UFA, 3 OCB2d 13 (BCB 2010)

(IP) (Docket No. BCB-2785-09).

Summary of Decision: Petitioner alleged that the FDNY failed to bargain in good faith over the issuance of a Memorandum which unilaterally implemented a 30-day pilot program that added a third 24-hour position for those members on light duty status, and other changes. The Union alleged that in creating such a program, the City violated NYCCBL § 12-306(a)(1) and (4). The City alleged that the claim is untimely, that the claim is moot since the program has ended, that the claim should be deferred to arbitration, and that it must be dismissed, as the claim involves an issue that falls under a statutorily granted management right. The Board found that the claim was untimely filed because the date of accrual, the date the Memorandum was issued, was more than four months prior to the filing of the petition. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO,

Petitioner,

- and -

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

Respondents.

DECISION AND ORDER

On July 20, 2009, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("UFA" or "Union") filed a verified improper practice petition against the City of New York ("City") and the New York City Fire Department ("FDNY") claiming that the FDNY failed to

bargain in good faith over the issuance of a Memorandum which unilaterally implemented a 30-day pilot program that added a third 24-hour position for those members on light duty status, and other changes. The Union alleges that in creating such a program, the City violated NYCCBL § 12-306(a)(1) and (4). The City alleges that the claim is untimely, that the claim is moot since the program has ended, that the claim should be deferred to arbitration, and that it must be dismissed as the claim falls within a statutorily granted management right. The Board finds that the claim was untimely filed because the date of accrual, the date the Memorandum was issued, was more than four months prior to the filing of the petition.

BACKGROUND

The FDNY and UFA are signatories to the 2006-2008 Uniformed Firefighters Association Collective Bargaining Agreement ("Agreement"). A subsequent Memorandum of Understanding was signed between the parties, effective August 1, 2008, through July 31, 2010.

Firefighters and Fire Officers work schedules set forth in the New York City Administrative Code. Article III, § 1 of the Agreement states that the working hours of Firefighters shall be in accordance with that provision of the Administrative Code. A side letter to that Agreement ("Attachment AA") reads:

> This is to confirm the parties' understanding with respect to the assignment of firefighters to schedules that do not conform to duty schedules as described in Article III of the parties' collective bargaining agreement. The parties' existing practices of scheduling Firefighters (line) to duties requiring schedules not in conformance with Article III of the parties collective bargaining agreement . . . shall continue.

(Ans., Ex. 2).

Members incapable of firefighting or performing fire investigation duties due to injury or

physical limitations, but capable of performing other tasks, may be assigned to "light duty." The Bureau of Personnel's Light Duty Desk coordinates light duty assignments by determining the needs of each Bureau, Division, and Unit, and by matching those needs with the light duty member as well as the expected duration of the light duty status. Once FDNY physicians determine that a firefighter or fire officer qualifies for light duty, the firefighter or fire officer must report to the light duty desk to receive his or her light duty assignment.

The scheduling of light duty firefighters has been the subject of prior litigation between the parties. The Light Duty Policy and the scheduling of light duty firefighters was also the subject of a prior improper practice petition by the Petitioner, *UFA*, 1 OCB2d 16 (OCB 2008). In that case, the Board held that the issue, which involved the scheduling of members on light duty, had to be deferred to the parties' grievance procedure, as the Union's allegations involved an interpretation of the side letter agreement. That grievance, which has proceeded through to arbitration, is currently docketed as A-12762-08.

According to the City, in 2006, the FDNY eliminated a Messenger position which had been assigned to members who were expected to be on light duty for some time. Prior to 2006, when the position was eliminated, there was one Messenger assigned to each Division.[1] Again according to the City, the FDNY reinstated the Messenger position in 2008, with one Messenger assigned to each Borough.

On February 14, 2009, the Division 7 Commander issued a memorandum ("Memorandum") to all light duty personnel instituting a pilot program that reinstated the Messenger position at

[1] The FDNY is divided into nine Divisions and a Special Operations Command, throughout five boroughs of the City. Division 7 is located in the North Bronx.

Division 7 in the North Bronx by creating a third 24-hour position for light duty personnel. The subject of the memo is stated as, "Personnel Policy and Procedures," and it reads, in pertinent part:

> On Monday, 2/23/09, we will begin a 30 day pilot program with the addition of a third 24 hour position. This position's primary responsibility will be to man the van. Members initially assigned to this position will have a maximum of two weeks to become competent enough as an administrative aide to work this position independently. Failure to achieve this will result in re-assignment to the CDA Task Force.

(Pet., Ex. A).

In addition to establishing specific conditions and adding a third member, additional restrictions were placed on vacation leave with an explicit directive that "Members who willfully violate the above will be returned immediately to the CDA Task Force to work 5-8's for the duration of their light duty status." (*Id.*). The Memorandum concluded with the following:

> The program is designed to save Light Duty positions with 24 hour mutual privileges. I must file a report on 3/25/09 on the results of the program listing all OT tours worked and why. You should all realize that the past policies that created unacceptably high OT totals for LD firefighters are gone and are not coming back. You can save these 24 hour LD positions for yourselves and those who follow, or you can screw yourselves and them. The choice is yours.

(*Id.*).

The City alleges, and the Union has not specifically denied, that the Memorandum "was conspicuously posted throughout the Division 7 office and work areas." (Ans. ¶ 53). The Union admits "there exists a [Memorandum] but the UFA was given no notice of the Pilot program or an opportunity to discuss it." (Rep. ¶ 35). The Union asserts that the FDNY did not "advise the UFA through conventional channels that the pilot program was considered, adopted, implemented or terminated," by directly notifying the Union. (Rep. ¶ 10) (emphasis omitted).

On May 6, 2009, UFA Counsel sent a letter to the FDNY Commissioner, drawing the Commissioner's attention to the Memorandum. UFA Counsel's letter focused on the last paragraph in which the Chief who wrote the Memorandum stated that past policies regarding light duty positions "are gone and not coming back." UFA Counsel then stated that the Chief who authored the Memorandum "issued this personnel policy and procedure without following the rules of the collective bargaining process regarding the creation of a light duty scheduling policy and disregarding existing procedures and policies which affect light duty personnel and members of the [UFA]." (Pet., Ex. B).

On May 14, 2009, the Commissioner acknowledged the Union's letter by indicating that he had forwarded the letter to the Chief of the Department. The Union did not receive a response from the Chief. It filed the instant improper practice petition on July 20, 2009.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the FDNY has refused to bargain in good faith, failed to honor its obligations, and has committed an improper practice pursuant to NYCCBL § 12-306(a)(1) and (4).[2]

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[2] NYCCBL § 12-306(a) provides in pertinent part:

> It shall be an improper practice for a public employer or its agents: (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter . . .
>
> * * *
>
> NYCCBL § 12-305 provides in pertinent part:
>
> Rights of public employees and certified employee organizations. 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 argues that the issue of work hours and the number of tours to be worked each week, and the issue of schedules are the subject of litigation and is currently the subject of another grievance between the parties. It contends that filing a grievance to contest these changes would not be the proper avenue to pursue in this matter, since the FDNY Chief who drafted the Memorandum ignored the UFA and has unilaterally set his own standards, creating a negative impact on the affected members. The UFA argues that there is no remedy available in a contract grievance that would address the Union's concerns.

The Union further argues that the FDNY's failure and refusal to maintain the work schedule at Division 7 is a refusal to bargain in good faith with the Union, in spite of the long history of doing so. The Union challenged the changes in a letter dated May 6, 2009, only to get a cursory response from the Commissioner that the Chief of Department would respond. It never received a response from the Chief of Department.

In response to the City's arguments in its answer, the Union contends that the petition was timely filed because the petition was filed within four months of its request to bargain the implementation of the pilot program, and the impact of the work schedule changes, and the City's failure to bargain in response thereto. Further, the charge is not moot, since the Union has clearly alleged a refusal to bargain over the impact of the unilateral changes implemented in the Memorandum. Not only did the Division begin a 30-day pilot program with a new 24-hour light duty position, the FDNY also amended vacation leave procedures in the Memorandum. In regard

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* * *

> (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;

to mootness, the fact that the FDNY bypassed the Union before implementing the program and the fact that the FDNY failed to negotiate the impact of the changes are both valid subjects for the Board to address. The Union has no assurance that the FDNY will refrain from implementing another pilot program, and the Union's objective is to prevent another, similar, program from being implemented without bargaining.

Although the City argued that, because of the side letter agreement on light duty staffing, the instant claim should be deferred to arbitration, the Union argues that the letter agreement "does not provide for unilateral determinations that fits the FDNY's need." (Rep., ¶ 55). Indeed, according to the letter agreement, the parties agreed to meet and discuss any issues regarding these matters in a Labor-Management Committee meeting.

As a remedy, the Union seeks an order directing the City to: cease and desist from changing the tours of light duty firefighters assigned to Division 7 to other schedules; bargain with UFA over any changes made in Division 7 or in any other unit within the FDNY; maintain the *status quo* throughout the processing of the proceeding; and post conspicuous notices throughout the FDNY stating that both the City and the FDNY have violated the NYCCBL.

City's Position

The City claims that the Union's petition is untimely. Here, the petition is admittedly based on a February 14, 2009 Memorandum regarding the tours of light duty firefighters. The Memorandum was conspicuously posted throughout the Division 7 office and work areas. As February 14, 2009 is the date that the Union's membership was actually made aware of the circumstances that gave rise to the instant improper practice petition, the Union knew or should have known as of that date that the program was being implemented. To come within the four-

month statute of limitations, the petition should have been filed on or before June 14, 2009. However, the petition was not filed until July 16, 2009. Even if the Board were to use as the date of accrual the date that the program was actually implemented, February 23, 2009, the petition would still be untimely.

The City also argues that the Petitioner's claims must be dismissed as moot, since the pilot program has already ended, and the City has effectively provided the Union with the remedy sought in its petition. Moreover, such a determination by the Board would not affect whatever consequences have already occurred from the pilot program outside the scope of collective bargaining, as the issue of what tours are available for the scheduling of light duty firefighters is an issue that has already been deferred and remains before an arbitrator. Further, the City alleges that the UFA is trying to bootstrap its prior grievances and improper practice petitions to the instant matter in a second attempt to have the Board make a ruling on those issues, and that the instant matter does not fall within any exception to the mootness doctrine. Therefore, there is no live controversy for the Board to decide.

The City further argues that this matter should be deferred to an arbitrator because it is identical to that the Board previously found to be warrant deferral in *UFA*, 1 OCB2d 16, when the Union complained that Respondents violated the NYCCBL by implementing a policy requiring light duty firefighters to work five 8-hour tours. The Board deferred the issue to arbitration because the issue was one that sounded in contract and, thus, was improperly before the Board.

Finally, the City contends that the case should be dismissed because in making the determination that the staffing of a third light duty firefighter was necessary to ensure the availability of a Messenger in each Division, the FDNY exercised its managerial prerogative to

assign firefighters on light duty to a specific assignment. The NYCCBL does not require bargaining over each individual staffing assignment, and it is recognized as a management right.[3]

DISCUSSION

Prior to ruling on the substance of an improper practice petition, we must address the City's argument that the petition is untimely. *DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Walker*, 79 OCB 2, at 12 (BCB 2007). An improper practice charge "must be filed no later then four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence." *Raby*, 71 OCB 14, at 9 (BCB 2003), *aff'd*, *Raby v. Office of Collective Bargaining*, No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (citing NYCCBL § 12-306(e) and § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City

[3] Section 12-307(b) of the NYCCBL provides:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, 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.

of New York, Title 61, Chapter 1) ("OCB Rules"));[4] *see also DC 37, Local 1457*, 1 OCB2d 32, at 21*; Tucker*, 51 OCB 24, at 5 (BCB 1993). In the instant case, the City argues that since the Memorandum was publicly posted in Division 7 beginning on February 14, 2009, the Union "knew or should have known" that the pilot program was going to be put into effect. Since the Union did not file the instant petition until July 20, 2009, over five months later, the City asserts that the petition is untimely.

The Union's claim revolves around the alleged unilateral changes delineated in the Memorandum–the announcement that prior rules would no longer be followed. Thus, for purposes of this matter, the date on which the Memorandum was issued is the date on which the "disputed action" occurred. *See Captains Endowment Ass'n*, 79 OCB 42 (BCB 2007) ([w]hen a claim arises more than four months prior to the filing of the petition and there is no allegation that the action continued or in other manner accrued at any time within the four-month time limitation, the petition will be dismissed as untimely. *Id.*, at 7 (citing *DC 37*, 77 OCB 34, at 12 (BCB 2006)). The Public Employment Relations Board ("PERB") has held that when a failure to bargain charge is based

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[4] NYCCBL § 12-306(e) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

OCB Rule § 1-07(d) provides, in relevant part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of Section 12-306 of the statute may be filed with the Board within four (4) months thereof . . .

upon a unilateral action, the action is not deemed a continuing violation of the statutory bargaining duty simply because the claim involves a mandatory subject of bargaining. In this circumstance, the charge must be filed within four months of the date of the alleged change. *See State of New York*, 30 PERB ¶ 4612 (1997), citing *Triborough Bridge and Tunnel Auth.*, 17 PERB 3017, at 3035 (1984); *City of Yonkers*, 7 PERB ¶ 3088 (1998); *NYC Trans. Auth.*, 41 PERB ¶ 4599, at 4815-4816 & nn.54- 55 (2008) (Blassman, ALJ) (reaffirming that PERB does not deem failure to bargain claim based on unilateral change to constitute a continuing violation). This Board has adopted a similar concept of accrual.[5] *See, e.g., Raby*, 71 OCB 14, at 12-13 (in context of duty of fair representation claim, explaining that "[n]or does the fact that Petitioner continued to seek a response from the [respondent] serve to toll the statute of limitations"); *DC 37, L. 1457*, 1 OCB2d 32, at 21-22 (BCB 2008) (in context of unilateral change claim, four month statute begins to run upon knowledge on the part of union of alleged change; citing and applying *Raby*).

In its pleadings, the Union did not address the question of when it gained knowledge of the Memorandum or the Pilot Program, and did not acknowledge when it obtained that knowledge. Further, the Union did not plead facts to suggest that it was somehow prevented from filing an improper practice petition in a timely manner. In fact, the Union contacted the FDNY within four months of the date of accrual. Thus, the Union had the opportunity to file an improper practice petition in a timely manner. *See OSA*, 2 OCB 30, at 12-16 (BCB 2009) (citing and following, *inter alia*, *Putter v. North Shore Univ. Hosp.*, 7 N.Y.3d 548 (2006); *Matter of Long Island Power*

[5] Indeed, we note that the earlier of these decisions have formed the basis of an Executive Secretary dismissal for untimeliness of just such a unilateral change claim. *NYC Sheriff's Assn.*, 75 OCB 25, at 3 (ES 2005). Although Executive Secretary decisions are not precedential, the application of the PERB decisions to a similar claim to that under the NYCCBL herein was hardly unforeseeable in light of that determination.

Ratepayer Litig., 47 A.D.3d 899, 900 (2d Dept. 2008); *CEA*, *supra*). Therefore, we find that, since the unilateral change in question occurred on February 14, 2009, and the Union did not file the instant petition until July 20, 2009, the Union's claims are untimely.

Moreover, the Union has not established that it was unaware of the changes listed in the Memorandum at the time of its issuance, which is when a concrete impact upon its members would have accrued. That date preceded the filing of the improper practice petition by slightly less than five months, and is therefore outside of the statute of limitations.[6]

In this instance, the fact that the FDNY Commissioner mentioned that he had referred the Union's complaint to a subordinate does not serve to toll the statute of limitations. We have held that the mere fact that a petitioner seeks a response from a respondent regarding a pre-filing complaint does not independently extend the limitations period to file a petition based on the complained-of act. *See Raby*, 71 OCB 14, at 12-13; *see generally NYC Trans. Auth*, 41 PERB ¶ 4599, *supra*.

Nor does the FDNY's one-sentence acknowledgment of the Union's letter, stating that the Union's letter had been referred to the Chief of Department, constitute a basis for a finding of equitable tolling. We have held that a petition could be found timely even though it was filed more than four months after the violation where the employer intentionally or unintentionally induced a petitioner to refrain from filing a charge in the interest of cooperative labor relations. *OSA*, 1

[6] The only indicia of when the Union obtained knowledge of the Memorandum or the Pilot Program is stated in its Reply, "When the Union learned of the Pilot Program, UFA Counsel Michael C. Axelrod sent a letter, dated May 6, 2009, to Commissioner Scoppetta requesting to bargain the impact (Exhibit 'B' of the Petition.)" (Union Rep., ¶ 36). We cannot infer from this language that the Union learned of the Memorandum immediately before it sent the letter or if some undetermined period of time had passed.

OCB2d 45, at 11 (BCB 2008), citing *Great Neck Water Pollution Control Dist.*, 27 PERB ¶ 3057, at 3134 (1994). In *OSA*, it was not apparent on the surface that HHC's announcement of certain civil service changes could have constituted an improper practice. The union's investigation and information exchanges with the employer clarified the basis upon which the improper practice charge in that case was alleged, and the charge was filed within four months of that basis becoming apparent. Here, we do not have any statements which would reasonably induce the Union to refrain from filing a petition. The basis for the alleged improper practice was present in the initial Memorandum. The FDNY clearly announced the alleged unilateral changes and the motive behind those intentions in that Memorandum. Additionally, the mere referral of correspondence to the Chief of Department, absent more, cannot reasonably be construed as a promise to take action, or other inducement to refrain from filing a charge. Therefore, we find the petition to be untimely and dismiss it in its entirety.

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 filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, docketed as BCB-2785-09, is hereby dismissed in its entirety.

Dated: February 25, 2010
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER

M. DAVID ZURNDORFER
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PAMELA S. SILVERBLATT
MEMBER