UFA, 3 OCB2d 38 (BCB 2010)

(IP) (Docket No. BCB-2795-09).

Summary of Decision: The Union alleged that the FDNY failed to bargain in good faith over the issuance of an Excessive Overtime Control Policy, which includes up to 96-hours of Roster Staffing overtime towards a new cap on discretionary overtime. The Union argued that by including Roster Staffing overtime in the overtime cap, the City unilaterally changed a procedure and jeopardized the integrity of Roster Staffing, in violation of NYCCBL § 12-306(a)(1) and (4). The Union also sought to bargain over the practical impact that the overtime cap will have on its members. The City alleged that the claim is untimely, 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 matter was timely filed and should not be deferred, but that the record did not support the Union's claims that the FDNY changed its procedures or that the Overtime Policy has a practical impact on its members. Accordingly, the petition was dismissed. ***(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 September 14, 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") alleging that the FDNY failed to bargain in good faith over the issuance of an "Excessive Overtime Control Policy" (the "Overtime Policy"), which includes up to 96-hours of Roster Staffing overtime towards a new cap on discretionary overtime. The Union argues that by including Roster Staffing overtime in the overtime cap, the City has unilaterally changed a procedure and jeopardized the integrity of Roster Staffing, violating § 12-306 (a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Union also seeks to bargain over the general practical impact that the overtime cap will have on its members. The City alleges that the claim is untimely, 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 finds that the matter was timely filed and should not be deferred, but that the record does not support the Union's claims that the FDNY changed its procedures or that the Overtime Policy has a practical impact on its members. Accordingly, the petition is dismissed.

BACKGROUND

Based on operational needs and other factors, firefighters work various types of non-discretionary overtime. These include portal-to-portal overtime, awaiting relief overtime, wash-up time, continuing on duty overtime, and mandated training.

In 1989, the FDNY implemented the Roster Staffing Program, which changed the way that the FDNY configured staffing at fire houses. The Roster Staffing Program allowed the FDNY to move firefighters to various companies to meet the minimum compliment of staffing at any given fire company. As a result of this change, the FDNY agreed with the Union to create the Roster

Staffing Overtime Program ("RSOT"). Under RSOT, firefighters would be given the opportunity to work 96 hours per year of pre-scheduled overtime associated with the Roster Staffing Program.

On March 6, 2009, the FDNY provided the UFA with notice that, on March 20, 2009, it intended to implement the Overtime Policy, which would apply to all uniformed FDNY employees. The Overtime Policy monitors and limits an employee's discretionary overtime after they have worked 325 hours of overtime in a year, or 81.25 hours of overtime in a quarter. The Overtime Policy states: "This directive does not apply to contractually obligated or operationally mandated overtime, veteran's related comp or cash overtime, court and arrest time." (Ans., Ex. F). The Overtime Policy provides for exemptions from the overtime limit, upon pre-approval by the Chief of Department. The Overtime Policy does not specify who must make the request for the exemption, the individual firefighter or someone at a level above the firefighter. The Overtime Policy was implemented on April 1, 2009.

On May 6, 2009, UFA's counsel wrote a letter to then-Commissioner Nicholas Scoppetta, informing him that it had requested clarification from a Chief that the Overtime Policy would not impact RSOT. UFA counsel wrote that the Chief responded that the Overtime Policy would "never prevent firefighters from working contractually mandated OT such as RSOT, but RSOT will count towards reaching the 325 OT cap." (Pet., Ex. 2). The Union then wrote that the Chief said: "However, he qualified; firefighters will not be permitted to work other types of OT (discretionary OT) *after* the cap is reached." (*Id.*) (Emphasis supplied). The UFA counsel wrote that he believed that the Overtime Policy violates the UFA collective bargaining agreement and RSOT agreement if the RSOT hours counted toward the overtime cap. The UFA counsel closed by asking the FDNY to negotiate over the impact of the Overtime Policy before the change was implemented.

On May 19, 2009, the Director of FDNY Labor Relations responded to the Union counsel's letter. The Director wrote that FDNY believed that administrative overtime is discretionary in nature and within management's prerogative to assign or not. She continued by writing that the Overtime Policy does not diminish or impact any firefighter's ability to earn contractually obligated or operationally mandated overtime or RSOT. She suggested that if the Union wished to pursue the matter further, it should contact the New York City Office of Labor Relations.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that by including the 96-hours of RSOT in the overtime cap, the City has jeopardized the integrity of Roster Staffing. Prior to the implementation of the procedure, the FDNY treated RSOT as a separate and distinct issue, and it unilaterally changed its procedures by including RSOT in the computation of the cap. By unilaterally adding another condition to the Roster Staffing agreement, the FDNY specifically violated a portion of the Roster Staffing agreement that grants RSOT subject to a reduction in head count. The FDNY has not considered the reduction in head count as the *quid pro quo* in the Roster Staffing agreement.

The Union argues that the FDNY's decision to include 96 hours of RSOT into the quarterly overtime cap effectively reduces overtime opportunities to 229 hours for firefighters instead of the Overtime Policy's 325. In addition, the Overtime Policy permits administrative personnel, including those who are not eligible for RSOT, to earn more overtime than those eligible under the RSOT agreement. The Union seeks to bargain over the general impact on its members and over the procedures for implementation of the cap since they are mandatory subjects of bargaining. It does

not seek to bargain over safety or workload impact, as the City asserts.

The Union argues that its claim was timely filed. The Union filed the improper practice within four months of when it discovered the effect that the new Overtime Policy would have on RSOT. The Union asserts that the date it obtained notice of the impact was May 19, 2009, the date it received a reply from the FDNY Director of Labor Relations to its inquiry about the impact on RSOT. Since the petition was filed on September 14, 2009, within four months of the date it received notice, the claim is, therefore, timely.

The Union argues that the City completely misconstrued its arguments. The City claims that it has the managerial right to assign overtime, but this dispute does not involve the assignment of overtime, since firefighters have substantive rights to such overtime as portal-to-portal pay, RSOT, and wash-up time. RSOT is non-discretionary overtime and should not be included in the cap. The petition challenges the reduction in opportunity to receive overtime by including RSOT hours in overtime cap computation, a mandatory subject of bargaining.

City's Position

The City argues that the Union's claims pertain to acts which occurred more than four months prior to the filing of the petition, so the petition must be dismissed as untimely. Here, the petition is admittedly based upon the issuance of the Overtime Policy, which was implemented on April 1, 2009. As April 1 is the date that Petitioner's membership was made aware of the circumstances giving rise to the instant improper practice petition, it is the date on which time began to run on the four-month statute of limitations.

The City contends that it retains the statutory management right to decide when and how much overtime is authorized or ordered. City employees have no substantive right to overtime. The

ability to assign overtime is a managerial prerogative, and, as such, the Union's petition, insofar as it alleged a violation of NYCCBL § 12-306(a)(1) and (4), must be dismissed. Though the Union alleges that the Overtime Policy will have an impact on its members, it has not alleged any specific facts to support such an allegation, as required by the NYCCBL. Since the disputed Overtime Policy does not have a practical impact on workload, staffing, or employee safety, the petition should be dismissed.

The City further argues that the instant petition should be summarily dismissed or deferred to arbitration. Since the Union alleges a violation of the Roster Staffing agreement and other internal policies, it alleges a contractual violation over which the Board does not have jurisdiction. While a violation of the Roster Staffing agreement may be an appropriate dispute for another forum, it cannot form the basis of an improper practice proceeding.

DISCUSSION

As a threshold matter, we address the City's argument that the petition is untimely. Under NYCCBL § 12-306(e), claims of violations of the NYCCBL must be made within four months of the accrual of the claim, when a petitioner knew or should have known that the action in question occurred.[1] *Nardiello,* 2 OCB2d 5, at 28 (BCB 2009), *see also* § 1-07(b)(4) of the Rules of the Office

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

> A petition alleging that a public employer . . . 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.

of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). OCB Rule § 1-07(b)(4) provides that an improper practice "petition must be filed within four months of the alleged violation."

As we have long held, "[t]he statute of limitations begins to run upon the party having actual or constructive knowledge of definitive acts which put it on notice of the need to complain." *USCA*, 3 OCB2d 27, at 6-7 (BCB 2010); *UFOA*, 37 OCB 44, at 12 (BCB 1986). As the statute of limitations is an affirmative defense, the burden of proving notice where such is subject to dispute lies upon the party raising the defense. *L. 831, USA*, 3 OCB2d 27, at 7 (OCB 2010). In the instant matter, the City has not met that burden. It is undisputed that when the Overtime Policy was announced, the Union was aware that the FDNY was preparing to implement a new Overtime Policy regarding a cap on overtime, generally. However, the Overtime Policy, as promulgated and distributed to the Union for comment, gives no indication of a potential impact on RSOT. Indeed, to any reader of the Overtime Policy, it appeared as if RSOT would not be involved given the Overtime Policy's explicit language that it was inapplicable to contractually or operationally mandated overtime.

The Union became aware that RSOT would be included in the calculation of overtime towards the cap only after the Overtime Policy was implemented, and after it received an official answer to its inquiry and request to bargain from FDNY's Labor Relations on May 19, 2009. Since the Union's first definitive notice of its claimed violation of the NYCCBL was May 19, 2009, and the Union filed its petition on September 14, 2009, we find that the petition was timely filed. *OSA*, 1 OCB2d 45, at 9-11 (BCB 2008).

Further, we find that this Board has jurisdiction over the claims asserted by the Union.

NYCCBL § 12-309(a)(4) vests in this Board exclusive jurisdiction "to prevent and remedy improper public employer . . . practices as such practices are listed in section 12-306." Among such improper employer practices is "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining . . ." *Id.* On the face of the pleadings, the Union claims that the City has made, absent bargaining with the Union, a change in procedures that creates a practical impact upon its members. The Union's claim does not sound in a violation of the Roster Staffing agreement, the Overtime Policy, or any provision of the parties' operative collective bargaining agreement. This dispute "sounds not in the terms of the collective bargaining agreement . . . but rather raises claims over which this Board has jurisdiction." *CSTG*, 79 OCB 41, at 11 (BCB 2007).

Moving to the merits of the dispute, in the absence of a limitation in the contract or otherwise, the assignment of overtime is within the City's statutory management right to determine the methods, means, and personnel by which government operations are to be conducted. *UPOA*, 67 OCB 48, at 4-5 (BCB 2001); *UPOA*, 39 OCB 29, at 4 (BCB 1987).[2] The Union recognizes the Board's prior holdings on this subject, but asserts that it wishes to bargain over the impact that the Overtime Policy has on its members and/or the procedures attendant to the implementation of the Overtime Policy. However, we find that the pleadings do not raise causes of action regarding a bargainable workload, safety or other impact, or any change in procedure related to the implementation of the Overtime Policy. *UFOA*, 71 OCB 6, at 10 (BCB 2003); *PBA*, 51 OCB 39, at 9 (BCB 1993). The only impact alleged is on the amount of discretionary overtime available

[2] Management's rights concerning overtime are not unfettered under the NYCCBL. Though the assignment of overtime is a management right, the distribution of overtime amongst employees is a mandatory subject of bargaining. *L. 2507, DC 37*, 67 OCB 3, at 7. However, the instant matter involves the assignment of discretionary overtime and not the distribution of overtime amongst employees.

under the Overtime Policy; but the Board long has held that the decision as to when and how much overtime is to be authorized or ordered is outside the scope of bargaining. *DC 37*, 67 OCB 3, at 7 (BCB 2001) (citing *UPOA*, 39 OCB 29, at 4 (BCB 1987)). Further, there is no allegation that the overtime cap in any way precludes anyone eligible for working RSOT from the opportunity to work it. Therefore, the instant improper practice petition and scope of bargaining petition must be dismissed.

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-2795-09, is hereby dismissed in its entirety.

Dated: August 9, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent.
CHARLES G. MOERDLER
MEMBER

I dissent.
PETER PEPPER
MEMBER