COBA, 11 OCB2d 9 (BCB 2018)

(IP) (Docket No. BCB-4181-16)

Summary of Decision: The Union alleged that the DOC violated NYCCBL § 12-306(a)(1), (4), and (5) by hiring a private company to provide training that was historically performed by its bargaining unit without prior bargaining. The Union further alleged that the training at issue and the use of a weapon not previously used by the DOC had safety impacts and created new risks of discipline for its members. The City argued that the petition should be dismissed as moot since the DOC no longer retains the company or uses the weapon. The City further argues that the Union has not demonstrated that the training at issue was exclusively performed by the bargaining unit or had any practical impacts. After a hearing, the Board found that the training at issue was not exclusively performed by the bargaining unit. The Board further found that there were no practical impacts on safety or discipline because the DOC does not use the tactics or the weapon at issue. Accordingly, the petition was denied. ***(Official decision follows).***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CORRECTION OFFICERS' BENEVOLENT ASSOCIATION,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On September 15, 2016, the Correction Officers' Benevolent Association ("Union") filed a verified improper practice petition alleging that the City of New York ("City") and its Department of Correction ("DOC") 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"), when it contracted with a private company, the Correction Special Operations Group ("C-SOG"), to provide training to DOC's Emergency Services Unit ("ESU"). The Union alleges that retaining C-SOG constituted a transfer of bargaining unit work and, accordingly, that the DOC violated the NYCCBL by not bargaining over this assignment. The Union further alleges that tactics recommended in the C-SOG training and the use of a weapon not previously used by the DOC had practical impacts on safety and created new risks of discipline and civil and criminal liability for its members. The City argues that the petition should be dismissed as moot since the DOC is no longer using C-SOG and has not adopted the tactics or weapon at issue. The City further argues that the Union has not demonstrated that the training at issue was exclusively performed by the bargaining unit or that the tactics and weapon at issue had any practical impacts. The Board finds that the training at issue was not exclusively performed by the bargaining unit. The Board further finds that there were no practical impacts on safety or discipline because the DOC is not using the tactics or the weapon at issue. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held a nine-day hearing and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts to be as follows.

The Union represents DOC employees in the civil service title of Correction Officer ("CO"). The DOC is responsible for the management and operation of 12 jail facilities, two hospital prison wards, and court holding facilities.

ESU responds to all DOC emergencies and conducts cell extractions, which is the process of removing a recalcitrant inmate from a cell. ESU is commanded by Assistant Deputy Warden ("ADW") Julio Colon and is composed of approximately fifty permanent members. It also has

support members, who are COs who have received ESU training and participate in ESU operations on an as-needed basis. All ESU members except for ADW Colon and ADW for Training Hems Mitton are COs or Captains.[1]

Training of ESU Correction Officers

At its Correction Academy, the DOC trains recruits to become COs and provides continuing "in-service" training to COs, including ESU members.[2] In order to become part of ESU, a CO is required to take additional DOC-mandated training conducted by a group of ESU instructors under the supervision of ADW Mitton. At the time of the hearing, all ESU instructors were COs. However, in the past at least two Captains have been ESU instructors.[3] ESU training covers, among other areas, firearms, cell extractions, defensive tactics, and use of force procedures. ESU members receive firearms training and certification from both the DOC's Firearms & Tactics Unit ("FTU") and ESU's own firearms instructors.

COs, including ESU members, may receive non-State required training from non-DOC personnel.[4] ESU members have attended training courses conducted by the New York City Police Department ("NYPD"), the Federal Bureau of Investigations ("FBI"), and the Department of

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[1] Captains and ADWs are not represented by the Union.

[2] State law sets minimum training requirements for COs and requires that certain specific courses be taken. These required courses constitute a subset of the courses taught at the Correction Academy. State law requires that the lesson plan for any State-required training and the instructors of these courses be certified by the State. All DOC personnel who conduct training are so certified.

[3] The record established that the ESU Captains and ADW Mitton have been involved in drafting lesson plans used to train ESU members but does not address to what extent they had directly trained ESU members. However, the record establishes that approximately 20 Captains provide in-service training to COs, including ESU members, at the Correction Academy.

[4] DOC Director of Training Allan Straker testified that training courses that are not mandated by the State are not required to use State certified curricula or instructors.

Homeland Security ("Homeland Security").[5] ADW Colon testified that the training provided by the NYPD, FBI, and Homeland Security covered areas also taught by ESU instructors, such as firearms, room entries, and active shooters situations. For example, in February 2016, two DOC ESU members attended the NYPD Specialized Training School ("STS"), which trains NYPD officers in ESU tactics. (*See* City Ex. 11) ADW Colon testified that his goal is for all ESU members to attend STS. ESU members have also received supplemental training from private companies. For example, the manufacturers of the Taser and the Monadnock collapsible batons have trained ESU members in the use of their products, and COs have received training directly from firearm manufacturers to become "armorers."[6]

C-SOG Training

In March 2016, the City entered into a contract with C-SOG to provide training to the ESU.[7] In May 2016, C-SOG began training a class of 30 ESU members, all of whom volunteered for the training. Although the C-SOG contract had a three-year term, it is undisputed that C-SOG only provided training to that one class and has not provided any training to DOC personnel since August 2016. The parties disagree as to whether the C-SOG training was ever mandatory for ESU members. Director Straker testified that the C-SOG courses were non-mandatory. ADW Colon acknowledged that DOC initially intended to have C-SOG train all ESU members.[8] However,

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[5] For example, an ESU member attended the FBI's Sniper Course in 2009.

[6] An armorer is someone who is qualified to repair a specific firearm.

[7] Neither the C-SOG course nor its instructors were State certified.

[8] Union witnesses, including two ESU members, testified as to why they believed that the C-SOG training was or would become mandatory for continued membership in ESU. CO David Wilson testified that he was informed that the DOC intended to adopt C-SOG tactics. However, he acknowledged that he was never explicitly told that the C-SOG training was or would become

later the DOC decided that C-SOG would train some ESU members who would train the rest of ESU in C-SOG's techniques.[9] Ultimately, sometime prior to August 2016, the DOC decided not to adopt C-SOG's techniques.

Union witnesses reviewed the curricula for the C-SOG classes, identifying numerous areas that were similar if not identical to those taught to ESU members by ESU instructors.[10] ADW Colon acknowledged that there were similarities between the training provided by C-SOG and the training ESU members received from ESU instructors.

When C-SOG training began in May 2016, Joseph Garcia, the president and owner of C-SOG, addressed various tours at Rikers Island. Union witnesses testified that during these presentations Garcia advocated several tactics that may be prohibited under DOC policy, such as eye gouges, facial blows, jaw breaks, or head butts.[11] (*See* Tr. 156-60, 175) These specific tactics do not appear in the written curricula for the C-SOG training.[12]

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mandatory. CO Mark Mack testified that he attended a meeting at which the DOC Commissioner stated that "the unit's going in a new direction" and that the DOC was "going to bring [C-SOG] in to train us in different techniques and tactics." (Tr. 454) He further testified that it was "implied" that a CO who did not receive C-SOG training, would "no longer be a part of [ESU]." (Tr. 457)

[9] There is nothing in the record indicating that C-SOG trained any DOC personnel in how to teach its techniques.

[10] The record also establishes that C-SOG training covered many areas in which ESU members were trained by FTU and Correction Academy staff.

[11] The DOC's Use of Force Directive, number 5006R-D, effective November 11, 2015, provides that "strikes to the head, face, groin, neck, kidneys, and spinal column" were only to be permitted "[i]n a situation in which a Staff Member or other person is in imminent danger of serious bodily injury or death, and where lesser means are impractical or ineffective ...." (Union Ex. N)

[12] An April 3, 2017, report released by the independent monitor appointed under the Consent Judgement in *Nunez v. City of the New York*, 11 Civ. 5845 (SDNY) ("*Nunez* Consent Judgement") briefly addressed C-SOG and noted that it had found no "evidence that the C-SOG program promoted the use of prohibited use of force techniques or was inconsistent with the goals and aims of the Consent Judgment or sound correctional practice." (City Ex. 38)

It is undisputed that C-SOG's cell extraction training in 2016 differed significantly from how ESU members had been trained by ESU instructors in cell extraction. ESU uses a team of seven or eight COs who enter the cell. Each member of the team has a very specific task—the first CO entering the cell has a polycarbon shield used to pin the prisoner, the next four COs are each assigned an inmate's limb, the sixth CO has mechanical restraints, the seventh CO has a camera to record the extraction, and, depending on the circumstances, there may be an eighth CO with pepper spray or a similar chemical agent.

C-SOG's cell extraction technique utilizes a four-person team and a weapon system consisting of the Kel-Tec KSG Twelve Gauge Shotgun ("Kel-Tec") and Lightfield Starlite Less Lethal Ammunition ("Starlite Ammo") (collectively referred to as the "Kel-Tec weapon system"). COs do not enter the cell under C-SOG's small team cell extraction technique. Instead, the cell door is partially opened with netting preventing the inmate from escaping. The inmate is first given verbal instructions to comply. If the inmate does not comply, an "overround" is fired to make a "flash bang noise to see if the inmate gets scared enough to comply." (Tr. 612) If the inmate continues to refuse to comply, then, from a distance of approximately 15 to 20 feet, the inmate is shot with Starlite Ammo from the Kel-Tec. Starlite Ammo is intended to incapacitate, not kill. It is not a bullet; it has a hard core surrounded by rubber which is supposed to be fired only at the non-vital fatty areas of the body, such as the legs and buttocks. ADW Colon testified that the C-SOG tactics would provide minimal injury to an inmate and would subject ESU members to less danger than ESU's current tactics since no ESU member would enter the cell.

The packaging of the Starlite Ammo warns that users should "always avoid targeting the head, neck, thorax, spine, kidney area, and groin as serious injury to death may occur." (Union Ex. K) CO Frederic Fusco, a former FTU instructor currently on full time release as a Union

delegate, testified that the C-SOG training and the Kel-Tec weapon system increased liability risks of COs because the DOC trains COs to target the center mass of the body, which includes the areas where the StarLite Ammo is explicitly not to be fired, such as the kidneys.[13] CO Wilson speculated that since ESU members were able to extract inmates from cells without a firearm, use of the Kel-Tec weapon system during a cell extraction may be considered excessive use of force.

Shortly after C-SOG began training on the Kel-Tec weapon system on May 18, 2016, the Union protested its use because the Kel-Tec had not gone through the DOC testing and evaluation procedures required before DOC staff may be permitted to use any new firearm. On June 3, 2016, the training in the Kel-Tec weapon system stopped while the FTU undertook the testing and evaluation process.[14]

FTU instructors CO Tyson Jones and CO Maurice Smith, both of whom testified, were given two weeks to test and evaluate the Kel-Tec.[15] They were instructed to give their opinion as to the Kel-Tec's capabilities but were not instructed to recommend or not recommend the shotgun.[16]

The Kel-Tec is a pump-action shotgun with a "bullpup" design, which means its action and magazine are behind its trigger group, resulting in a significantly shorter, lighter, and more

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[13] ADW Colon testified that the training for center mass targeting was for the use of lethal force. However, he acknowledged that ESU members are trained to fire center mass when using a Pepper Ball, a less than lethal projectile that is a chemical agent delivery device.

[14] C-SOG initially provided DOC with two used Kel-Tecs that had been modified with aftermarket grips. DOC policy, however, requires that weapons submitted for evaluation to be new, so in June 2016, C-SOG provided he DOC with two new unmodified Kel-Tecs.

[15] The unrebutted testimony of COs Jones and Smith was that the evaluation and testing process of a new firearm should take three to six months. (*See* Tr. 52; 339-40)

[16] The Evaluation Report was entered into the record.

maneuverable weapon than a traditional pump shotgun like the Benelli Super 90 shotgun ("Benelli") currently used by ESU. Both CO Jones and CO Smith testified as to five significant concerns they discovered during their testing of the Kel-Tec. First, the Kel-Tec had a tendency to malfunction by the improper feeding of ammunition more frequently than other DOC weapons such as the Benelli.[17] While this malfunction can be remedied, CO Jones testified that doing so takes time which "could cost somebody his or her life." (Tr. 57-8) Second, due to the Kel-Tec's bullpup design, the user's hand may slip off the front grip and go past the end of the barrel. CO Jones testified that he was aware of instances where individuals "have lost their hands" using the Kel-Tec. (Tr. 514) Third, to check on whether the Kel-Tec is loaded, the user has to turn it over, pointing the muzzle away from the target, thereby compromising "muzzle discipline," which is control over the direction the muzzle is pointed. Fourth, the Kel-Tec is painful to load, which also compromises muzzle discipline. Fifth, the Kel-Tec ejects shell casing from the rear instead of the usual side ejection, creating tripping hazards for the operator and others.

The evaluators found that the Kel-Tec weapon system was one hundred percent accurate at a range of 15 feet, fifty percent accurate at 45 feet, and one percent accurate at 75 feet. After receiving the Evaluation Report, on June 17, 2016, the Correction Academy Commanding Officer recommended to the Chief of the Department that the Kel-Tec weapon system be approved for use only "for non-lethal purposes, if authorized ... at a distance not to exceed fifteen feet."[18] (Union Ex. J) Training with the Kel-Tec weapon system resumed on June 17, 2016.

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[17] COs Jones and Smith both testified that they were instructed to continue testing the Kel-Tecs after discovering its tendency to malfunction even though normal DOC practice would be to discontinue testing a firearm once it begins malfunctioning. (*See* Tr. 277-7, 335-7)

[18] None of the evaluators' concerns appear in the memorandum recommending the adoption of the Kel-Tec. (*See* Union Ex. J)

On July 5, 2016, representatives of the Union, the City's Office of Labor Relations, and the DOC met to discuss, among other things, the use of the Kel-Tec. The Union asserted that the Kel-Tec was not safe and requested that its use be discontinued. The DOC responded that the testing revealed that the gun was safe for the limited purpose for which it would be used, but promised to discuss the issue internally. On July 6, 2016, the DOC notified the Union that the use of the Kel-Tec Shotgun would be discontinued. ESU does not use the Kel-Tec or the Starlite Ammo for training or any other purposes. Training by C-SOG ceased before August 2016, and there has been no subsequent training by C-SOG.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DOC violated NYCCBL § 12-306(a)(1), (4), and (5) by hiring an outside contractor to conduct training that was historically performed by bargaining unit members.[19] Specifically, the Union argues that firearms and defensive tactics training, as well as

[19] 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

the training of instructors in these areas, is the exclusive work of COs. The Union acknowledges that ADWs and Captains, non-bargaining unit members, were identified as being ESU instructors, but argues that there was no evidence that they provided training in firearms or defense tactics.

The Union delineates the firearms training exclusive to the bargaining unit as that which is "specifically required as a term and condition of continued employment or assignment." (Union Br. at 42) It argues that the occasional participation of ESU members in outside firearms courses such as the FBI's sniper school or an outside contractor's training of COs to be armorers does not defeat the exclusivity of the bargaining unit work due to "the non mandatory nature and low number of attendees." (*Id.* at 43) Similarly, the Union specifies that the defensive tactics training exclusive to the bargaining unit as that which is provided by COs to ESU members that is "intended to be mandatory." (*Id.* at 46) It argues that "outside training" in defensive tactics such as provided to ESU members by the NYPD and Homeland Security does not defeat the exclusivity of the bargaining unit work because that outside training "is not mandatory and [is] sporadically attended." (*Id.* at 45) According to the Union, the C-SOG training was intended to be mandatory. Thus, the Union argues, the mandatory nature of the C-SOG training violated the exclusivity of the bargaining unit work.

> negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

NYCCBL § 12-305 provides, in pertinent part, that: "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."

The Union further argues that use of the Kel-Tec had a safety impact on bargaining unit members, which the DOC was obligated to negotiate to mitigate.[20] According to the Union, documented safety risks associated with the Kel-Tec weapon system include a life-threatening delay caused by malfunctions and a risk that a CO may shoot their own hand.

Similarly, the Union argues that the C-SOG defensive tactics and the Kel-Tec weapon system clearly places COs in legal (both criminal and civil) and disciplinary jeopardy. First, the DOC trains its COs to fire at areas that Starlite Ammo is not supposed to be fired. According to the Union, if a CO follows DOC training and fires center mass, the CO will be held accountable for not following the unique Kel-Tec weapon system instructions, and if the CO follows the Kel-Tec weapon system instructions, there will be a similar reckoning for violating DOC's center mass training. Second, Garcia's advocacy for blows to the head contradicts DOC policy. The Union acknowledges that the Board has not addressed whether a bargaining obligation arises where a change in terms and conditions of employment increases the risk of civil or criminal liability. It argues that the scope of the duty to bargain over employee discipline and the practical impact of possible discipline should apply to the risks of civil and criminal liability. The Union argues that, since very little is known about the *Nunez* monitor's investigation into C-SOG's training, it cannot

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[20] NYCCBL § 12-307(b) provides, in pertinent part, that.

> It is the right of the city ... to determine the standards of services to be offered by its agencies; ... direct its employees; ... determine the methods, means and personnel by which government operations are to be conducted; ... and exercise complete control and discretion over … the technology of performing its work. Decisions of the city ... on those matters are not within the scope of collective bargaining, but ... questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

be concluded that the monitor was aware of Garcia's instructions with respect to blows to the head when he determined that C-SOG's training was consistent with the *Nunez* Consent Judgement.

The Union argues that the instant case is not moot because Respondents have refused to commit to not using C-SOG or another contractor to provide similar training in the future. Absent such a commitment, a decision is necessary to serve as deterrent and to insure that an appropriate remedy is issued. The Union further argues that the Respondents did not claim mootness in their Answer and by failing to do so waived that defense.

City's Position

The City argues that the petition should be dismissed as moot since C-SOG has not provided any training to ESU since August 2016, the DOC has not adopted any of C-SOG's tactics, and the DOC has not adopted the Kel-Tec weapon system.

The City argues that the petition must be denied because the decisions to enter into an agreement with a private contractor to provide training to employees and to use a new weapon system are management rights under NYCCBL § 12-307(b). The City further argues that the Union has failed to demonstrate that there has been a practical impact that would trigger the duty to bargain under NYCCBL § 12-307(b).

The City argues that it is squarely within Respondents' managerial rights to determine the training of DOC personnel, and the record shows that the training performed by C-SOG is not exclusive to the Union's bargaining unit. According to the City, ESU members receive training from Captains and ADWs, and neither title is in the Union's bargaining unit. The City further argues that the record shows that ESU members are routinely trained by outside entities such as the NYPD, FBI, Homeland Security, and weapons suppliers. According to the City, the record establishes that Respondents were under no obligation to bargain over the training provided by C-

SOG because it is not a requirement for continued employment with ESU. Second, the City argues that it is squarely within Respondents' managerial rights to determine the selection and use of equipment, namely in the instant case, the Kel-Tec weapon system.

Further, the City argues that the Union cannot demonstrate any safety impacts because the DOC has not adopted the Kel-Tec weapon system and cannot be required to negotiate over equipment it did not purchase, does not intend to obtain, and is not using.[21] The City similarly argues that the Union has not established any practical impact regarding the C-SOG techniques because the DOC has not adopted them and is not training its COs in any of the techniques cited by the Union as creating a practical impact. Moreover, the City notes that the *Nunez* monitor found that the C-SOG training was not in contravention of the *Nunez* Consent Judgement.

DISCUSSION

The Union argues that mandatory training in firearms and defensive tactics has been exclusively performed by members of its bargaining unit. However, the record before us establishes that the training provided by C-SOG was not mandatory and the Union does not claim that non-mandatory training has been exclusively performed by its bargaining unit members. The record before us also establishes that the DOC has not adopted the Kel-Tec or the C-SOG tactics that the Union alleges had practical impacts. Accordingly, we find the DOC did not violate by the NYCCBL as alleged.

[21] The record established that, as of the time of the hearing, there were still four Kel-Tecs in the DOC's arsenal.

Mootness

At the outset, we reject the City's mootness argument.[22] It has long been established that an "improper practice proceeding does not become moot merely because the acts alleged to have been committed in violation of the law have ceased. The question of a remedy for a prior violation of law and the matter of deterring future violations remain open for consideration." *DC 37, L. 1457*, 1 OCB2d 32, at 22 (BCB 2008). Accordingly, we find that the matter is not moot. *See CSTG, L. 375*, 3 OCB2d 14, at 12 (BCB 2010) (citing *DC 37, L. 1457*, 1 OCB2d 32, at 22-23; *Cosentino*, 29 OCB 44, at 11 (BCB 1982); *Southold Union Free Sch. Dist.*, 36 PERB ¶ 4508 (2003)).

Transfer of Bargaining Unit Work

Although it is for the Board to determine the boundaries of the allegedly exclusive work under consideration, we need not reach that issue here because the arguments advanced by the Union foreclose a finding in its favor. Specifically, the Union argues that the work that the bargaining unit exclusively performed is mandatory training. For the reasons set forth below, we find that the C-SOG training was non-mandatory, and thus not included within the scope of work claimed by the Union.

While "management has the right to determine the methods, means and personnel by which government operations are to be conducted," this Board has held "that management is limited from exercising this right if it has so agreed in a contract provision, if a statutory provision prevents such unilateral exercise, or if a party makes a showing that the work belongs exclusively to the bargaining unit." *IUOE, L. 15 & 14*, 77 OCB 2, at 12 (BCB 2006) (quotation marks and citations

[22] We acknowledge but find it unnecessary to address the Union's argument that the City has waived its mootness defense.

omitted). Accordingly, "management is limited from exercising [its] right if ... a party makes a showing that the work belongs exclusively to the bargaining unit." *CWA, L. 1180*, 1 OCB2d 2, at 11 (BCB 2008) (citing *IUOE, L. 15 & 14*, 77 OCB 2, at 12) (additional citations omitted). However, here the record contains no evidence of a transfer of the alleged bargaining unit work. *See UFADBA*, 8 OCB2d 37, at 18 (BCB 2015).

To establish a transfer of unit work that requires bargaining, the Union "must prove: (1) that the work in question had been performed by unit employees exclusively, and (2) that the reassigned tasks are substantially similar to those previously performed by unit employees." *IUOE, L. 15 & 14*, 77 OCB 2, at 12 (citing *Niagra Frontier Transp. Auth.*, 18 PERB ¶ 3083 (1985)).

The work that the Union claims to have lost in this case is the training provided by C-SOG to ESU members in firearms and defensive tactics.[23] The Union does not dispute that ESU members have received training in firearms and defensive tactics from non-bargaining unit members but draws a distinction between that training and training it alleges was exclusively provided by its bargaining unit. Specifically, the Union asserts that the training provided by its bargaining unit members was DOC-mandated training.[24] (*See* Union Br. at 42, 45) While the record shows that the DOC considered making the C-SOG training mandatory, there is no evidence upon which to conclude that the DOC ever made C-SOG training mandatory. At best, based on

[23] The Union also alleges that the training of DOC trainers is exclusive bargaining unit work. While the DOC did consider having C-SOG train ESU COs to train other ESU members in C-SOG's techniques, there is nothing in the record indicating that C-SOG ever conducted any such training. Therefore, there is no evidence of a transfer of work in this regard.

[24] Among the training that the Union classifies as non-mandatory was training in firearms provided by the FBI and firearm manufacturers, and training in defensive tactics provided by the NYPD and Homeland Security.

statements made by various DOC personnel, some COs believed that the C-SOG training was, or would be, mandatory. However, it is undisputed that the COs who participated in the May 2016 C-SOG training were all volunteers. As a result, we find that the C-SOG training was similar to the non-mandatory training provided to ESU members, such as the training provided by the NYPD and the FBI. Like those training programs, the C-SOG training was attended only by a sub-set of ESU members who volunteered for the training and was not a requirement of continued membership in ESU.[25] Thus, we do not find factual support for the Union's claim that the DOC transferred mandatory training duties from the bargaining unit to C-SOG. *See UFADBA*, 8 OCB2d 37, at 18-19.

Practical Impact

NYCCBL § 12-307(b) "provides public employers with the discretion to act unilaterally in certain enumerated areas outside of the scope of bargaining, including assigning and directing employees and determining their duties during working hours." *UFA*, 7 OCB2d 4, at 18 (BCB 2014); *see also UFA*, 43 OCB 70, at 2 (BCB 1989), *affd Uniformed Firefighters Assn. v. Off. of Collective Bargaining*, Index No. 1065/90 (Sup Ct New York County Nov 26, 1990). However, an employer may be required to negotiate over the alleviation of a practical impact stemming from the exercise of a managerial right. *See* NYCCBL § 12-307(b). As we have held that "a public employer is not required to bargain over a question concerning a practical impact prior to this Board determining that a practical impact exists," we review the record to determine if it supports finding a practical impact. *CEU, L. 237, IBT*, 2 OCB2d 37, at 17 (BCB 2009) (citation omitted). "A petitioner urging the Board to find such an impact must present more than conclusory

[25] Additionally, we note that the C-SOG training and its instructors were not certified by the State, which is a requirement of State-mandated training.

statements of a practical impact in order to require the employer to bargain." *Id.* at 18 (citation omitted); *see also CCA*, 51 OCB 28, at 8 (BCB 1993) ("practical impact is a factual question, and the existence of such impact cannot be determined when insufficient facts are provided by the union.").

For the Board to find a safety impact, the Union "must demonstrate that the exercise of a management right has created a 'clear and present or future threat to employee safety.'" *UFOA*, 3 OCB2d 50, at 18 (BCB 2010) (quoting *UPOA*, 39 OCB 37, at 5-6 (BCB 1987)). Further, the Board considers whether the employer has adopted measures that offset any potential threat to safety and whether the employees' adherence to management procedures and guidelines would obviate any safety concerns. *See UFA*, 3 OCB2d 16, at 30 (BCB 2010); *EMS SOA*, 79 OCB 7, at 30-31 (BCB 2007).

The Union alleges that the use of the Kel-Tec by the DOC has several safety impacts upon its members. At most, the Kel-Tec was only evaluated and used briefly for training in the summer of 2016. The DOC ceased using the Kel-Tec by August 2016 and never adopted it for use by ESU. Accordingly, based on this limited exposure and the DOC's decision to discontinue its use, we find that the use of the Kel-Tec has not created a practical safety impact on the bargaining unit. *See UFA*, 3 OCB2d 16, at 30; *EMS SOA*, 79 OCB 7, at 30-31; *see also UFOA*, 3 OCB2d 50, at 18; *UPOA*, 39 OCB 37, at 5-6.

For the same reasons, we find that the Union has not established that the C-SOG training and the Kel-Tec weapon system have created a practical impact that requires bargaining. While the Union alleges that the use of C-SOG techniques and the Kel-Tec weapon system give rise to the risk of civil or criminal liability and/or discipline, there is simply no evidence of such an

impact.[26] The DOC did not adopt the Kel-Tec weapon system or any of the techniques advocated by Garcia or taught by C-SOG. Thus, the Union has failed to establish a practical impact. Accordingly, the petition is dismissed.

[26] In reaching this conclusion, we do not address whether the alleged disciplinary and/or legal liability risks create an obligation to bargain.

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, docketed as BCB-4181-16, filed by the Correction Officers' Benevolent Association against the City of New York and its Department of Correction is denied, and the same hereby is dismissed.

Dated: April 16, 2018
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER