DC 37, Local 3631, 4 OCB2d 34 (BCB 2011)

(IP) (Docket No. BCB-2906-10)

Summary of Decision: The Union filed an improper practice petition alleging that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4) by unilaterally changing the procedure for completing performance evaluations of two non-managerial members of the EMS Command. The City and the FDNY contended that the decision to increase the frequency of performance evaluations falls within the management rights clause of the NYCCBL, and that such change is not a mandatory subject of bargaining. The Board found that conducting an employee review on a more frequent basis than prescribed in FDNY policy was a procedural change which affected the employee, and is a mandatory subject of bargaining. However, it determined that the second performance evaluation was not an actual performance evaluation under FDNY policy and was within the scope of management rights. Accordingly, the Board granted the petition, in part, and denied it, in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 3621,

***Petitioner*,**

-and-

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

***Respondents*.**

DECISION AND ORDER

On October 29, 2010, District Council 37, AFSCME, AFL-CIO, Local 3621 ("Union") filed a verified improper practice petition against the City of New York ("City") and the Fire Department

of the City of New York ("FDNY"). The Union alleges that the City and the FDNY interfered with the Union's right to collectively bargain over changes to performance evaluation procedures for non-managerial members of the Emergency Medical Services ("EMS") Command by unilaterally changing the frequency and timing of such evaluations, in violation of § 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 contends that the modification to the frequency and timing is a procedural change that affects employees and thus is mandatorily negotiable. The City and the FDNY argue that the change to the evaluation procedure falls within the management rights clause of the NYCCBL, and that the Union has failed to demonstrate that such a change is a mandatory subject of bargaining because it affects only supervisors and not the employees. The Board found that conducting an employee review on a more frequent basis than prescribed in FDNY written policy was a procedural change which affected the employee, and is a mandatory subject of bargaining. However, it determined that the second performance evaluation was not an actual performance evaluation under FDNY written policy and was within the scope of management rights. Accordingly, the Board granted the petition, in part, and denied it, in part.

BACKGROUND

The FDNY serves as the City's first responder to fire, public safety, and medical emergencies. The EMS Command operates within, and is a part of, the FDNY. The Union represents FDNY employees in the titles of Supervising Emergency Medical Specialist Levels I and II ("Lieutenant" and "Captain," respectively).

EMS OGP 104-08, titled "Performance Evaluations of Non-Managerial Members,"

("Directive") memorializes the FDNY's "policy and procedure for the performance evaluation of non-managerial members of the EMS Command." (Pet. Ex. A). With the exception of probationary members, the Directive provides that each member will be evaluated annually. The annual rating period covers "a 12 month period from January 1st to December 31st." (Pet. Ex. A). The Performance Evaluation System is based on "Tasks and Standards," which are developed for each title and assignment and "reflect the duties for which the employee is responsible and how these duties should be performed." (*Id.*). The Directive provides that "[e]ach member of the Command should be given a copy of the Tasks and Standards for his/her particular title during their training course/program and should be afforded time to discuss the Tasks and Standards for which he/she will be held responsible." (*Id.*).

The section of the Directive titled "Procedure" provides, in pertinent part:[1]

> 4.1 Each member will be evaluated annually, based on the Tasks and Standards. When a member's responsibilities change during the course of the year, a revised Tasks and Standards sheet should be prepared. The following chart indicates who is required to sign each member's evaluation:

Employee	**Supervisor (Evaluator)**	**Reviewer**
EMT/Paramedic	Lieutenant	Captain
Lieutenant	Captain	Deputy Chief
Captain	Deputy Chief	Division Commander
Deputy Chief	Division Commander	Deputy Assistant Chief

> 4.2 All members, including probationary members are to be shown their

[1] The Procedure section also lays out options for members who disagree with the ratings or recommendations they receive, including the option to appeal.

evaluation reports, in person.

4.3 Members shall be given advance notice of their upcoming evaluation session and be prepared for the discussion.

4.4 Since most members of the EMS work in the field, the evaluation process is conducted differently than support staff who have direct supervision on a daily basis. The Officer shall try to set aside a dedicated period of time to meet with the member, in private, to review the member's performance.

4.5 Members receiving an overall rating of "conditional" or "unsatisfactory" shall be evaluated again within 90 days. During the initial evaluation session, the Officer shall provide specific example[s] of good job performance and inform the member of what must be done to improve their performance.

(Pet. Ex. A).

The Union alleges that the FDNY issued performance evaluations for periods of less than one year to two members, EMS Captain John O'Loughlin and EMS Lieutenant Linda Carlson.[2] On or about July 6, 2010, O'Loughlin received a memorandum titled "Work Performance First Half 2010" (hereinafter, "Memorandum") from Janice Olszewski, who, according to the City, has been O'Loughlin's immediate supervisor since April 2010. (Pet Ex. B). The Memorandum briefly lists O'Loughlin's "performance strong points" and "areas in need of improvement," and explains why such areas are deficient. (*Id.*). The Memorandum does not list any Tasks and Standards and is not signed by O'Loughlin or Olswewski, although it appears to have been initialed by Olszewski. The parties do not address whether O'Loughlin was given advance notice of the issuance of the Memorandum or whether he and Olswewski ever discussed its contents.

[2] The Union further contends that the FDNY has "issued similar interim performance evaluations to other members of DC 37, Local 3621." (Pet. ¶ 13). However, it has not specified the names of such individuals nor has it provided any details of the alleged evaluations.

On or about July 14, 2010, Carlson received a "Performance Evaluation Statement of Understanding" for the period April 1, 2010 to June 30, 2010 (hereinafter, "Performance Evaluation"). The Performance Evaluation rates Carlson on her performance of eight tasks. It lists a description of each task and the corresponding performance standards, describes Carlson's performance of each task, and assigns her one of six ratings for each task.[3] The Performance Evaluation then assigns Carlson an overall rating, explains the justification for the rating, and provides plans for future performance, including a directive for a re-evaluation within 90 days. On the last page, the Performance Evaluation is signed by Captain Wayne Baskin as Supervisor and Deputy Chief Mitchell Berkowitz as reviewer.[4] The last page also includes an employee statement, which provides:

> My signature below indicates only that my evaluation has been discussed with me, and that I have received a copy of the evaluation on this date. This does not necessarily indicate my agreement with the contents of this evaluation. I understand that I have a right to submit a written response to this evaluation.

(Pet. Ex. C). A signature below the statement, which appears to be Carlson's, is dated July 14, 2010.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that, by issuing performance evaluations for periods of less than one year, the FDNY unilaterally implemented a change in procedure, which is a mandatory subject of

[3] The possible ratings are: unratable, unsatisfactory, conditional, good, very good, and outstanding.

[4] Baskin became Carlson's immediate supervisor in April 2010.

bargaining. This action constitutes a violation of NYCCBL § 12-306(a)(1) and (4).[5] The Union points out that the Directive specifically states that the "annual non-managerial performance evaluation rating period for all members of the EMS Command (other than probationary employees) covers a 12 month period from January 1st to December 31st." (Pet. ¶ 6). The Directive further states that "[e]ach member will be evaluated *annually*, based on the Tasks and standards." (Pet. ¶ 7) (emphasis supplied in Petition).

The Union asserts that procedures related to performance evaluations are a mandatory subject of bargaining, and that public employers have a statutory duty to bargain on all matters concerning wages, hours and working conditions. The Union clarifies that, while criteria and standards for performance evaluations are generally nonmandatory bargaining subjects, this Board has held that the procedural aspects of performance evaluations are mandatorily negotiable. Accordingly, by

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

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;
>
> * * *
>
> (4) to refuse to bargain in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

NYCCBL § 12-305 provides, in pertinent part:

> Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities.

unilaterally altering the procedure related to performance evaluations, the FDNY has interfered with the members' rights to collectively bargain.

In response to the City's contention that the procedural change only affects supervisors, thus relegating it to a non-mandatory subject, the Union contends that the change in timing of the evaluations also impacts employees. Employees are "made aware that they have been evaluated and more importantly are made aware of the areas in which they need improvement." (Rep. ¶ 20). As a result, there is an expectation that the employee will modify his or her behavior and/or performance to remedy any deficiencies raised in the evaluation.

City's Position

The City contends that the Memorandum to O'Loughlin is not a performance evaluation, nor was it intended to replace O'Loughlin's official performance evaluation or serve as an additional performance evaluation. It distinguishes the Memorandum from a performance evaluation on five grounds. First, the Memorandum does not contain ratings based upon O'Loughlin's assigned tasks and standards. Second, it is not signed by O'Loughlin. Third, it did not have to be reviewed and signed by Deputy Chief Olszewski's supervisor. Fourth, it did not provide an overall rating or a justification for an overall rating. Fifth, it does not become a permanent part of O'Loughlin's record.[6]

To the extent the FDNY issued the Memorandum and Performance Evaluation for periods covering less than one year, the City contends that the action falls within the scope of management's right, under NYCCBL § 12-307(b), to "maintain the efficiency of governmental operations;

[6] The City also characterizes Carlson's performance evaluation as "unofficial" and "informal" but does not elaborate on its reasons for doing so.

determine the methods, means and personnel by which governmental operations are to be conducted. . . ." (Ans. ¶ 26).[7] It asserts that this Board has construed NYCCBL § 12-307(b) to permit management to make unilateral changes to "methods, means and personnel" without engaging in negotiations, as long as they do not impact a designated mandatory subject of bargaining. By issuing the Memorandum and the Performance Evaluation to O'Loughlin and Carlson, respectively, the FDNY has not altered the parties' negotiated disciplinary procedures. Rather, it is attempting to improve its members productivity, which is within its purview under the management rights clause.

The City further contends that the Union has failed to demonstrate that the change in timing of the issuance of the memorandum and performance evaluation constitutes a mandatory subject of bargaining. While acknowledging that the change is procedural, the City contends that such a change affects only the supervisors and not the recipients of the memorandum and performance evaluation. It asserts that, if the procedural change does not impact the duties of the employee receiving the evaluation, the change is considered a non-mandatory subject of bargaining. Neither

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[7] NYCCBL § 12-307(b) provides, in pertinent part:

> 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. . . .

Carlson nor O'Loughlin were required to do anything procedurally different as a result of the performance evaluation. Therefore, there was no violation of NYCCBL § 12-306(a)(4). As a consequence of the Union's failure to show a violation of the duty to bargain in good faith, the City argues there can be no derivative finding of interference pursuant to NYCCBL § 12-306(a)(1).

DISCUSSION

The threshold issue before us in this case is whether the Memorandum and the Performance Evaluation, issued to O'Loughlin and Carlson, respectively, can properly be characterized as performance evaluations, based on the Performance Evaluation System and other criteria outlined in the Directive. If we find that one or both are performance evaluations, we must then determine whether the FDNY, by altering the frequency of the evaluations, made a unilateral change to a mandatory subject of bargaining, in violation of the City's duty to bargain.

We find that the Memorandum, on its face, is not a performance evaluation, based on the Directive's criteria. It does not provide the tasks or list the standards appropriate to O'Loughlin's qualifications and position, which are the building blocks upon which the City's Performance Evaluation System is based, nor does it rate O'Loughlin pursuant to the Directive. It further does not provide an overall rating with an accompanying justification. Finally, it is not signed by O'Loughlin nor was it reviewed or signed by Olszewski's supervisor.

Moreover, there is no evidence to suggest that the Memorandum is being used as anything other than an informal supervisory communication to the employee. As such, we find that it falls outside the scope of mandatory bargaining. *See COBA*, 69 OCB 26, at 16 (BCB 2002) ("An employer may extend to or retract from a supervisor discretion with respect to the performance of

supervisory functions without incurring a decisional bargaining obligation in that regard.") (quoting *Town of Carmel*, 31 PERB ¶3023 (1998)). Accordingly, our determination is that there has been no unilateral change to a mandatory subject of bargaining with regard to the Memorandum. We therefore dismiss the Union's claims pursuant to NYCCBL § 12-306(a)(1) and (4) to the extent they pertain to the Memorandum.

The parties do not dispute, and we agree, that the Performance Evaluation issued to Carlson is a performance evaluation, issued in accordance with the Directive's criteria. The Performance Evaluation conforms to all aspects of the Directive's Performance Evaluation System, with the exception of the change in the frequency of the evaluation period, which we discuss in detail below. It lists tasks required of Carlson based on her title and assignment, provides the established standards, and rates her on those tasks, in accordance with the City's Performance Evaluation System. It provides an overall rating and a justification for that rating. The evaluation is signed by Carlson's supervisor and her reviewer. Carlson also signed the evaluation and, in doing so, confirmed that its contents had been discussed with her.[8]

We next address whether the FDNY, by altering the frequency of the Performance Evaluation, made a unilateral change to a mandatory subject of bargaining, in violation of the City's duty to bargain. It is an improper practice under NYCCBL § 12-306(a)(4) 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." Under NYCCBL

[8] We have found no evidence in the record to indicate that the performance evaluation will become part of Carlson's permanent record. Regardless, the record is sufficient to establish that the report issued to Carlson is a performance evaluation, as set forth in the Directive.

§ 12-307(a), these matters generally include wages, hours, working conditions, and any subject with a significant or material relationship to a condition of employment.[9] *See, e.g., PBA*, 79 OCB 43, at 7 (BCB 2007); *DC 37*, 75 OCB 10, at 7 (BCB 2005). A public employer may not unilaterally implement a change in a mandatory subject before bargaining on the subject has been exhausted. *See UMD, L. 333*, 2 OCB2d 44, at 24 (BCB 2009); *DC 37*, 77 OCB 34, at 18 (BCB 2006); *COBA*, 63 OCB 26, at 9 (BCB 1999).

When a petitioner asserts that an employer's refusal to bargain in good faith has resulted in a unilateral change in a term or condition of employment, the petitioner must first demonstrate that the matter over which it seeks to negotiate is or relates to a mandatory subject of bargaining. *See UFOA*, 1 OCB2d 17, at 9 (BCB 2008). The petitioner must then demonstrate the existence of a change from the existing policy or practice. *Id.* If a unilateral change is found to have occurred in a term or condition of employment which is determined to be a mandatory subject, then the Board will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice. *Id.; see DC 37*, 79 OCB 20, at 9 (BCB 2007); *see also Local 1182, CWA*, 26 OCB 26, at 4 (BCB 2001); *PBA,* 63 OCB 4, at 10 (BCB 1999).

The City contends that the change in the timing and frequency of Carlson's Performance Evaluation is not bargainable because it falls within the City's managerial rights pursuant to

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[9] NYCCBL § 12-307(a) provides, in pertinent part:

> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including, but not limited to, wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including, but not limited to, overtime and time and leave benefits), working conditions . . . .

NYCCBL § 12-307(b). The City asserts that this Board has construed NYCCBL § 12-307(b) to permit management to make unilateral changes to the "methods, means and personnel" by which governmental operations are to be conducted without engaging in negotiations, and has restricted the scope of bargaining "whenever it intrudes into those areas that primarily involved a basic goal or mission of the employer." *DC 37,* 45 OCB 1, at 8 (BCB 1990). It claims that, by issuing the Performance Evaluation, it is attempting to improve member productivity, an action that is within its managerial rights under NYCCBL § 12-307(b).

While the City has the right to make and implement decisions concerning its management prerogatives without bargaining, the procedures for implementing decisions that affect terms and conditions of employment, such as performance evaluations, are mandatorily negotiable. *See DC 37*, 75 OCB 13, at 11 (BCB 2005). Hence, we have consistently held that the procedures for implementing performance evaluations are mandatory subjects of bargaining. *Id.; see, e.g., DC 37, L. 1508,* 79 OCB 21, at 22-23 (BCB 2007); *see also PBA*, 63 OCB 2, at 11(BCB 1999). However, we have also found that, "[w]hen procedural revisions, such as timing issues, are made to performance evaluations, they are mandatorily negotiable *unless they pertain only to supervisory functions*." *PBA*, 73 OCB 12, at 15 (BCB 2004) (emphasis added). The remaining issue, therefore, is whether the change in the frequency of Carlson's Performance Evaluation affects only her supervisors, or whether it also has an impact upon Carlson herself.

Where a procedural change to an evaluation process is clearly a management prerogative and does not implicate any expectation or action on the part of the employee, the change is considered substantive and thus a non-mandatory subject of bargaining. *See PBA*, 63 OCB 2, at 15 (changes in performance evaluation process were substantive and not procedural where "the employee is not

required to do anything procedurally different from before"); *see PBA*, 73 OCB 12, at 16 (procedural change to a performance evaluation that requires action solely on the part of a supervisor is substantive in nature). In contrast, changes which require additional acts of an employee are deemed procedural in the sense that they do not fall within the managerial prerogative. *See DC 37*, L. 1508, 79 OCB 21, at 23 (citing *Matter of Patrolmen's Benevolent Assn. of the City of New York* v. *New York City Bd. of Collective Bargaining, et al.*, No. 112687/04 (Sup. Ct. N.Y. County, Aug. 8, 2005) (slip op at 6) ("where an employer imposes a new requirement that an employee meet with a supervisor as part of an evaluation process, this requirement is a procedure that is subject to mandatory bargaining") (emphasis in original); *see also Suffolk County Bd. Of Coop. Educ. Serv.*, 17 PERB ¶ 3043 (1984) (requirement that teacher participate in pre-observation conference as part of evaluation procedure is unilateral change in procedure and a mandatory subject of bargaining).[10]

By increasing the frequency of the performance evaluations, the FDNY required Carlson to take the additional actions of signing the evaluation form and submitting to a discussion of her job performance with her supervisor on a more frequent basis than prescribed in the Directive, which limits these acts to once a year. *See DC 37*, L. 1508, 79 OCB 21, at 23. Implicit in these requirements, as the Union points out, is "an expectation that [the] employee will modify their behavior and or performance in order to remedy any alleged deficiencies." (Rep. ¶ 20). Since acts were required of the employee, these requirements cannot be characterized as simply a management

[10] The City's argument that the change in the frequency of the performance evaluation is not procedural because it did not alter Carlson's job duties or require her to do anything "procedurally different" than before, is misplaced. As a threshold matter, we have found no requirement that a petitioner demonstrate that an employee's job duties were altered in order to prove the existence of a procedural change in the context of a performance evaluation.

prerogative. For these reasons, we find that the modification to the frequency of Carlson's performance evaluation constitutes a unilateral change to a mandatory subject of bargaining.

In light of the above, we find that the City breached its duty to bargain, in violation of NYCCBL § 12-306(a)(4), by unilaterally changing the timing of Carlson's Performance Evaluation.[11] When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37*, 77 OCB 34, at 18 (BCB 2006). We therefore grant the Union's improper practice petition as it pertains to Carlson's Performance Evaluation.

[11] While the instant dispute appears to involve only a single deviation from a recognized procedure, *i.e.*, the issuance of Carlson's performance evaluation for a three month period in contravention of the Directive, which clearly provides that a performance evaluation "covers a 12 month period from January 1st to December 31st," we note that the City has not asserted that it issued the performance evaluation in error or that it was an isolated occurrence. Rather, its stated defense was that it had a managerial right to issue performance evaluations on a more frequent basis than annually. In addition, the Union alleged, and the City did not deny, that the FDNY issued "similar interim performance evaluations" to other Union members, although such individuals and the details of the alleged evaluations were not specified in the pleadings.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, Docket No. BCB-2906-10, filed by District Council 37 and its affiliated Local 3621, against the City of New York and the Fire Department of the City of New York, be, and the same hereby is, granted, in part, and denied, in part; and it is further

ORDERED, that the Fire Department of the City of New York cease and desist from altering the timing and frequency of the performance evaluations of non-managerial members, and not make any further change unless or until such time as the parties negotiate either to agreement or to impasse with respect to such change.

Dated: June 29, 2011
New York, New York

MARLENE A. GOLD
CHAIR

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MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

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