

**UFA, 1 OCB2d 16 (BCB 2008)**

(IP) (Docket No. BCB-2595-07)

**Summary of Decision:** Petitioner alleged that the FDNY violated the NYCCBL by unilaterally changing work schedules and implementing an evaluation process that lacks an appeals procedure for light duty Firefighters. The Board defers the question of changed work schedules to the parties' grievance procedure and dismisses the remaining claim. *(Official decision follows.)*

---

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

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

*-between-*

**UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94,**

*Petitioner,*

*-and-*

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

*Respondents.*

---

**DECISION AND ORDER**

On January 22, 2007, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("UFA") filed an improper practice petition alleging that the New York City Fire Department ("FDNY" or "Department") 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 unilaterally issuing a policy, PA/ID 1-2007, which allegedly imposes an eight hour tour, five days

a week work schedule, new timekeeping requirements<sup>1</sup>, and an evaluation process lacking an appeals procedure on those Firefighters assigned to light duty status (“light duty Firefighters”).<sup>2</sup> The City of New York (“City”) denied the charge. The Board finds that the issue of changed work schedules is arguably covered by the parties agreement and should be deferred to the parties’ contractual grievance procedure and retains jurisdiction until the resolution of the grievance process. The Board dismissed the claim regarding the evaluation procedure as the Union has not alleged a change from existing procedures.

### **BACKGROUND**

New York City Administrative Code § 15-112 prescribes work schedules for certain employees of the FDNY in the following terms:

a. The commissioner shall divide the deputy chiefs, battalion chiefs, captains, lieutenants, engineers and firefighters, marine engineers and pilots in boats of the department into platoons, and such divisions shall be fully completed and the provisions hereof fully effectuated. None of such platoons, or any member thereof, shall be assigned to more than one tour of duty in any twenty-four consecutive hours. The commissioner shall install a two platoon system.

The two platoon system shall consist of not more than two tours of duty of not more than nine hours each, to be followed by a rest period of at least forty-eight hours for all members. After such rest period there shall be not more than two tours of duty of not more than fifteen hours to be followed by a rest period for all members of at least seventy-two hours which shall continue in such sequence so

---

<sup>1</sup> By letter dated March 10, 2008, the UFA withdrew its claim that PA/ID 1-2007 § 3.6 implemented new timekeeping requirements.

<sup>2</sup> A similar allegation concerning PA/ID 1-2007 was brought by the Uniformed Fire Officers Association, *UFOA*, 1 OCB2d 17 (BCB 2008). However, as the Agreement between the parties here has contractual language that differs from the City’s agreement with the UFOA, that case is not dispositive here.

that not more than six nine-hour tours of duty and six fifteen-hour tours of duty shall be worked in any twenty-five consecutive calendar days, except, in the event of conflagrations, riots or other similar emergencies or for the necessary time consumed in changing tours of duty, in which events such platoons or members thereof shall be continued on duty for such hours as may be necessary. . . .

The UFA represents FDNY employees in the titles of Firefighter and Fire Marshall (Uniformed). The City and the UFA have incorporated the hours of work provisions of Administrative Code § 15-112 into Article III § 1 of their collective bargaining agreement (“2002 - 2006 Agreement”).<sup>3</sup> In addition, the parties have agreed:

[t]he parties’ existing practices of scheduling Firefighters (line) to duties requiring schedules not in conformance with Article III of the parties’ collective bargaining agreement (including those which had been the subject of the following actions: A-10691-04; A-10883-05; BCB-2478-05; A-8502-00 and Index No. 1634/04 (Supreme Court of the State of New York, County of Kings)) shall continue.

Pet. Ex. A, “Attachment AB,” side-letter to the parties’ Agreement.<sup>4</sup>

Firefighters deemed incapable of performing firefighting duties by a Department physician, but capable of performing other tasks, are assigned to a status referred to as “light duty.” (Ans. ¶ 39; Rep. ¶ 9). The FDNY utilizes light duty employees to perform functions other than firefighting.

The City contends, and the UFA denies, that the FDNY has had a long-standing policy and practice of assigning light duty Firefighters to five day per week, eight hour per day schedules. The City refers to the FDNY’s issuance of a series of documents in support of this contention. The City

---

<sup>3</sup> Article III § 1 provides:

Working hours of Firefighters shall be in accordance with Section 15-112 of the Administrative Code of the City of New York.

<sup>4</sup> We take administrative notice that Attachment AB of the parties 2002 - 2006 Agreement has been incorporated into the parties’ 2006 - 2008 Agreement, executed December 11, 2007, after the submission of the instant petition, as Attachment AA, and that Article III § 1 remains unchanged.

alleges, that on or about June 26, 2000, the FDNY's First Deputy Commissioner issued a memorandum to Bureau Heads reminding them that "light duty work schedules are five days a week, eight hours per day." (Ans. ¶ 45; Ans. Ex. 4). On or about November 26, 2002, the FDNY issued Department Order No. 108 which stated, in pertinent part, that "Members on light duty shall work an eight (8) hour day, five (5) days a week." (Ans. ¶ 46; Ans. Ex. 5). Thereafter, on or about January 6, 2003, the FDNY issued Supplement No. 1 to Department Order No. 2 stating that "[i]t is expected that such members [in light duty status] will be assigned to building inspection or tag summons duty on a 5-day, 8-hour schedule." (Ans. ¶ 47; Ans. Ex. 6). The City also alleges that on or about December 15, 2004, the FDNY's Chief of Operations issued a memorandum to Borough Commands and the Special Operations Command which stated that "[a]ll members assigned to light duty shall work 0900 - 1700 hours, five days per week. Any variation to this schedule must be approved by the Chief of Operations." (Ans. ¶ 48; Ans. Ex. 7). Further, the City alleges that the Chief of Operations issued another memorandum to Borough Commands and the Special Operations Command on or about June 13, 2006 (Ans. ¶ 49; Ans. Ex. 8), which was re-issued on or about November 29, 2006 (Ans. ¶ 50; Ans. Ex. 9), stating that "[a]ll members assigned to light duty shall work eight hours per day, five days per week."

With the exception of Department Order No. 108, issued on or about November 26, 2002, and Supplement No. 1 to Department Order No. 2, issued on or about January 6, 2003, the UFA denies having received any of these documents. The UFA alleges that it "never acquiesced to the five day schedule" and that it filed a grievance challenging such assignments.

The City alleges that despite the issuance of the orders and directives referred to above, the FDNY found that its field supervisors consistently failed to comply and continued to assign some

light duty Firefighters to schedules based on the members' personal convenience. The City asserts that on January 2, 2007, the FDNY issued PA/ID 1-2007 to address this situation.

PA/ID 1-2007 § 3.1 mandates that the “[s]tandard Light Duty work schedule is five eight-hour tours per week,” but permits variations in some cases “where they will better meet the needs of the Department”; any such variations require the approval of the Chief of Department. Section § 3.10 states that “[a]nnual evaluation of Light Duty personnel shall be performed as per applicable department policy.” According to the City, All Units Circular (“AUC”)240 and PA/ID 6-78, referenced in PA/ID 1-2007, and PA/ID 2-80, explain the applicable procedures regarding evaluations.

The UFA alleges that since the issuance of PA/ID 1-2007, light duty Firefighters assigned to several units within the Department have experienced scheduling changes.

---

**POSITIONS OF THE PARTIES**

**Union's Position**

The UFA alleges that the FDNY violated NYCCBL §12-306(a)(1) and (4) when it unilaterally promulgated PA/ID 1-2007, a policy that calls for an eight hour, five day per week schedule, implemented new timekeeping requirements and created an annual evaluation for all light duty Firefighters

NYCCBL § 12-306(a) provides, 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 section 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; . . .

NYCCBL § 12-305 provides, in pertinent part that

[p]ublic 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 and shall have the right to refrain from any or all of such activities. . . .

The UFA alleges that since the issuance of PA/ID 1-2007, several units within the Department have experienced scheduling changes. The UFA asserts that these scheduling changes required by PA/ID 1-2007 constitute mandatory subjects of bargaining which cannot be unilaterally imposed and over which the UFA has requested bargaining. The UFA alleges that with the issuance of PA/ID 1-2007, the Department “unilaterally imposed new tour schedules and hours of work” for light duty Firefighters. (Pet. ¶ 3). The UFA maintains that, contrary to the City’s position, there has been no consistent practice of assigning all light duty Firefighters to a five day, eight hours per day tour but rather there were various light duty assignments involving different schedules and hours.

The UFA also alleges that § 3.10 of PA/ID 1-2007 “created an annual evaluation of light duty personnel without establishing an appeal procedure.” (Pet. ¶ 14). However, in its reply the UFA admits the City’s allegation that PA/ID 1-2007 “refers members to the existing department policy regarding annual evaluations and creates no new evaluation procedure and, accordingly, no new appeal procedure.” (Ans. ¶ 58). Notwithstanding this, the UFA alleges that an evaluation appeals procedure is a proper subject of negotiations.

The UFA requests that the Board find that the FDNY has violated the NYCCBL by unilaterally implementing PA/ID 1-2007 and order that the FDNY bargain over the number of

weekly appearances and reporting times, as well as an evaluation procedure, for light duty Firefighters, and maintain the status quo during such negotiations. Further, the UFA seeks the posting of notices stating that the City and the Department have violated the NYCCBL.

**City's Position**

The City alleges that PA/ID 1-2007 was issued to stem non-compliance on the part of supervisors who were not conforming to the Department's existing practice concerning assignment of light duty Firefighters and that PA/ID 1-2007 only "codified a long-standing policy of assigning light duty firefighters . . . to a five-day a week, eight-hour work chart." (Ans. ¶ 36). Further, the City alleges that § 3.10 of PA/ID 1-2007 "reminds members" of annual evaluations that are authorized by AUC 240 and PA/ID 6-78. (Ans. ¶ 58). The City argues that PA/ID 1-2007 creates no new evaluation or appeal procedure and points out that AUC 240 and PA/ID 6-78 by explicitly incorporated by reference and that PA/ID 2-80 contains an evaluation appeals procedure.

The City requests that the Board dismiss the petition since there has been no change in terms and conditions of employment over which the City must bargain. The City alleges that the five day, eight hours per day tour has always existed and that it is within the discretion of the Department to assign employees to existing tours of duty. Moreover, the City contends that the parties reached an agreement, memorialized in Attachment AB of the Agreement, that the Department had the contractual right to continue existing practices of scheduling Firefighters to schedules that do not conform to those described in Article III of the Agreement. Therefore, the City argues, the UFA fails to state a cause of action under NYCCBL § 12-306(a)(1) and (4) because it fails to allege facts showing any violation of the NYCCBL by the Department.

The City alleges that it is not required to bargain with the UFA over matters that are within

its statutory management rights under NYCCBL § 12-307(b). The City alleges that it has a managerial prerogative to stem supervisors' lack of compliance, "direct the provision of emergency services," and assign light duty Firefighters to a specific tour. (Ans. ¶91). The City also asserts that the "NYCCBL does not require bargaining over each individual scheduling assignment." (Ans. ¶91).

The City also requests that the UFA's petition be dismissed because the UFA's claims allege, in essence, either a violation of the scheduling provisions of the parties' Agreement or of New York Administrative Code § 15-122, not the NYCCBL. Therefore, the City argues, the Board lacks jurisdiction in this matter.

### **DISCUSSION**

Two alleged violations of NYCCBL § 12-306 (a)(1) and (4) stemming from the implementation of PA/ID 1-2007 are presented to the Board: (1) whether the FDNY's assignment of light duty Firefighters to an eight-hour tour, five day a week work schedule constitutes a unilateral change and (2) whether the City's alleged refusal to bargain over an evaluation appeals procedure for light duty Firefighters also constitutes a unilateral change in terms and conditions of employment. We defer the first claim to the parties' grievance and arbitration procedure since the issue of scheduling is arguably covered by the parties' agreement. We dismiss the second claim because there was no change from existing evaluation procedures.

Section 15-112 of the New York City Administrative Code sets forth statutory requirements regarding scheduling and assignments of Firefighters. While these requirements are incorporated into Article III § 1 of the Agreement, the parties have also reached an understanding, memorialized

in Attachment AB of the 2002-2006 Agreement, regarding the “assignment of Firefighters to schedules that do not conform to duty schedules as described in Article III . . . .” (Pet. Ex. A). This understanding is also incorporated into the 2006 - 2008 Agreement as Attachment AA. At issue here are the duty schedules of light duty Firefighters that do not conform to the Administrative Code requirements incorporated into Article III of the Agreement.

As we have stated

[w]hile this Board has exclusive jurisdiction under NYCCBL § 12-309 (a)(4) to prevent and remedy public employer improper practices, we have declined to exercise jurisdiction over improper practices ‘when the basis of the claimed statutory violation is derived from a provision of the collective bargaining agreement’ or mutually agreed-upon policies. . . . [w]hen, as here, the Union’s claims under these provisions involve a matter that is arguably covered by a negotiated agreement, and the claim under the NYCCBL may be resolved in the arbitral process, this Board will consider deferring the claim.

*Local 237, IBT, 77 OCB 24*, at 15-16 (BCB 2006); *see also Local 237, IBT, 71 OCB 24*, at 10-11 (BCB 2003); *DC 37, Local 3621, 77 OCB 6*, at 13 (BCB 2006); *DC 37, 67 OCB 36* (BCB 2001).

In *Local 237, IBT, 77 OCB 24*, the union claimed the City violated NYCCBL § 12-306(a)(4) and (5) when the NYPD unilaterally changed the summer hours of certain employees. We determined that “the pivotal issue in determining whether the City, in issuing its uniform policy on summer hours, unilaterally changed those hours . . . is whether under Article V, § 18 of the Citywide [the titles at issue] are ineligible for summer hours.” *Id. at 16*. We held that it was, therefore, appropriate for an arbitrator to decide whether the NYPD misinterpreted or misapplied the relevant sections of the Citywide Agreement.

Likewise, in the matter before us, the UFA’s improper practice allegation regarding the assignment of light duty Firefighters to an eight hour day, five days a week schedule is arguably

covered by the parties' 2002 - 2006 and 2006 - 2008 Agreements. Therefore, we find that the claim should be presented to an arbitrator to determine whether the FDNY has misapplied or misinterpreted the provisions of these agreements. *See also Local 375, CSTG, 63 OCB 11 (BCB 1999); DC 37, 67 OCB 36; DC 37, Local 1508, 79 OCB 21 (BCB 2007)*. We retain jurisdiction "to insure that any prospective arbitration award is consistent with, and not repugnant to, the policies and provisions of the NYCCBL." *DC 37, 25 OCB 10, at 13 (BCB 1980); see also Local 375, CSTG, 63 OCB 11, at 10; DC 37, Local 1508, 79 OCB 21, at 21.*

\_\_\_\_\_ We now turn to the UFA's claim regarding the evaluation appeals procedure for light duty Firefighters. PA/ID 1-2007 does not refer to any evaluation appeal procedure. Rather the City claims, and the Union does not deny, that the evaluation appeal procedure previously set forth in PA/ID 2-80 continues to apply to light duty Firefighters. Therefore, since there is no dispute that PA/ID 1-2007 did not effect a unilateral change in the evaluation appeal procedure that applies to light duty Firefighters, we dismiss this claim.

**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 claims relating to scheduling and assignment of light duty Firefighters raised in the improper practice petition filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, docketed as BCB-2595-07, is hereby deferred to the parties' grievance and arbitration process without prejudice to reopen, should a determination on the merits of the due process contractual claims be foreclosed or should any award be repugnant to rights under the NYCCBL, and it is further

ORDERED, that the remainder of the improper practice petition is held in dismissed.

Dated: April 29, 2008  
New York, New York

MARLENE A. GOLD  
CHAIR

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

ERNEST F. HART  
MEMBER

PETER PEPPER  
MEMBER