UFOA, 1 OCB2d 17 (BCB 2008)

(IP) (Docket No. BCB-2594-07)

Summary of Decision: Petitioner alleged that FDNY violated the NYCCBL when it issued PA/ID 1-2007, unilaterally changing the work schedules of unit members assigned to light duty. The Board found that despite FDNY's prior issuance of memoranda and directives prescribing a light duty schedule, there existed a practice allowing nonconforming schedules. This practice was changed by issuance of PA/ID 1-2007. Accordingly the Board found that the City breached its duty to bargain over the mandatorily bargainable aspects of scheduling for light duty Fire Officers. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Petition

-between-

UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On January 22, 2007, the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO ("UFOA") filed an improper practice petition pursuant to § 1-07 of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). The UFOA alleges that the New York City Fire Department ("FDNY") 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 imposes an eight

hour tour, five days a week work schedule on those Fire Officers assigned to light duty status ("light duty Fire Officers"). The City of New York ("City") denied the charge. The Board finds that despite FDNY's prior issuance of memoranda and directives prescribing an eight hour tour, five days a week work schedule for light duty Fire Officers, there existed a practice allowing assignment to nonconforming schedules. This practice was changed by FDNY's issuance of PA/ID 1-2007 on January 2, 2007. The Board finds that, by this unilateral change, the City breached its duty to bargain over the mandatorily bargainable aspects of scheduling for light duty Fire Officers.

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.
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> 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 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 UFOA represents FDNY employees in the titles Lieutenant, Captain, Battalion Chief, and Deputy Chief (with certain exceptions), collectively referred to by the parties as Fire Officers (line).[1] The City and the UFOA have incorporated by reference the hours of work provisions of § 15-112 into Article III, § 1(A) of their collective bargaining agreement ("Agreement").[2] In addition, the parties have agreed that certain Fire Officers may be assigned to work schedules that do not conform to this statutory configuration of hours. Article III, § 1(B) of the Agreement provides:

> (i) Notwithstanding the above Section 1(A), the Fire Department shall have the right to schedule Fire Officers (line) assigned to nonfirefighting duties such as the Division of Training, the Bureau of Fire Prevention, Headquarters, and other similar units or administrative functions to duty schedules that do not conform to the Fire Officer duty schedule described in this Article III. For the purpose hereof, any member assigned to respond to an alarm and to perform firefighting duty or supervise firefighting duties shall be deemed to be performing firefighting duties.
>
> (ii) Prior to an involuntary assignment, the Department shall endeavor to obtain qualified volunteers. The determination of such Fire Officer's qualifications shall be made at the discretion of the department, whose decision shall be final. The involuntary assignment of a Fire Officer shall be limited to one year, but may be extended to two years in such cases where unique and extraordinary skills or functions are required and where such assignment is of critical importance to the Fire Department.
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> (iii) Notwithstanding the foregoing no such assignment shall be made on a punitive basis.

It is undisputed that Fire Officers incapable of performing firefighting or fire investigation duties,

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[1] In addition, the UFOA represents Fire Medical Officers and Supervising Fire Marshals.

[2] Article III, § 1(A) provides:
All the terms and conditions of Section 15-112 of the Administrative Code of the City of New York, as presently provided therein [are] hereby incorporated by reference.

but capable of performing other tasks, are assigned to a status referred to as "light duty." (Ans. ¶ 2; Rep. ¶ 4). The FDNY relies on its light duty employees to perform certain functions.

The City contends, and the UFOA denies, that the FDNY has had a long-standing policy of assigning light duty Fire Officers to five day per week, eight hour per day schedules. (Ans. ¶ 23). The City refers to the FDNY's issuance of a series of documents in support of this contention. The City alleges, first, 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. ¶ 32, Ex. 4). Then, on or about November 26, 2002, the FDNY issued Department Order No. 108 which stated, in pertinent part, "Members on light duty shall work an eight (8) hour day, five (5) days a week." (Ans. ¶ 33, 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. ¶ 34, 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. ¶ 35, 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. ¶ 36, Ex. 8), which was re-issued on or about November 29, 2006 (Ans. ¶ 37, Ex. 9), stating that "[a]ll members assigned to light duty shall work eight hours per day, five days per week."

The UFOA denies having knowledge of the light duty scheduling provisions of any of these documents. Moreover, 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 UFOA denies having received any of these documents. According to the UFOA, the documents, other than the two Department Orders mentioned above, were sent by the FDNY to staff chiefs who are outside the UFOA bargaining unit. (Gorman reply affidavit ¶ 2). In addition, it is undisputed that in 1997, the FDNY issued a proposed order, All Units Circular 322 ("AUC 322"), of which the UFOA did have knowledge. This proposed regulation, among other things, purported to require that all light duty Firefighters and Fire Officers work eight hours a day, five days a week. The UFOA alleges the FDNY immediately held AUC 322 in abeyance when the UFOA and the Uniformed Firefighters Association objected that it would make unilateral changes in terms and conditions of employment. The City does not deny the fact that AUC 322 was held in abeyance.

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 and Fire Officers 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 mandates that the "[s]tandard Light Duty work schedule is five eight-hour tours per week." It further 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. It is the promulgation of PA/ID 1-2007 that is challenged by the UFOA in this improper practice petition.

When PA/ID 1-2007 was issued, there were approximately 181 Fire Officers assigned to light

duty. (Pet. ¶ 3; Dunne affidavit ¶ 2). The UFOA alleges that it has identified at least 47 light duty Fire Officers who were not working a schedule conforming to that prescribed in PA/ID 1-2007 when that order was issued. (Dunne affidavit ¶ 3; Gorman supplemental affidavit ¶ 2).

POSITIONS OF THE PARTIES

UFOA's Position

The UFOA alleges that the FDNY violated §12-306(a)(1) and (4) of the NYCCBL when it unilaterally promulgated PA/ID 1-2007, a policy that calls for an eight hour, five day per week schedule for all Fire Officers assigned to light duty.[3] The UFOA avers that 47 of the approximately 181 Fire Officers assigned to light duty have never worked an eight hour tour, five day a week schedule. The UFOA asserts that these proposed scheduling changes constitute mandatory subjects of bargaining which cannot be unilaterally imposed and over which the UFOA has repeatedly requested bargaining. The UFOA alleges that the unilateral imposition of PA/ID 1-2007, "drastically changes the number of hours [light duty Fire Officers] will be required to work in each day and

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[3] 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 bargaining with certified or designated representatives of its public employees; . . .

Further, § 12-305 of the NYCCBL provides, in pertinent 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 and shall have the right to refrain from any or all of such activities. . . .

week, the number of hours the employees have off between tours, and the number of appearances per week that will now be required.." (Pet. ¶ 15).

The UFOA maintains that the City's position, that PA/ID 1-2007 has not changed departmental scheduling practices for Fire Officers assigned to light duty, is "disingenuous" because, despite the City's claim to the contrary, there has been no policy or practice to assign all light duty Fire Officers to a five day, eight hours per day tour. The UFOA also alleges that a practical impact on Fire Officers has resulted from the issuance of PA/ID 1-2007. Finally, the UFOA argues that the City misleads the Board by relying on the scheduling provisions of Article III, § 1(B)(i) of the parties' Agreement, which were not meant to encompass light duty Fire Officers. The UFOA submits that this section only applies to Fire Officers who serve in administrative functions such as teaching at the Division of Training.

The UFOA requests that the Board issue a determination that the FDNY has violated the NYCCBL by unilaterally implementing PA/ID 1-2007 and changing the work schedules of light duty Fire Officers and direct the FDNY to rescind both the policy and any resulting schedule changes. The UFOA also requests that the Board direct the FDNY not to implement any proposed changes to the work schedules of light duty fire officers without bargaining to resolution or exhausting the impasse procedures of the NYCCBL.

City's Position

The City alleges that it has "always assigned light duty firefighters" to the five day, eight hours per day tour, even before the issuance of PA/ID 1-2007. (Ans. ¶ 23). The City alleges that there has been no change in terms and conditions of employment over which the City must bargain

since the five day, eight hours per day tour has always existed and it is within the discretion of the Department to assign employees to existing tours of duty. The City maintains that this is an "appropriate exercise of the Department's managerial right to assign employees" under the NYCCBL and the Administrative Code. (Ans. ¶ 23).

Moreover, the City contends that Article III, § 1(B) of the UFOA Agreement also affirms the right of the Department to continue assigning Fire Officers to schedules that do not conform to the duty schedules contained in Article III. This section confirms that the City fulfilled its bargaining obligation insofar as it had such an obligation.

The City further argues that the UFOA 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 law by the Department. The City argues that PA/ID 1-2007 was issued to stem apparent non-compliance on the part of its supervisors who were not assigning light duty Fire Officers to the five day, eight hour tour in conformity with FDNY's written policies. The City also requests that the UFOA's petition be dismissed because the UFOA's claim, alleges, in essence, a violation of the scheduling provisions of the parties' Agreement, not the NYCCBL.

Finally, the City argues that as to the UFOA's claim that the City has failed to bargain over workload impact, the UFOA has failed to allege facts that demonstrate that there has been any such impact. Therefore, the City requests that the Board also dismiss the UFOA's practical impact claim.

DISCUSSION

The primary issue presented by the UFOA is whether the FDNY's issuance of PA/ID 1-2007

constituted a unilateral change in a mandatory subject of bargaining, in violation of the City's duty to bargain. Upon our review of the record in this proceeding, this Board finds that despite FDNY's prior issuance of memoranda and directives prescribing an eight hour tour, five days a week work schedule for light duty Fire Officers, there existed a practice allowing assignment to nonconforming schedules. This practice was changed by FDNY's issuance of PA/ID 1-2007 on January 2, 2007. Accordingly, for the reasons set forth below, this Board finds that by this unilateral change the City breached its duty to bargain over the mandatorily bargainable aspects of scheduling for light duty Fire Officers.

NYCCBL § 12-307(a) provides that public employers and certified or designated employee organizations have a duty to bargain in good faith on matters within the scope of collective bargaining. These matters include wages, hours, and working conditions and are mandatory subjects of bargaining. *See, e.g., PBA,* 79 OCB 43, at 7 (BCB 2007); *D.C.37*, 75 OCB 10, at 7 (BCB 2005). Under NYCCBL § 12-306(a)(1) and (4), it is an improper practice for a public employer to refuse to bargain in good faith on mandatory subjects of bargaining. When a petitioner asserts that a unilateral change has occurred in a term or condition of employment, the petitioner first must demonstrate that the matter sought to be negotiated is, in fact, a mandatory subject. *DC 37,* 75 OCB 14, at 12 (BCB 2005); *SSEU*, 69 OCB 10, at 4 (BCB 2002); *see Doctors Council,* 67 OCB 27, at 7 (BCB 2001); *DeMelia*, 25 OCB 14, at 5 (BCB 1980). The petitioner further must demonstrate the existence of such a change from the existing policy or practice. PBA, 73 OCB 12, at 17 (BCB 2004); *see also SSEU*, 69 OCB 10 (BCB 2002); *Town of Stony Point*, 26 PERB ¶ 4650 (1993). If a unilateral change is found to have occurred in a term or condition of employment which is

determined to be a mandatory subject, then the Board will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice. *See DC 37,* 75 OCB 14, at 13 (BCB 2005); *Local 1182,CWA,* 67 OCB 26, at 4 (BCB 2001); *PBA*, 63 OCB 4, at 10 (BCB 1999).

Turning to the present case, we first address the City's contention that all aspects of employees' work schedules are solely matters of management prerogative under the NYCCBL, and thus not mandatory subjects of bargaining. We find that contention to be inaccurate and overbroad. It is well established that while the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total numbers of hours employees work per day or per week. *See DC 37*, 75 OCB 10, at 8 (BCB 2005); *PBA*, 15 OCB 5, at 17 (BCB 1975); and its companion case, *PBA*, 15 OCB 24, at 16-17, 19 (BCB 1975), *aff'd, Patrolmen's Benevolent Ass'n v. Bd. of Collective Bargaining*, N.Y.L.J., Jan. 2, 1976, at 6 (S. Ct. N.Y. Co.). Further, this Board has held that the duty to bargain over hours includes the duty to bargain over "swings," or time off between tours. *DC 37,* 75 OCB 10, at 9 (BCB 2005); *see FADBA*, 55 OCB 1, at 10-11 (BCB 1995); *PBA*, 15 OCB 24, at 19-20. Therefore, under the principles of these cases, a change in "the number of number of hours [light duty Fire Officers] will be required to work in each day and week, the number of hours the employees have off between tours, and the number of appearances per week that will now be required" as alleged by the UFOA would be a mandatory subject of bargaining.

However, as both parties have recognized, aspects of work schedules for Firefighters and Fire Officers are affected by a statute other than the NYCCBL. Section 15-112 of the Administrative Code sets forth detailed parameters for the work schedules of certain members of the FDNY,

including the titles at issue herein. In the past, this Board implied that the scheduling provisions of an external statute may be waived through bargaining, *PBA*, 15 OCB 24, at 15-16 (eight-hour tour limitation in Unconsolidated Laws § 971 did not bar negotiation of longer tours). However, in a case specifically involving § 15-112 of the Administrative Code, we held that any bargaining over work schedules not in conformity with § 15-112 would be nonmandatory, rather than mandatory, subjects of bargaining. *UFA*, 49 OCB 44, at 25-26 (BCB 1992) (provisions in expired agreement inconsistent with § 15-112 were nonmandatory and could not be submitted to an impasse panel). In light of a recent decision of our State counterpart, the Public Employment Relations Board ("PERB"), we take this opportunity to re-examine this holding.

In *City of New York*, 40 PERB ¶ 3017 (2007), PERB examined whether a union demand for a change in duty schedules was a prohibited subject of bargaining (as found by an ALJ) because of the existence of the scheduling provisions for police officers contained in Unconsolidated Laws § 971. PERB, citing precedent including its own decisions, those of the courts, and this Board's decision in *PBA*, 15 OCB 24 (BCB 1975), found that the demand was not a prohibited subject and that the provisions of § 971 were waivable through collective bargaining. Next, PERB considered whether the scheduling demand was a mandatory or nonmandatory subject of bargaining. After reviewing in detail the case law on the subject of work schedules, PERB concluded that the demand was a mandatory subject, based on PERB's:

> well-established precedent finding that proposals relating to tours of duty and work schedule are mandatory subjects as long as they do not interfere with an employer's determination regarding staffing and other managerial prerogatives.

40 PERB ¶ 3017 at 3069 (2007) (footnote omitted).

PERB's statement delineating both the duty to bargain over hours of work and an employer's right to determine levels of staffing, is consistent with our own decisions on this subject. *See, e.g.*, *D.C.37*, 75 OCB 10, at 8 (BCB 2005) and decisions cited therein. We also agree generally with PERB's analysis that a statutory benefit may be waived through bargaining, unless to do so would violate public policy or where the statute has preempted the subject. *See PBA*, 59 OCB 24, at 40-43 (BCB 1997). The provisions of § 15-112 of the Administrative Code are analogous to those of Unconsolidated Laws § 971 considered by PERB in *City of New York*, and, in the circumstances of this case, we are persuaded by and hereby adopt PERB's rationale that the matter of work schedules for light duty Fire Officers is mandatorily bargainable, but only to the extent that such bargaining does not impinge on the right of the City to determine levels of staffing and incidental aspects of schedules, including starting and finishing times. To the extent that our decision in *UFA*, 49 OCB 44 (BCB 1992), is inconsistent with this conclusion, it hereby is overruled.

We next consider the question of whether there has been any change in the work schedules for light duty Fire Officers. The City claims that FDNY's issuance of PA/ID 1-2007 on January 2, 2007 was merely the codification of a long-standing policy of assigning light duty Firefighters and Fire Officers to a five day per week, eight hour per day schedule. The UFOA denies that this is the case, alleging that hundreds of FDNY members, including at least 47 of the 181 UFOA members on light duty, have worked schedules different from that set forth in PA/ID 1-2007.

The City attempts to support its claim by submitting a series of documents issued by FDNY from 2000 through 2006 that state that the work schedule for light duty Fire Officers is five days per week, eight hours per day. The problem with the City's reliance on these documents is twofold.

First, all but two of the documents are memoranda addressed to Bureau Heads, Borough Commanders, and/or Special Operations Command and were sent to staff chiefs who are outside the UFOA bargaining unit. There is no evidence that the documents were sent to the UFOA, and, according to the UFOA, they were not received by that organization. We find that if these documents established a policy, there is no evidence that the UFOA had knowledge of it. Further, of the two documents that were Departmental Orders and which the UFOA does not deny receiving, one (Department Order 108) made reference to a light duty schedule only in the context of a directive (§ 2.3) addressing appointments for medical therapy while on light duty; the other (Supplement No. 1 to Department Order No. 2) provides for a schedule for light duty personnel assigned only to building inspection or tag summons duty. We conclude that while these two documents should have placed the UFOA on notice that *some* light duty Fire Officers were being required to work a five day per week, eight hour per day schedule, they provided no basis for the UFOA to know of any policy requiring that *all* light duty Fire Officers work that schedule.

The second and overarching problem with the City's argument consists of the City's own statement that:

> Despite the Department's numerous orders and directives, field supervisors consistently failed to comply with the Department's practice of assigning light duty firefighters and fire officers to eight hour tours, five days a week and instead continued to assign light duty firefighters and fire officers to schedules based on members' personal convenience.

(Ans. ¶ 38). Given this statement, it is clear to this Board that, notwithstanding any written policies unilaterally promulgated by FDNY, there existed in fact a practice, as alleged by the UFOA, of assigning at least some, and perhaps many, light duty Fire Officers to schedules other than five days

per week, eight hours per day. The UFOA has documented, and the City has not disputed, that at least 47 of the 181 Fire Officers assigned to light duty at the time PA/ID 1-2007 was issued worked schedules that did not comply with the alleged written policy. The City, recognizing that there was a practice of scheduling that did not conform to the written policy, asserts that PA/ID 1-2007 was issued to address what FDNY considered to be abuses that resulted from the existing scheduling practice. (Ans. ¶ 39). It is undisputed that under PA/ID 1-2007, no light duty Fire Officer can be assigned to other than a five days per week, eight hours per day schedule without approval of the Chief of Department. This certainly reflects a change from the prior practice.

If it were shown that a union was on notice of a long-standing and consistently applied written policy regarding a mandatory subject, and the employer subsequently acted to enforce compliance with that policy, the employer's action might not constitute a unilateral change. However, here, there is no evidence that the UFOA was on notice of the written policy prior to the issuance of PA/ID 1-2007, and there is undisputed evidence that there was an existing practice of assigning light duty Fire Officers to schedules that did not conform to the written policy – a practice that was ended by the issuance of PA/ID 1-2007.

Therefore, this Board concludes that the issuance of PA/ID 1-2007 constitutes a unilateral change in the existing practice concerning the hours of work of light duty Fire Officers, which is a mandatory subject of bargaining.

We next address the City's claim that the parties already have negotiated concerning Fire Officer schedules that do not conform to § 15-112 of the Administrative Code. This Board has recognized that a union and an employer may satisfy by agreement their mutual duty to bargain a

given subject, and thereby waive any further bargaining rights regarding the exercise of that contract right. *Antoine*, 73 OCB 8, at 11-12 (BCB 2004); *Doctors Council*, 69 OCB 24, at 7 (BCB 2002); *see County of Livingston*, 26 PERB ¶ 3074 (1993). A contractual waiver of the right to bargain over a mandatory subject must be clear, unmistakable, and without ambiguity. *Doctors Council*, 69 OCB 24, at 7, *citing CSEA v. Newman*, 88 A.D.2d 685 (3d Dept. 1982), *appeal dismissed*, 57 N.Y.2d 775 (1982). The question here is whether the parties' Agreement clearly evidences such bargaining.

Article III of the Agreement, entitled "Work Schedule," enumerates two different schedules: § 1(A) incorporates by reference the Administrative Code § 15-112 schedule, and § 1(B)(i) authorizes the FDNY to:

> schedule Fire Officers (line) assigned to nonfirefighting duties such as the Division of Training, the Bureau of Fire Prevention, Headquarters, and other similar units or administrative functions to duty schedules that do not conform to the Fire Officer duty schedule described in this Article III. For the purpose hereof, any member assigned to respond to an alarm and to perform firefighting duty or supervise firefighting duties shall be deemed to be performing firefighting duties.

It is undisputed that Fire Officers assigned to light duty status are incapable of performing firefighting duties. (Pet. ¶ 4; Ans. ¶ 2; Rep. ¶ 4). Thus, logically, they must be assigned to nonfirefighting duties. The City argues that § 1(B)(i) of Article III of the Agreement shows that the parties have agreed that the FDNY may schedule Fire Officers assigned to nonfirefighting duties to duty schedules that do not conform to § 15-112 of the Administrative Code. The UFOA disputes this contention, arguing that § 1(B)(i) applies to full duty Fire Officers who are asked to serve in administrative functions such as the Division of Training, and does not apply to Fire Officers placed on light duty. The UFOA observes that § 1(B)(ii) limits how long the FDNY can take an Officer off

the "chart" involuntarily, and requires the FDNY to seek volunteers before making an involuntary assignment off the "chart." The UFOA submits that since Fire Officers do not volunteer for light duty, but rather are assigned due to injury or other limitation, § 1(B)(i) can have no application in this case.

We are not persuaded that Article III, § 1(B)(i) of the Agreement constitutes "clear and unmistakable" evidence that the parties bargained and agreed upon FDNY's right to place light duty Fire Officers on a schedule other than that provided by § 15-112 of the Administrative Code. This section contains no explicit reference to light duty assignments, and, in the context of the following § 1(B)(ii), there is doubt as to whether the section could have been intended to apply light duty Fire Officers who do not volunteer for placement on light duty and who are not so placed because of their "qualifications" or "unique skills." We cannot conclude that this section establishes that the City's duty to bargain has been satisfied.

Since we find that bargaining on the subject of non-statutory work schedules for light duty Fire Officers was not explicitly waived by the parties' agreement on work schedules, as set forth in Article III, § 1(B) of the Agreement, and that there was an existing practice not in conformity with FDNY's various memoranda and directives to its supervisors, that practice could not be changed unilaterally by FDNY. Accordingly, we find that the City breached its duty to bargain in violation of NYCCBL § 12-306(a)(4). When an employer violates its duty to bargain in good faith, there is also a derivative violation of § 12-306(a)(1) of the NYCCBL. *DC 37*, 77 OCB 34, at 18 (BCB 2006); *DC 37*, 71 OCB 20, at 5-6 (BCB 2003); *Uniformed Sanitation Chiefs Ass'n*, 67 OCB 32, at 8 (BCB 2001).

Since this Board determines that the City breached its duty to bargain, we need not consider the UFOA's claim of practical impact. We have long held that "the question of whether a 'practical impact' exists is a question of fact to be determined by the Board on a case-by-case basis." *UFA*, 47 OCB 25, at 24 (BCB 1991); *see DC 37*, 79 OCB 20, at 13 (BCB 2007). We express no opinion on whether the UFOA's allegations of practical impact in this case would have been sufficient to warrant a hearing.

For the reasons stated above, the UFOA's improper practice petition hereby is granted. As a remedy, we order the City to rescind PA/ID 1-2007 and to restore the affected light duty Fire Officers to the schedules that they worked prior to January 2, 2007. Since the existing practice prior to that date included some light duty Fire Officers working five days per week, eight hours per day schedules, and others working different schedules, we order that if the City wishes to establish a uniform schedule for light duty Fire Officers or make some other change to the configuration of light duty of schedules, it must bargain with the UFOA to the point of either agreement or exhaustion of impasse procedures over all bargainable aspects of scheduling as set forth in this decision. However, this order to bargain does not extend to those aspects of scheduling, including the determination of staffing levels and starting and finishing times, which we have found to be matters of management prerogative.

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, Docket No. BCB-2594-07, filed by the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO against the City of New York and the New York City Fire Department, be, and the same hereby is, granted; and it is further

DETERMINED, that the New York City Fire Department has violated NYCCBL § 12-306(a)(1) and (4) by making a unilateral change in hours of work for Fire Officers assigned to light duty, a mandatory subject of bargaining; and it is further

ORDERED, that the New York City Fire Department rescind the changes in scheduling for light duty Fire Officers implemented through the issuance, on January 2, 2007, of PA/ID 1-2007; and restore affected light duty Fire Officers to the schedules in effect prior to that date; and it is further

ORDERED, that the New York City Fire Department and cease and desist from implementing changes in the bargainable aspects of light duty schedules, as defined in this decision, until such time as the parties negotiate such changes and either reach agreement or exhaust the statutory impasse procedures.

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
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PETER PEPPER
MEMBER