claims that the Police Commissioner's ability to investigate misconduct would not be impeded by a finding that overtime eligibility for such unit members is a mandatory subject of bargaining. Additionally, the Union asserts that OO 54 restrictions are not a disciplinary penalty. Disciplinary penalties are set out in NYC Administrative Code § 14-115 and may only be enacted following an investigation, charges, and a hearing.<sup>3</sup>

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<sup>3</sup> NYC Administrative Code § 14-115 provides:

- (a) The Commissioner shall have the power, in his or her discretion . . . 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; but no more than thirty days' salary shall be forfeited or deducted for any offense. All such forfeitures shall be paid forthwith into the police pension fund.
- (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....

**City's Position**

The City argues that the instant improper practice petition should be dismissed because OO 54 was enacted pursuant to the Police Commissioner's exclusive authority over discipline. Citing Court of Appeals precedent applied by the Board, the City contends that the exercise of the Police Commissioner's disciplinary authority, as defined in NYC Administrative Code § 14-115 and § 434(a) of the NYC Charter, is a prohibited subject of bargaining.<sup>4</sup> It contends unit members are only placed on modified assignment when they are alleged to have committed "offenses of a serious nature." (Ans. ¶ 11) It also asserts that Modified Assignment is a "means of discipline." (Ans. ¶ 62) The City thus asserts that changes to the overtime eligibility for unit members on Modified Assignment fall within the scope of the Police Commissioner's authority over discipline. In this sense, the City is asserting that the change to overtime eligibility is inextricably intertwined with the Commissioner's authority.

Further, the City argues, the Court of Appeals has found that matters "tangential" to the disciplinary process are also prohibited subjects of bargaining. Accordingly, it thus contends that even a finding that the distribution of overtime is tangential to discipline will not trigger the NYPD's bargaining obligations.

**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." *See UFA*, 10 OCB2d

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<sup>4</sup> NYC Charter § 434(a) provides: "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."

5, at 13 (BCB 2017) (citing *ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014)), *affd.*, *City of New York v. Uniformed Firefighters Assn*, 2018 NY Slip Op 30453(U) (Sup. Ct. N.Y. Co. Mar. 14, 2018) (Bluth, J.)). In order to sustain its burden, the party alleging a unilateral change to a mandatory subject must demonstrate “that (i) the matter sought to be negotiated is a mandatory subject and (ii) the existence of such a change from existing policy.” *Id.* at 13 (quoting *ADW/DWA*, 7 OCB2d 26, at 18) (internal quotations omitted); *see also DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011).

Although the Board has found that employers retain the prerogative to determine when and how much overtime will be authorized, “the procedures or methods for the distribution of available overtime are mandatory subjects of bargaining under the NYCCBL.” *See UFA*, 9 OCB2d 19, at 9 (BCB 2016) (holding that employer must bargain before issuing regulations governing how available overtime would be distributed among unit members); *see also DC 37, 67 OCB 3*, at 8-9 (BCB 2001) (holding that employer must bargain before issuing an order that limited accrual of compensatory time once employee reached a certain number of overtime hours); *Local 621*, 51 OCB 34 (BCB 1993) (finding that the distribution of overtime is a mandatory subject of bargaining).

Here, the Union seeks to enforce the City’s obligation to negotiate overtime eligibility for officers on Modified Assignment. Significantly, there is no dispute that the overtime eligibility criteria effectuated by OO 54 represents a change from the NYPD’s prior policy.<sup>5</sup> Furthermore, the parties do not dispute that OO 54 concerns only how overtime is distributed after the NYPD has determined that such overtime is needed. The Union does not demand that the NYPD make

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<sup>5</sup> While Patrol Guide 206-10 states that officers on Modified Assignment “will not perform an extended tour and no overtime is authorized,” the parties do not dispute that prior the enactment of OO 54 in 2016, officers on Modified Assignment were assigned non-enforcement overtime. (Pet., Ex. C)

additional overtime assignments available for officers on Modified Assignment. Accordingly, we find that OO 54 represents a change in the method of distributing overtime and, therefore, is subject to mandatory bargaining. *See UFA*, 9 OCB2d 19, at 9.

As Court of Appeals has explained, only matters that are “inextricably intertwined” with the Police Commissioner’s authority over discipline are outside the scope of mandatory bargaining. *See City of New York v. PBA*, 14 N.Y.3d 46, 59 (2009). Subjects “ancillary or tangential” to the Commissioner’s disciplinary authority remain subject to mandatory bargaining. *Id.*<sup>6</sup> We are not persuaded by the City’s argument that the restriction on overtime assignment effectuated by OO 54 is “inextricably intertwined with the Commissioner’s authority to oversee discipline.” *See City of New York v. Uniformed Firefighters Assn*, 2018 NY Slip Op 30453(U), at 5 (*affirming UFA*, 10 OCB2d 5, at 17 (BCB 2017)); *see also City of New York v. PBA*, 14 N.Y.3d at 59.

In *City of New York v. PBA*, the Court of Appeals held that drug methodology and testing triggers are prohibited subjects of bargaining because they impacted the NYPD’s ability to detect or investigate wrongdoing. *See* 14 N.Y.3d at 59. The Court reasoned that “if the Commissioner is not at liberty to use a particular drug test . . . then his ability to carry out his disciplinary authority has been significantly limited.” *Id.* at 59 (internal quotations omitted). More recently, the Supreme Court, New York County, upheld the Board’s conclusion that, “because the [FDNY] Commissioner retain[ed] the ability to impose whatever discipline he sees fit in a particular

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<sup>6</sup> In *City of New York v. PBA*, the Court emphasized that it was only answering “the discrete question” of whether determining or selecting drug testing methodology and testing triggers are encompassed within the Police Commissioner’s disciplinary authority. 14 N.Y.3d at 59. The Court expressly stated that it was not determining that “every step the Commissioner takes . . . is excluded from bargaining.” *Id.*; *see also UFA*, 10 OCB2d 5, at 17.

instance,” the Commissioner’s disciplinary authority did not allow him to unilaterally change the value of a day’s pay attached to disciplinary sanctions. *See City of New York v. Uniformed Firefighters Assn*, 2018 NY Slip Op 30453(U), at 5.

Here, the same logic leads us to the conclusion that the restriction on overtime effectuated by OO 54 is not a prohibited subject of bargaining. Mandatory bargaining leaves unencumbered the Commissioner’s authority to place a member on Modified Assignment, to investigate wrongdoing, or to punish unit members. Indeed, as articulated by the Supreme Court, New York County, “[t]he Commissioner is not prevented from imposing severe discipline for conduct that he deems reprehensible.” *See City of New York v. Uniformed Firefighters Assn*, 2018 NY Slip Op 30453(U), at 8. We also note that the Union is not challenging the City’s decision to place an officer on Modified Assignment, only the unilateral elimination of overtime eligibility for those officers. Accordingly, the modification to the method of distributing overtime at issue in this dispute is “ancillary” or “tangential” to the NYPD Commissioner’s disciplinary authority, rather than inextricably intertwined with it. *See City of New York v. PBA*, 14 N.Y.3d at 59. To the extent that the City claims that bargaining is prohibited even over matters ancillary or tangential to the NYPD Commissioner’s disciplinary authority, we reject that argument.

Furthermore, the record does not support the City’s contention that the restriction on overtime is a “means of discipline.” (Ans. ¶ 62) Disciplinary penalties available to the Commissioner are set forth NYC Admin. Code 14-115.<sup>7</sup> Neither restriction of the unit members’ overtime eligibility, nor placement on Modified Assignment, are identified as permissible

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<sup>7</sup> These include: “reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days’ salary shall be forfeited or deducted for any offense.” *See NYC Admin. Code 14-115(a)*.

disciplinary measures.<sup>8</sup> Our analysis is unchanged by the City’s claim that officers are placed on Modified Assignment only when they are alleged to have performed what the City characterizes as “offenses of a serious nature.” (Ans. ¶ 11) This argument is belied by the express language of Patrol Guide 206-10, which provides that, as an alternative to Modified Assignment, captains and other senior officers may assign unit members to administrative duties in the next higher command “when there is no disciplinary action contemplated and the facts or circumstances indicate that such assignment would be in the best interest of the department.” (Pet., Ex. B) Similarly undermining the City’s argument is the fact that OO 54’s overtime restriction is not limited to circumstances imposed “on conviction” by the Commissioner or pursuant to the disciplinary procedures set forth in the Administrative Code. *See* NYC Admin. Code § 14-115(a).

Based on the above, the Union’s improper practice petition is hereby granted. We find that the NYPD breached its duty to bargain in violation of NYCCBL § 12-306(a)(1) and (4). Additionally, because OO 54 was issued during a *status quo* period after the expiration of the Agreement and prior to the signing of the MOU, we find that the NYPD violated NYCCBL § 12-306(a)(5).

Under these circumstances, we find it appropriate to order the NYPD to rescind Operations Order 54. Additionally, we direct the NYPD to bargain either to agreement or impasse prior to making changes to overtime eligibility for unit members in the future. Finally, we consider the Union’s request for remedial relief including payment of back pay and interest. The record, as it now stands, is insufficient to fashion a remedy for affected employees. Therefore, the parties

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<sup>8</sup> There is no evidence that the overtime restrictions constitute “withholding pay” as set forth in 14-115, nor that the withholding of overtime complied with the Administrative Code’s requirement that such forfeiture is limited to 30 days or sent to the police pension fund. *See* NYC Admin. Code § 14-115(a).

should be prepared to provide additional information under the Board's supervision and direction so that the Board can make a determination as to the proper remedy. The Board will retain jurisdiction to determine any further remedy at a later date. *See UFT*, 4 OCB 2d 4 (BCB 2011).

**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 Patrolmen's Benevolent Association of the City of New York, Inc., docketed as BCB-4196-17 against New York City Police Department and the City of New York, hereby is granted in its entirety; and it is further

ORDERED, that the New York City Police Department rescind Operations Order 54 and reinstate the *status quo* regarding overtime eligibility for unit members on Modified Assignment; and it is further

ORDERED, that the New York City Police Department cease and desist from implementing the changes to overtime eligibility for unit members on Modified Assignment until such time as the parties negotiate any such changes or the dispute is resolved; and it is further

ORDERED, that the parties provide, at the Board's direction, additional information and their positions regarding back pay as the Board will retain jurisdiction to determine any further remedy at a later date; and it is further

ORDERED, that the City post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain conspicuously posted for a minimum of thirty days.

Dated: October 16, 2018  
New York, New York

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SUSAN J. PANEPENTO  
CHAIR

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ALAN R. VIANI  
MEMBER

I dissent in a separate opinion attached hereto.

M. DAVID ZURNDORFER  
MEMBER

I dissent in a separate opinion attached hereto.

CAROLE O'BLINES  
MEMBER

GWYNNE A. WILCOX  
MEMBER

Dissent of M. David Zurndorfer and Carole O'Blenes  
In Docket No. BCB-4196-17

We dissent. The Police Department had no duty to bargain over the promulgation of Operations Order 54 because it was issued pursuant to the Police Commissioner's exclusive authority over discipline. Accordingly, the improper practice petition should be dismissed.



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**CITY MEMBERS**

M. David Zurndorfer  
Pamela S. Silverblatt

**DEPUTY CHAIRS**

Monu Singh  
Steven Star

**NOTICE  
TO  
ALL EMPLOYEES  
PURSUANT TO  
THE DECISION AND ORDER OF THE  
BOARD OF COLLECTIVE BARGAINING  
OF THE CITY OF NEW YORK  
and in order to effectuate the policies of the  
NEW YORK CITY  
COLLECTIVE BARGAINING LAW**

We hereby notify:

That the Board of Collective Bargaining has issued 11 OCB2d 37 (BCB 2018), determining an improper practice petition between Patrolmen's Benevolent Association and New York City Police Department and the City of New York.

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 Patrolmen's Benevolent Association of the City of New York, Inc., docketed as BCB-4196-17 against New York City Police Department and the City of New York, be, and the same hereby is, granted to the extent that Police Department of the City of New York has violated New York City Collective Bargaining Law §§ 12 306(a)(1), (a)(4), and (a)(5); and it is further

**ORDERED**, that the New York City Police Department rescind Operations Order 54 reinstate the status quo regarding overtime eligibility for unit members on Modified Assignment; and it is further

ORDERED, that the New York City Police Department cease and desist from implementing the changes to overtime eligibility for unit members on Modified Assignment until such time as the parties negotiate any such changes or the dispute is resolved; and it is further

ORDERED, that the parties provide, at the Board's direction, additional information and their positions regarding back pay as the Board will retain jurisdiction to determine any further remedy at a later date; and it is further

ORDERED, that the City post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain conspicuously posted for a minimum of thirty days, and must not be altered, defaced, or covered by any other material.

New York City Police Department  
(Department)

Dated: \_\_\_\_\_ (Posted By)  
(Title)