UFOA, 3 OCB2d 50 (BCB 2010)

(IP) (Docket No. BCB-2840-10).

Summary of Decision: The Unions claimed that the FDNY unilaterally implemented a new system for processing 911 emergency calls without first bargaining and that the new system has a practical impact on the safety of their employees. The Unions claimed that the City's failure to bargain over the alleviation of the impact violates the NYCCBL. The City contended that the petition is untimely, that the methods and technology by which it provides its 911 response is within its prerogative, and that there is absolutely no evidence of a safety impact on its members. The Board found that the improper practice portion of the petition was untimely filed but ordered that a hearing be held as to the scope portion of the claim, to ascertain if ARDs are being excluded from UCT phone calls and, if they are, if such exclusion results in a safety practical impact on the Unions' membership. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854, IAFF, AFL-CIO,

-and-

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

Petitioners,

- and -

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

Respondents.

INTERIM DECISION AND ORDER

On March 8, 2010, the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO ("UFOA"), and the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("UFA") ("Unions," collectively) filed a verified improper practice/scope of bargaining petition as well as a petition for injunctive relief on behalf of their members against the City of New York ("City") and the New York City Fire Department ("Department" or "FDNY"). The Unions claim that the FDNY unilaterally implemented a new system for processing 911 emergency calls without first bargaining and that the new system has a practical impact on the safety of their employees. The Unions claim that the failure to bargain over the alleviation of the impact violates the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City contends that the petition is untimely, that the methods and technology by which it provides its 911 response is within its prerogative, and that there is absolutely no evidence of a safety impact on its members. On April 2, 2010, the Board denied the Unions' petition for injunctive relief. The Board finds that the improper practice portion of the petition was untimely filed but orders that a hearing be held as to the scope portion of the claim, to ascertain if ARDs are being excluded from UCT phone calls and, if they are, if such exclusion results in a safety practical impact on the Unions' membership.

BACKGROUND

For the period immediately prior to May 4, 2009, 911 calls which involved a fire were received by a New York Police Department ("NYPD") Police Communication Technician ("PCT"). Immediately, the PCT elicited necessary information and entered it into a Sprint telecommunications system. Once the PCT established that the call regarded a fire emergency, a borough-specific Alarm

Receipt Dispatcher ("ARD") would be conferenced-in to the call. The ARD would ask a series of questions, including the borough from which the caller was calling, the address of the emergency, and the nature of the emergency. After the ARD obtained the initial information and entered it into FDNY's Starfire communications system, it was released to an FDNY Decision Dispatcher, who was responsible for dispatching the appropriate FDNY units. If an exact address was entered into the FDNY Starfire system, the Critical Information Display System ("CIDS") forwarded important information regarding the structure or contents of a building to responding units, provided that information was available for that address.

Once the information was pre-released to the Decision Dispatcher, the ARD would remain on the call with the 911 caller to ask some remaining standard questions, such as the cross-streets of the location of the emergency and the caller's phone number. The ARD would then release that information to the Decision Dispatcher so that the units en-route to the emergency could be updated with that information.

The response time under this system was calculated based on the time from which the FDNY ARD was conferenced-in to the call until an FDNY unit arrived at the location of the emergency. The City asserts that the average response time under the pre-release system was an average of four minutes and seven seconds.

The City claims that after September 11, 2001, it reviewed and analyzed the 911 system and communication between the City's various emergency services to determine how the City's emergency systems could be improved. The City determined that the most efficient and effective way to field emergency calls for the various first response units was to employ a single call-taker, capable of handling every type of emergency call situation, so that callers would not have to speak

to and answer redundant questions from several call-takers. This system is called "Unified Call Taking" ("UCT") and, according to the City, an identical system has been successfully implemented in other municipalities and is becoming the standard.

The UCT system was implemented on May 4, 2009. As before, an NYPD PCT receives a call from a 911 caller and asks a series of questions to garner basic information, which is entered in to the NYPD's Sprint telecommunications system. Under the new UCT system, however, once the initial information is placed into the Sprint system, it can be immediately released directly into FDNY's Starfire system, where any CIDS information will also be released to responding units. Once the initial information is gleaned from the caller regarding a fire emergency, the information can also be pre-released to an FDNY Decision Dispatcher.[1] Prior to May 4, 2009, the ARD would have been conferenced-in to the call prior to the release of the Starfire/CIDS information.

After the initial information is pre-released to the Decision Dispatcher, the 911 caller remains on the line to answer the remaining standard questions. Any further information is also entered into the system and released to the Decision Dispatcher, so that units en-route to the emergency are updated with that information. In certain emergency situations where the caller requires specific emergency-related advice, *e.g.*, where a 911 caller is trapped in a fire, the City asserts that an ARD may still be conferenced on to the call, so that the ARD can talk the caller through the situation and give the caller fire-related advice.

According to the City, the response time under the UCT system is calculated based on the time from which the information is received by the FDNY Decision Dispatcher until an FDNY unit

[1] The Decision Dispatcher still reviews the information and is still responsible for dispatching the appropriate FDNY unit by releasing the information to the respective fire houses.

arrives at the location of the fire emergency. Further, the City claims that the response time under the UCT system decreased from the prior system, and the average response time was below four minutes in November 2009.

The Unions had been monitoring the implementation of the UCT system and, believing that the new system increased errors, they requested that the City bargain over the UCT system. The UFOA requested bargaining on October 30, 2009, and the UFA did so on November 4, 2009. On November 20, 2009, the City met with the UFOA. According to the Unions, the Commissioner of Labor Relations stated that the City did not recognize that the UCT had any impact on the Unions' membership and would not bargain over impact. The Commissioner explained that the meeting had been a courtesy only.

Commencing on November 20, the NYPD and the FDNY decided to modify the new UCT procedure by instructing PCTs to conference ARDs onto the line when they were eliciting fire-related emergency information, but after the PCT had forwarded the critical information to the Decision Dispatcher. The PCT was instructed to remain in control of the call, but if the ARD had additional questions, or thought an error may have been made, the ARD could ask additional or follow-up questions of the caller.

On January 25, 2010, the Deputy Director, Fire Dispatch Operations for FDNY sent an Internal Memorandum to Dispatch Personnel. It reads, in pertinent part:

> The following procedures shall be followed when receiving UCT conference calls:
>
> **ARD**
> When receiving a call from UCT with the caller on the line, let them handle the call. Let 911 do the questioning. **Only** when they don't question the caller, do you handle the call.

-Exchange dispatcher numbers
-Ask for the Boro
-Ask if the call was pre released

(Now listen as they question the caller.)

If the UCT gives you the address:

-Ask them to have the caller repeat the address and cross streets.
-Ask any additional information you need.
-Let them end their call.
-After the caller is gone, verify the address entered by the 911 call-taker

* * *

Bring up the history to check and see that all important information is in the history. If not, notify the ARD supervisor who shall ensure that the DD & Radio Out Dispatcher are notified of the additional info.

UCT Correction Log Sheet

If the call was pre released by the UCT with a wrong address, a sheet must be filled out and noted that the error was discovered while you were on the line.

The Unions filed the improper practice petition on March 8, 2010.

POSITIONS OF THE PARTIES

Unions' Position

The Unions contend that the problems with the UCT system are significant. First, PCTs are not "well-trained" members of the FDNY. Second, PCTs are not effectively eliciting or transmitting the relevant information necessary for FDNY units to respond quickly and accurately to the fire or rescue scene. The Unions contend that they have recorded approximately 600 mistakes since May 2009, and that those incidents are but a fraction of the incidents that have occurred. According to the Unions, unlike ARDs, who are experienced in soliciting information on events that are transpiring at that moment, most PCTs are experienced only in obtaining information on incidents that have already occurred.

The Unions assert in their petition that the November 2009 change regarding the conferencing-in of ARDs is of no consequence. Even though the ARD is conferenced-in on the call, he or she must still let the PCT handle the call and let him or her do the questioning. The modifications defeat the purpose of bringing the ARD on to the call since the ARD is prevented from eliciting information or inquiring into the necessary details of the call. Second, ARDs are frequently not brought on to the calls at all.

The Unions summarized examples of what the alleged UCT system's failures in their petitions and included the UCT forms reporting the specifics of those incidents as exhibits to the petition. They draw specific attention to two incidents. First, the Unions claim that on November 7, 2009, a PCT sent responding units to an address on 62nd Street in Queens, as opposed to the actual location of the fire on 65th Street. The Unions assert that the mistake caused a significant delay in the units' response time and as a result, the fire on 65th Street killed three people. Second, on February 18, 2010, the PCT sent an EMS unit to a location in Brooklyn, and when the responders reached that address, they discovered that there was no emergency, and they had been sent to the wrong address in the wrong borough. The Unions contend that the misinformation caused a 13-minute delay in response time and the EMS unit was therefore unable to save the victim, a six-year old child.

The Unions contend that the misinformation and incomplete information transmitted through the UCT system are causing significant delays in the amount of time in which responding units are reaching emergency scenes, and allowing fire scenes to grow exponentially worse. A fire doubles in size every minute, and the growth and increased severity of a fire scene places the Unions' membership in an immediate health and safety risk. The Unions submitted an Affidavit from the

UFOA's President attesting to these assertions, and also averring that during the summer of 2009, the UFOA requested that its membership submit copies to the UFOA of the UCT Correction Log Sheets that the members had submitted to FDNY. The Unions also submitted a video with a simulation demonstrating the speed at which fires grow over time.

In the petition, the Unions claim that the City has not bargained over the impact on safety to its members as required by NYCCBL § 12-306(a)(4).[2] The Unions argue that the NYCCBL expressly affords public employee unions the right to bargain over the *per se* impact which the City's actions have on the safety and working conditions of unit employees. The Unions submit that the *per se* impact of these changes on Petitioners' members is clear, undisputable, and apparent on the face of the Unions' submissions to the Board.

The Unions argue alternatively that the NYCCBL expressly affords unions the right to bargain over the practical impact which the City's decisions have on the safety and working conditions of unit employees. The City's failure to bargain with Petitioners over the unilateral implementation of the UCT system, the modified UCT system, and the impact both have had on the health and safety of the Petitioners' membership constitutes an improper practice. Unless the City is ordered to discontinue use of the UCT system, and the emergency reporting system in existence prior to April 2009 is restored, Petitioners' members face a safety impact due to the delays caused by the chronic, recurring, and well-documented mistakes caused by the UCT system.

The City's inability to deny that the number of mistakes being made in the fire emergency reporting system has increased is a critical admission. The Unions' collective experience

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[2] NYCCBL § 12-306(a)(4) provides that it shall be an improper practice for a public employer or its agents "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. . . ."

representing its membership for decades, and certainly since the inception of the fire emergency reporting systems germane to this petition shows that the system in place immediately prior to the implementation of the UCT system engendered far fewer reporting mistakes and errors.

The City's assertion that response times have decreased since November 2009 is without any support in the record, misleading, and irrelevant. The City has changed the way in which response times are calculated. As now recorded, the response time omits the time spent between the UCT dispatcher and the caller. Second, it does not account for the many occasions under the UCT system when responding units have arrived at a reported fire scene only to find the fire is somewhere else. Therefore, the question should not be how fast the responding unit is getting out the door and to a reported fire scene, but whether the responding unit's response time to the actual fire scene has improved.

The City's only response to the Unions' voluminous submissions of UCT errors has been to deny knowledge or information sufficient to form a belief as to the delays. The City has not and cannot deny the existence of these delays. Unable to challenge the Unions' evidence that UCT errors are causing delays, the City has reverted to blaming the caller, but there is zero evidence in the record that the UCT errors detailed by the Unions are the result of caller error.

The Unions' burden in this case is not to apportion blame in regard to each UCT mistake. It is enough for the Unions to have established that fire emergency transmission mistakes are occurring under the UCT system and have increased, that some of these mistakes are delaying responding units, and that said delays are exposing the Unions' membership to grave harm.

Finally, Petitioners have satisfied the Board standard to determine if a *per se* practical impact exists by showing that there is a clear threat to employee safety. The Board can determine the

existence of this clear threat by recognizing the numerous UCT errors established by the Unions' evidence. The City admits these errors by acknowledging 178 UCT errors in eight months. The delays are exposing the Unions' membership to fire scenes which have grown in scope and severity, a fact to which the City offers not a word of rebuttal. The evidence of a threat to employee safety is clear and unrefuted. The balance of the City's legal arguments are simply wrong or misstated.

The Unions request that the Board direct Respondents to cease and desist from further use of the UCT system, and immediately reinstate the emergency call-taking system in place prior to May 2009.

City's Position

The City contends that both pre-UCT and post-UCT, an NYPD PCT has always remained on the line from the moment a 911 call was received, until the moment a 911 caller hung up. These PCTs have always been professional telecommunicators employed by the NYPD, and their primary function is to get help to emergency situations by speaking with, and eliciting information from, individuals who are frantic, excited, and scared. PCTs have been listening to the handling of fire emergency calls, and the standard questions asked in fire emergency situations for as long as the 911 system has been in place–over 40 years. They are trained extensively and engage in routine in-service training approximately every two months, and they are constantly learning new skills and procedures. In addition to the routine training, before, during, and after the implementation of the UCT system, PCTs have undergone additional training dedicated specifically to fire-related emergency calls.

Before the UCT system, neither the NYPD nor the FDNY utilized any method for recording or keeping statistics on the number of mistakes being made by either PCTs or ARDs. Under the

UCT system, members of the UFA or UFOA now complete a form when they believe a mistake has been made. The City contends that every complaint is reviewed and analyzed.[3] From May 4, 2009, through December 10, 2009, PCTs received and handled over 150,000 911 calls. During that time period, approximately 500 forms were submitted to the FDNY for review. Of the approximate 500 alleged mistakes, only 178 were deemed to be employee errors and the remaining 322 were unfounded.

The City contends that while the NYPD and the FDNY strive to limit employee error to zero, it must be acknowledged that employee error exists, both prior to the implementation of the UCT system, and after. Since human error is simply a fact of nature, it cannot be eliminated. Nevertheless, the City is making every effort to provide call-takers with the training, knowledge, and skills necessary to keep human error to an absolute minimum.

The City asserts that the majority of allegations of mistakes proffered by the Unions in their papers were either not related to the UCT system, or were not mistakes at all. Many of the examples submitted were calls where the 911 caller made an error, or where the caller reported a false alarm. In two of the cases cited by the Unions, callers reported the smell of smoke but were unsure of the source, so the PCT recorded the address as the apartment of the caller, which is the correct action to take. The City also contends that several of the Unions' submitted "mistakes" involved calls made via intercom, calls initiated from a fire call-box, and EMS emergencies; and the system for handling

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[3] The City claims that the process for reviewing alleged mistakes works as such: once a form is submitted for a particular call, the call is listened to by members of the NYPD to identify whether a mistake was made and, if so, what the nature of the error was. If it is determined that a mistake was made, the respective PCT is notified of the mistake, listens to the tape of the 911 call that was received, reviews the error, and is re-trained on the appropriate action, procedure, or protocol. The City asserts that members of the FDNY have also listened to these 911 recordings.

those types of calls has not changed with the implementation of the UCT system. Specifically, the February 18, 2010 incident that resulted in the death of a child involved an EMS call, and the EMS procedure for handling 911 calls has not changed. Furthermore, the City asserts that any allegations regarding the failure of PCTs to include CIDS information are unfounded, because if a caller is unable to give an exact address, CIDS information simply cannot be obtained.

The City contends that the methods and technology by which it provides its 911 response is clearly within management's statutory prerogative. Notwithstanding that prerogative, the City did work closely with affected unions on many aspects of the changes to the 911 call taking structure.

Assuming for the sake of argument that the City's adoption of the UCT system triggered a bargaining obligation, the program was officially enacted on May 4, 2009. Since the applicable statute of limitations is four months, and the Unions' claims pertain to acts that occurred more than ten months prior to the filing of the instant improper practice petition, such claims must be dismissed as untimely. Further, the City argues that since the Unions allege that the failure to bargain charge is based upon a unilateral action, the Board cannot deem the action a continuing violation.

Additionally, the City contends that bargaining over the impact of managerial prerogative does not become mandatory until the Board declares that an impact exists and the public employer fails to correct or minimize the impact. At this time, the Board has not determined that a practical impact on safety exists. Thus, the proper channel for the Unions to bring forth a claimed practical impact is a scope of bargaining petition, and not an improper practice charge. Although the Unions' claim that the UCT system has a *per se* practical impact on its members, they have enunciated no legal basis for such a claim, and the existence of an impact is in question.

The City vehemently disputes that there is, has been, or will be any impact on the safety of

the Unions' members. The Unions have not presented one scintilla of evidence to demonstrate that the exercise of the City's managerial right has created a clear and present or future threat to employee safety. Although the Unions raise some factual examples that may suggest a safety question as to the public and other individuals or entities, the UFOA and UFA do not have standing to pursue a claim of a safety impact on anyone other than firefighters and fire officers.

In their petition the Unions plead certain factual scenarios, but the petition is notably bereft of any explanation of how these facts indicate any immediate injury to firefighters or fire officers. None of the factual incidents referenced by the Unions indicate an issue with the UCT system. The mistakes can be attributed to caller or employee error. The UCT system is not responsible for a mistake when a caller gives the wrong address, and even in cases where employee error is to blame, the Unions cannot establish a causal connection between an incident and the UCT system. Employee errors, though combated vigorously, were made under the old system as well. Furthermore, many of the incidents mentioned by the Unions are EMS calls, which are handled in the exact same way as they were before the enactment of the UCT system. Of the 22 incidents specifically referred to by the Unions in their petition, zero firefighter or fire officer injuries occurred.

Here, the Unions have not identified a single past injury or other safety impact on their unit members. Instead, the Unions rely exclusively on speculative and conclusory allegations. The Unions cannot and have not established causal connection between the enactment of the UCT system and any past, present, or future harm to firefighters or fire officers.

DISCUSSION

Prior to ruling on the merits of the petition, we must address the City's argument that both

the improper practice petition and scope petition are untimely. *DC 37, Local 1457*, 1 OCB2d 32, at 21 (BCB 2008); *Walker*, 79 OCB 2, at 12 (BCB 2007). We first address the timeliness of the improper practice petition.

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. N.Y. 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 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 program was announced and then officially implemented on May 4, 2009, the Unions "knew or should have known" that the program was going to be put into effect on that date. Since the Unions did not file the instant petition until March 8, 2010, over nine months later, the City asserts that the petition is untimely.

The Unions' claim revolves around the alleged unilateral changes that the Department

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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 . . .

effected on May 4, 2009–when the substance of the Unions' complained-of changes were implemented by FDNY. Thus, for purposes of this matter, the date on which the UCT system was implemented is the date on which the "disputed action" occurred. *UFA,* 3 OCB2d 13, at 10 (BCB 2010); *See CEA*, 79 OCB 42, at 7 (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 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. *DC 37, L. 1457,* 1 OCB2d 32, at 21-22 (in context of unilateral change claim, four month statute begins to run upon knowledge on the part of union of alleged change).

In their reply, the Unions contend that their claim is timely because they brought it within 120 days of November 20, 2009, which is when the Unions assert that the City "significantly" amended the UCT system. However, the gravamen of the Unions' claim is that the ARDs were removed from the 911 call process under the UCT system, which they allege creates a safety impact. The ARDs

were removed from that process on May 4, 2009, and, according to the Unions, the practice after the November changes still exclude/restrict the ARDs, despite the plain language of the January 25, 2010 memorandum that implemented the November changes. Further, the Unions' allegations, whether they concern the City's decision to implement the UCT system or the contended safety impact arising therefrom, focus primarily on the UCT system as implemented on May 4, 2009. By their own assertions and from the exhibits to their pleadings, the Unions had notice of the effective date of the original change that gave rise to this dispute, and the essential nature of the dispute did not change with the November modifications. Therefore the November changes are *de minimis* for purposes of this petition. Accordingly, we dismiss as untimely the improper practice portion of the Unions' claims.

We next address the timeliness of the scope portion of the petition. The Unions allege that the implementation of UCT has resulted in a practical impact on the safety of its members. The City also contends that this claim is untimely, and, in any event, without merit. We disagree. We have recognized that when an employer exercises a management right in a manner that has an adverse effect on terms and conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact. *UFA*, 73 OCB 2, at 6 (BCB 2004); *Local 621, SEIU*, 51 OCB 34, at 9 (BCB 1993); *SBA*, 42 OCB 56, at 13 (BCB 1988). We consider claims of practical impact to present scope of bargaining issues, not issues of improper practice. *NYSNA*, 71 OCB 23, at 12 (BCB 2003); *SBA*, 42 OCB 56, at 15-16. Therefore, the four-month statute of limitations applicable to improper practice petitions, pursuant to NYCCBL § 12-306(e), does not preclude consideration of the Unions' practical impact claim. *EMS Superior Officers Assn.*, 75 BCB 15, at 15 (BCB 2005).

With regard to the claims that survive the initial level of scrutiny of timeliness, we find that an evidentiary hearing is necessary to resolve remaining relevant material questions of fact that have been raised by the submissions of the Unions and the City. In a case in which there is a clear present or future threat to employee safety, the Board may direct the parties to bargain over the alleviation of any threatened practical impact on safety. *UPOA*, 39 OCB 37, at 5-6 (BCB 1987). Where the existence of such a threat is not clear, as here, the Board may require a hearing to resolve a factual dispute on the issue. *Id.* at 7.

Specifically, we find that the Unions have raised a material question of fact as to whether ARDs are prevented from eliciting information or inquiring into the necessary details of a call, and whether ARDs are frequently omitted from the calls. The City claims that the November 2009 revision to the UCT system allow ARDs to speak as necessary, while the Unions claim that their ability to elicit information is, at a minimum, restricted. The plain language of the November modification, as set forth in the January 25, 2010 memorandum, and selectively quoted by the Unions, explicitly states that ARDs are allowed to speak. However, notwithstanding that language, the Unions assert that ARDs are frequently not brought in to the calls at all. Accordingly, we direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining. A hearing will give the parties the opportunity to present evidence and arguments for the purpose of establishing a record upon which this Board may ascertain whether a practical impact on the safety of the employees involved has occurred from this alleged exclusion/restriction of ARDs from the phone calls. *EMS Superior Officers Assn.*, 75 BCB 15, at 17; *see UPOA*, 43 OCB 31, at 12-13 (BCB 1989); *UFA*, 37 OCB 43, at 9-10 (BCB 1986).

In ordering a hearing, we remind the parties that to establish a practical impact arising from

health and safety issues, a petitioner must demonstrate that the exercise of a management right has created a "clear and present or future threat to employee safety." *UPOA*, 39 OCB 37, at 5-6 (BCB 1987). Here, the Unions have submitted a substantial amount of evidence supporting its claim that restricting or omitting ARDs from calls to the UCT system causes increases in response times, which may have an impact on the public at large. However, we remind the Unions that in order to establish a claim of practical impact, they must present evidence at the hearing to show that the alleged restriction or exclusion of ARDs from calls to the UCT creates a safety practical impact on the firefighters/fire officers themselves.

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 Fire Officers Association, Local 854, IAFF, AFL-CIO, and Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, docketed as BCB-2840-10, is hereby dismissed.

ORDERED, that a hearing be held as to the scope portion of the petition, to ascertain if ARDs are being excluded from UCT phone calls and, if they are, if such exclusion results in a safety practical impact on the Unions' membership.

Dated: October 26, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

Partial concurrence (see attached).

CHARLES G. MOERDLER
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

Matter of Improper Practice Proceeding Between
UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854 IAFF, AFL-CIO et ano
and
THE CITY OF NEW YORK, et ano
(Docket No. BCB 2840-10)

Partial Concurrence

I concur in so much of the Order as wisely directed an evidentiary hearing. I would, however, expand the scope of the hearing to take whatever admissible testimony and proofs may be offered going to whether the so-called November changes were, in fact, de minimus.[5]

New York, NY, October 26, 2010

CHARLES G. MOERDLER

[5] References in the majority opinion to "managerial prerogatives" or "management right" require me to note the dissent in *Uniformed Firefighter Association*, *Decision No. B-39-2006; Dkt No. BCB-2531-06*.