UFA v. City, 47 OCB 6 (BCB 1991) [Decision No. B-6-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DECISION NO. B-6-91

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK, DOCKET NO. BCB-1346-90
Petitioner,

-and-

CITY OF NEW YORK,
Respondent.

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In the Matter of

UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, DOCKET NO. BCB-1347-90
Petitioner,

-and-

CITY OF NEW YORK,
Respondent.

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INTERIM DECISION AND ORDER

On December 12, 1990, the Uniformed Firefighters Association of Greater New York ("the UFA" or "petitioner") filed a verified improper practice petition against the City of New York ("the "City" or "respondent"), docketed as BCB-1346-90, in which it alleged that the New York City Fire Department violated Section 12-306 of the New York City Collective Bargaining Law ("NYCCBL")[1] by unilaterally announcing a change in personnel policy without

[1] Section 12-306 of the NYCCBL provides, in relevant part, as follows:

a. **Improper public employer practices.** It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public

(continued...)

providing the Union with an opportunity to bargain regarding that change. On December 24, 1990, the City, represented by its Office of Labor Relations, filed a motion to dismiss the improper practice petition and an affidavit in support thereof. The UFA filed an answer to the City's motion on January 4, 1991 and, on January 17, 1991, the City filed a reply.[2]

On December 12, 1990, the UFA filed a scope of bargaining petition, docketed as BCB-1347-90, in which it alleged that the assignment of "light duty" firefighters to the position of Division Aides will have a direct, immediate and specific adverse impact on the safety of both "light duty" firefighters assigned as Division Aides and full duty firefighters. On December 24, 1990, the City filed a motion to dismiss the scope of bargaining petition and an affidavit in support thereof. The UFA filed an answer to the City's motion on January 4, 1991 and, on January 17, 1991, the City filed a

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[1](...continued)
employee in the exercise of their rights granted in section 12-305 of this chapter;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization;
(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.

[2] We note that Section 13.11 of the Revised Consolidated Rules of the Office of Collective Bargaining does not provide for the submission of a reply by the moving party to "answering affidavits" filed by the petitioner. In the present case, however, no objection was raised by the UFA and the contents of the reply do not prejudice any rights of the petitioner. Accordingly, we have accepted the additional pleading.

reply.

By letter dated January 17, 1991, the City requested consolidation of four separate petitions filed by the UFA and the Uniformed Fire Officers Association ("UFOA"). The City noted that the UFA and the UFOA have each filed an improper practice petition and a scope of bargaining petition concerning issuance by the Fire Department of Department Order 168. In addition, both the UFA and the UFOA have sought, thus far unsuccessfully, preliminary judicial relief in New York State Supreme Court, New York County and Kings County, respectively.

The City alleged that it has filed motions to dismiss each of the petitions. It argued that its two motions to dismiss the improper practice petitions raise the same legal question, i.e., whether the petitions are premature without a prior determination of a pre-existing duty to bargain over the assignment of light duty Division Aides, as do its two motions to dismiss the scope of bargaining petitions, i.e, the failure to plead a prima facie case of safety practical impact. Moreover, the City claimed, examination of both sets of union and City papers indicate reliance on the same circumstances and chronology of events. Therefore, "to avoid unnecessary waste of the Board's, Unions' and City's resources and to avoid the possibility of inconsistent and untimely rulings" the City requested that the Board order consolidation of the four petitions "solely for the purpose of proceeding with the rulings on the four pending motions [to dismiss]."

On January 22, 1991, the UFA filed an objection to the City's request for consolidation noting that,

> while both the UFA and the UFOA recognize that an ultimate consolidation of these petitions might be eventual and necessary

> for reasons of administrative economy in the event of hearings, etc., it is the UFA's position that consolidation at this juncture would serve only to delay adjudication by the Board in the pending UFA cases (which adjudication may be dispositive in all cases).

In support of its position, the UFA noted that the UFA cases are "ripe" for determination by the Board because it has responded to the City's motions to dismiss. In contrast, the motions to dismiss addressed to the UFOA's petition have only recently been made.

We note that contrary to the City's assertion, as of this date it has not filed a motion to dismiss the UFOA's scope of bargaining petition, filed on January 16, 1991. Whether the City files a motion to dismiss or an answer to the UFOA's scope of bargaining petition, the UFOA must be given an opportunity to respond. Thus, as the UFA argues, were we to grant the City's request for consolidation, consideration of the City's motions to dismiss the UFA's petitions would be delayed. While we recognize that some duplication of effort will be incurred by the Board in its consideration of the petitions filed by the UFA and the UFOA in separate determinations, due to the circumstances presented herein, including the delay which would be occasioned by consolidation, and the claimed threat to the safety of firefighters which continues during the pendency of these proceedings, we shall deny the City's request for consolidation without prejudice to consideration of consolidation of the petitions at a later stage in these proceedings.

With regard to the improper practice and scope of bargaining petitions filed by the UFA, we shall consolidate those proceedings for the purpose of deciding the City's motions to dismiss since they are ripe for adjudication, and concern related issues which involve the same parties, facts and chronology of events.

BACKGROUND

On November 26, 1990, the Fire Department issued Department Order 168,[3]

[3] Department Order 168 states, in relevant part, as follows:

2.3 LIGHT DUTY DIVISION AIDES

Effective January 1, 1991, the position of Division Aide will no longer be classified as a full duty position. All full duty firefighters presently assigned or detailed as Division Aides SHALL be replaced by light duty firefighters. This reduction in full duty headcount is one of the budget reduction measures mandated for this Department.

All light duty firefighters who anticipate remaining on light duty for at least one year are encouraged to apply for assignment as a Division Aide. The Department intends to fill these positions, to the greatest extent possible, with long term light duty personnel. These positions will be considered priority light duty assignments.

Interested members shall forward a report no later than December 10, 1990 to Deputy Chief Edmund P. Cunningham, Bureau of Personnel requesting consideration for such assignment. Report shall include member's name, badge number, assigned unit and present light duty assignment.

The Bureau of Personnel in conjunction with the Bureau of Operation and the Bureau of Health Services shall review all applications and select those long term light duty firefighters most qualified to serve as Division Aides. Selected members shall be assigned, whenever possible, to the Division of their choice. Work schedule shall be in accordance with the established firefighter group chart.

2.4 TRANSFER REQUESTS, DIVISION AIDES

Effective January 1, 1991, the position of Division Aide will no longer be a full duty position. Only light duty firefighters will be assigned and/or detailed as Division Aides from that date forward. All presently assigned and/or detailed full duty Division Aides shall be re-assigned effective January 1, 1991. Full duty Aides assigned to Divisions shall forward a Transfer request to the Deputy Chief of Personnel Edmund P. Cunningham before December 19, 1990. Full duty aides who are detailed to Division shall, unless they request a transfer to another unit, return to their assigned unit, effective 0900

(continued...)

wherein it announced its intention to staff the position of Division Aide with light duty firefighters. Firefighters are placed on light duty when, for any reason, they are unable to perform the physically demanding duties of a firefighter.

Fire Department procedures provide that in the event of a fire scene operation, Battalion Chiefs and their Aides (referred to as Battalion Chief Aides) are the first level of Command to report to the scene. In the case of an expanding firefighting operation, Deputy Chiefs and their Aides (referred to as Division Aides) are dispatched to the scene. If a multiple alarm is called, Deputy Assistant Chiefs and their Aides and Assistant Chiefs and their Aides (referred to as Staff Chief Aides) are dispatched to the scene. Finally, in the event that a fourth alarm is called, the Chief of Department and his Aide would be dispatched to the scene.

At the time Department Order 168 was announced, 305 individuals were serving as Aides to the various Chiefs. Of these, 55 were serving as Division Aides and would be affected by Department Order 168. The remaining 250 Chief's Aide positions will not be affected by Department Order 168, and will continue to be filled by full duty firefighters.

In general, the role of Chief's Aides in fire and emergency operations includes emergency vehicle operation, reconnaissance, intelligence gathering and communication of this information to the Command Chief at the scene.

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[3](...continued)
hours, January 1, 1991.
Every effort shall be made, to the greatest extent possible, to assure that effected members are transferred to a unit of their choice.

According to petitioner, the Chiefs (Command Chiefs) in charge of fire and emergency scene operations rely heavily on the Aides to communicate their observations of the fire structure and its surroundings, as well as the fire operation itself. They are the Command Chief's principal communication links to the firefighting unit. The Command Chief evaluates the information provided by the Aides and directs the firefighting operation accordingly. In order to make these observations, Aides are often dispatched to advanced positions within the fire structure and exposure buildings.[4]

The Chief's Aides also may be called upon to give assistance at the fire scene if prior to the arrival of the Firefighter Assist Team or Rescue Company the Incident Commander determines that a firefighter is in need of assistance. This procedure was developed in response to a citation issued to the Fire Department, on or about July 16, 1989, by the New York State Department of Labor, Division of Public Employee Safety and Health (PESH) for the violation of Section 1910.134(e)(3)(i) of the Occupational Health and Safety Act ("OSHA").[5] Section 1910.134(e)(3)(i) requires the presence of at least one other person in areas where the wearer of a respirator could be overcome by a toxic or oxygen deficient atmosphere. By letter dated December 3, 1990, PESH accepted the Fire Department's proposal to amend its procedures which provides, inter alia, that:

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[4] It is not disputed that prior to the issuance of Department Order 168, Division Aides performed the duties described above. Respondent notes, however, that the Fire Department has issued operating guidelines which, it contends, limit the duties of light duty firefighters assigned as Division Aides pursuant to Department Order 168. See infra p. 21, n. 14.

[5] 29 CFR Section 1910.134(e)(3)(i).

> 6. If prior to the arrival of the Firefighter Assist Team or Rescue Company the Incident Commander determines that a member may become in need of assistance, the IC shall designate any of the following for assistance or rescue:
>
> 6.1 Companies held in reserve.
>
> 6.2 Companies available for immediate reassignment.
>
> 6.3 Members available for immediate reassignment. Example: - Ladder Company Chauffeur, Roofman, members of Rescue or Squad Companies, etc.
>
> 6.4 Uncommitted chauffeurs or **chief's aides**.
>
> 6.4.1 It is imperative that the IC reassign these members as early as possible in the operation.
>
> 6.4.2 These members shall be properly equipped per Department Regulations 11.3.1 and be placed in a stand-by position at the command post or other location designated by the IC.
> (Emphasis added)

Accordingly, the citation against the Fire Department was removed.

On December 12, 1990, the UFA filed two petitions against the City. In its improper practice petition, the UFA requested that the City be ordered to bargain immediately with petitioner regarding the change in personnel policy set forth in Department Order 168, i.e., the assignment of "light duty" firefighters to the position of Division Aides, and to rescind Department Order 168 pending such negotiations. In its scope of bargaining petition, the UFA requested that the Board of Collective Bargaining ("the Board") find that the City's unilateral change in the assignment of light duty firefighters to the position of Division Aides, effective January 1, 1991, has a practical impact on firefighters and, therefore, is within the scope of bargaining. The UFA further requested that the Board issue an order: (1) directing the City to engage in collective bargaining with the UFA over the means to alleviate the

practical impact caused by such change; (2) directing the City to rescind Department Order 168, paragraphs 2.3 and 2.4 pending the outcome of the ordered negotiations; and (3) granting the UFA such other and further relief as the Board deems just and proper.[6]

On December 19, 1990, Tobias Bermant, Deputy Commissioner and General Counsel of the Office of Labor Relations, wrote to Steven C. DeCosta, Deputy

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[6] Thereafter, on December 13, 1990, the UFA filed a complaint against the City in Supreme Court, New York County, in an action for declaratory judgment and injunctive relief. (Supreme Court, New York County, Index No. 27472/90. (Judge Herman Cahn).) In that proceeding, the UFA sought to prevent the City from implementing Department Order 168 pending a final disposition of the underlying dispute by the OCB. To that end, the UFA requested an Order:

> a. granting a temporary restraining order enjoining and restraining the City from implementing Department Order 168, paragraphs 2.3 and 2.4, until such time as a hearing can be had on the UFA's request for a preliminary injunction;
>
> b. permanently enjoining and restraining the City from implementing and enforcing Department Order 168, paragraphs 2.3 and 2.4, pending a determination by the OCB of the merits of the UFA's Improper Practice and Scope of Bargaining petitions; and
>
> c. such other and further relief, including attorney's fees, as may be just and proper.

The City cross-moved to dismiss the complaint pursuant to the Civil Practice Law and Rules, Section 3211(a)(2), (5) and (7).

On December 24, 1990, Judge Cahn denied the UFA's motion for a preliminary injunction, finding that:

> No irreparable harm will come to plaintiff because if OCB rules in favor of plaintiff after a unilateral implementation of Order 168 by defendants, they will have to rescind the order and return to the status quo ante. The implementation of the order will not affect OCB's decision making process and, therefore, the jurisdiction of OCB need not be protected by a preliminary injunction.

Chairman and General Counsel of the Office of Collective Bargaining ("OCB"), noting that concurrent with the filing of its improper practice petition, the UFA had filed a related scope of bargaining petition. Mr. Bermant stated that "[e]ssentially, the UFA is claiming that a new policy, effective 1/1/91, of assigning, light duty firefighters to the position of Deputy Chief Aides constitutes simultaneously an improper practice and a scope of bargaining violation for failure to bargain about the proposed policy." He argued that the provisions of the NYCCBL and the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules") do not permit the concurrent filing of a scope of bargaining petition and an improper practice petition based on the failure to bargain over the same disputed agency policy. According to Mr. Bermant,

> The reasons are self-evident. There cannot be a finding of an improper practice for failure to bargain unless there is a **prior** determination of a mandatory subject of bargaining. Moreover, such a finding of a mandatory bargaining issue would then trigger a reasonable period of time for the parties to bargain in good faith. Only after the exhaustion of that period would a petition alleging an improper practice for failure to bargain be appropriate.

Therefore, "in order to assure orderly administrative procedures consistent with the NYCCBL and [the OCB] Rules," Mr. Bermant requested that the Executive Secretary dismiss the improper practice petition as premature, untimely, and insufficient as a matter of law.

In a letter dated December 21, 1990,[7] Mr. DeCosta responded to Mr.

[7] The UFA contends that it was not served with a copy of the City's December 19, 1990 letter requesting dismissal of the improper practice petition and, therefore, did not know that such a request had been made until it received Mr. DeCosta's letter (continued...)

Bermant's request on behalf of the City. Mr. DeCosta informed the City that prior to the date of Mr. Bermant's letter, the UFA's improper practice petition had been reviewed by the Executive Secretary, and had been found not to be so untimely or insufficient as to warrant summary dismissal under Section 7.4 of the OCB Rules.[8] Notice of the Executive Secretary's

[7](...continued)
denying the request.

[8] Section 7.4 of the OCB Rules provides as follows:

> **Improper Practices.** 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 by one (1) or more public employees or any public employee organization acting in their behalf or by a public employer together with a request to the Board for a final determination of the matter and for an appropriate remedial order. Within ten (10) days after a petition alleging improper practice is filed, the Executive Secretary shall review the allegations thereof to determine whether the facts as alleged may constitute an improper practice as set forth in [Section 12-306] of the statute. If it is determined that the petition, on its face, does not contain facts sufficient as a matter of law to constitute a violation, or that the alleged violation occurred more than four (4) months prior to the filing of the charge, it shall be dismissed by the Executive Secretary and copies of such determination shall be served upon the parties by certified mail. If, upon such review, the Executive Secretary shall determine that the petition is not, on its face, untimely or insufficient, notice of the determination shall be served on the parties by certified mail, provided, however, that such determination shall not constitute a bar to the assertion by respondent of defenses or challenges to the petition based upon allegations of untimeliness or insufficiency and supported by probative evidence available to the respondent. Within ten (10) days after receipt of a decision of the Executive Secretary dismissing an improper practice
(continued...)

determination was sent to the City on December 13, 1990.[9] Since determinations by the Executive Secretary are not subject to reconsideration based upon the submission of arguments by the respondent, Mr. DeCosta concluded that the City's request for dismissal by the Executive Secretary could not be entertained. Mr. DeCosta did, however, invite the City to submit its arguments in support of its request for dismissal in its answer to the improper practice petition and the related scope of bargaining proceeding.

Thereafter, on December 24, 1990, the City filed two motions to dismiss. In its motion to dismiss the UFA's improper practice petition, the City asserted that the petition fails to state a cause of action upon which relief may be granted under the NYCCBL because it is premature, inconsistent with and duplicative of the pending scope of bargaining petition. In its motion to dismiss the UFA's scope of bargaining petition, the City argued that that petition also fails to state a cause of action upon which relief may be

[8](...continued)
petition as provided in this subdivision, the petitioner may file with the Board of Collective Bargaining an original and three (3) copies of a statement in writing setting forth an appeal from the decision together with proof of service thereof upon all parties. The statement shall set forth the reasons for the appeal.

[9] In his letter dated December 13, 1990, Mr. DeCosta acknowledged receipt of the UFA's improper practice petition, and informed the UFA and the City that the petition had been reviewed by the Executive Secretary who determined that it was not, on its face, so untimely or insufficient as to warrant summary dismissal pursuant to Section 7.4 of the OCB Rules. Accordingly, the City was directed to serve and file its answer to the petition within ten days of its receipt of the letter.

granted under the NYCCBL because it is premature. In both proceedings respondent requested that, in the event its motions to dismiss are denied, it be given fourteen days from the date of receipt of such denial to file its answer to the UFA's petition, and such other and further relief as the Board deems just and proper.

On January 4, 1991, the UFA filed its affirmations and brief in opposition to the City's motions to dismiss.[10] In its brief, the UFA argued that given the serious nature of the dispute, if the Board denies the motions to dismiss, the City should be ordered to file its answers to the petitions within five days of the Board's interim decision.

Thereafter, on January 17, 1991, the City filed its replies to the UFA's affirmations in opposition to the motions to dismiss.

POSITIONS OF THE PARTIES

IMPROPER PRACTICE PETITION

Respondent's Position

The City first contends that the UFA's improper practice petition is premature and, therefore, must be dismissed. In support of its position the City notes that in addition to its improper practice petition, the UFA filed a scope of bargaining petition alleging a per se practical impact on the safety

[10] On December 27, 1990, petitioner wrote to Mr. DeCosta requesting, with the consent of the City, until January 4, 1991 to serve and file its answer to the City's motions to dismiss. By letter dated December 28, 1990, Mr. DeCosta granted the UFA's request.

of firefighters resulting from the unilateral change in personnel policy set forth in Department Order 168. As a remedy, the UFA requested that the City be ordered to bargain over the implementation of Department Order 168, and that Department Order 168 be rescinded pending such negotiations. As of this date, no determination has been rendered by the Board in the scope of bargaining proceeding.

The City maintains that an improper practice petition in which a refusal to bargain has been alleged necessarily assumes that there has been a prior determination of a duty to bargain over the subject matter. Where, as in the instant case, no such determination has been made, there can be no finding of improper practice based upon a refusal to bargain. In short, the City contends, "[t]here can be no determination that Respondent committed an improper practice for violating a duty to bargain if the same petitioner is simultaneously asking for a determination such a duty exists ... [A]n alleged violation of [a] non-existent duty is inconsistent [on] its face and insufficient as a matter of law." Moreover, the City contends, whether or not it would argue that an improper practice petition filed after a determination had been made in a scope of bargaining proceeding was untimely, as the UFA alleges, is purely speculative and insufficient to rebut its contention that the improper practice petition is premature.

The City further argues that the improper practice petition must be dismissed as premature because the personnel change set forth in Department Order 168 is not yet in effect. The City submits that there can be no

violation of a bargaining obligation if there has been no unilateral change.[11] In any event, the City notes that the UFA has not alleged that it requested bargaining over Department Order 168 or that such a request has been refused. "The failure to submit a bargaining demand, without more," the City claims, "is a complete defense to a failure to bargain charge."[12]

Alternatively, the City argues that the UFA's improper practice petition must be dismissed because it seeks the same result as that sought by petitioner in the pending scope of bargaining petition, i.e., a determination of a duty to bargain over Department Order 168, and, therefore, is inconsistent with and duplicative of the pending scope of bargaining petition. The City contends that this result is consistent with prior decisions wherein the Board has declined to exercise jurisdiction over an improper practice petition to avoid unnecessary duplication of effort and the risk of an

[11] In support of its position, the City cites Nassau CSEA v. PERB, 16 PERB Par. 7017 (2d Dept. 1983), wherein the New York Supreme Court, Appellate Division, upheld a determination of PERB, finding that the county did not violate its bargaining obligation when it announced that it intended to change from a noncontributory to a contributory health plan, effective six weeks after the announcement. PERB noted that the notice of the county's intent was merely an announcement of an anticipatory change and, when the employees' union requested that the county negotiate the change, it agreed. A negotiating session was held ten days after the notice was sent to the employees. Negotiations did not continue after that day because they were broken off by the unions. By so doing, PERB held, they waived their right to complain when the announced change took effect.

[12] The City cites Heuvelton Central School District, 12 PERB Par. 3007 (1979) in support of its position. In that case, PERB held that the failure of the union to present its negotiating package to the School District on or before the date specified in the parties agreement constituted, under the terms of the agreement, consent to the continuation of the agreement for one year. Accordingly, the school District was under no obligation to negotiate with the union after that date.

inconsistent determination. The City maintains that contrary to the UFA's assertion, there is no basis for consolidation of the improper practice and scope of bargaining petitions or for allowing the improper practice petition to proceed at the present time. The UFA's scope of bargaining petition requests a ruling as to the City's alleged duty to bargain and, therefore, respondent argues, is inconsistent with the improper practice petition which presupposes a favorable ruling in the scope of bargaining proceeding.

In its reply, the City argues that the UFA's assertion that the motion to dismiss the improper practice petition should not be considered because an earlier letter was submitted by the City
to the Executive Secretary of the OCB requesting dismissal of the petition is without merit. In support of its position, the City notes that nothing in the OCB Rules precludes the filing of a motion to dismiss where a previous request to dismiss a petition has been made to the Executive Secretary. Moreover, the City claims, the UFA's assertion "overlooks the fact that OCB's response to the aforementioned letter was to invite all arguments in support of dismissal of the Petition."

Petitioner's Position

The UFA submits that the City's motion to dismiss the improper practice petition has been effectively ruled on by the OCB in its denial of the City's "ex parte 'request' to dismiss" dated December 19, 1990. On that basis alone, the UFA asserts, the instant motion to dismiss should be denied.

The UFA does not dispute that the improper practice petition is closely related to its scope of bargaining petition, also filed on December 12, 1990. The UFA maintains, however, that if it waited to file the instant petition

until a final determination was issued by the Board in the scope of bargaining proceeding, the City undoubtedly would argue that the improper practice petition was untimely filed.

The UFA claims that both the improper practice petition and the scope of bargaining petition concern a mandatory subject of bargaining. It notes, however, that since the City announced Department Order 168 on November 26, 1990, it has repeatedly stated its position that the policy embodied therein is not a mandatory subject of bargaining, and that it fully intends to implement the policy without first engaging in bargaining with the Union. To that end, the UFA alleges, the City has taken substantial steps to implement the policy and, by the time the Board decides the instant motion to dismiss, will have put the policy into effect. Thus, according to petitioner, the City's allegation that the improper practice petition is premature is "absurd".

With regard to the City's assertion that the improper practice petition should be dismissed because it is duplicative of the scope of bargaining proceeding and a waste of OCB resources, the UFA notes that the OCB may exercise its discretionary authority pursuant to the OCB Rules to consolidate the proceedings in the two related petitions, thus avoiding any "risk of inconsistent determinations."[13]

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[13] Section 13.12 of the OCB Rules provides as follows:

> **Consolidation or Severance.** Two or more proceedings may be consolidated or severed by the Board on notice stating the reasons therefor, with an opportunity to the parties to make known their positions. For purposes of this section the term "proceedings" shall

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SCOPE OF BARGAINING PROCEEDING

Respondent's Position

The City asserts that the UFA's scope of bargaining petition must be dismissed because it is premature and fails to state a cause of action. In support of its assertion, the City contends that the UFA's allegations of a "clear threat" to employee safety are based on a mistaken assumption that Division Aides will be assigned to the Firefighter Assist Team and to full firefighter duties which they might not be capable of performing, thereby resulting in a potential threat to the safety of employees. The City maintains, however, that the duties of "light duty" Division Aides under operating guidelines that will be effective upon implementation of Department Order 168 will not include duties assigned to full duty firefighters.[14] To

[13](...continued)
include but not be limited to representation, arbitrability, arbitration, mediation and impasse and improper practice proceedings.

[14] In an affidavit accompanying the City's motion to dismiss the UFA's scope of bargaining petition, Chief of Department Joseph DeMeo stated that the duties of a Division Aide in responding to a fire, as set forth in the operating guidelines to be issued by the Fire Department prior to implementation of Department Order 168, will limit the duties of Division Aides to include the following:

* driving the Deputy Chief to the scene of the fire;
* relaying orders from the Deputy Chief to various units at the fire;
* monitoring communications and radios;
* acting as liaison with other City agencies;
* relaying orders from the Deputy Chief;
* transmitting additional alarms, calls for special units and equipment;

(continued...)

the extent the UFA asserts that the assignment of light duty firefighters as Division Aides will result in a practical impact on safety because they will ignore the operating guidelines, and instead engage in unsafe activities beyond the scope of their limited duties, the City maintains that such assertions are "speculative, suspect and short of any factual submission."

The City points out that in selecting candidates for the position of Division Aide, Dr. Cyril Jones, Chief Medical Officer of the Fire Department, will review the medical histories of light duty firefighters to determine whether they are capable of performing the duties of a Division Aide.[15] If a

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[14](...continued)
* transmitting progress reports.

The tasks presently performed by Division Aides which will **NOT** be performed by "light duty" Division Aides under the operating guidelines include the following:

* Division Aides will not be assigned to the hazard area at a fire and consequently will not perform reconnaissance duty inside the hazard area.

* Division Aides will not be directed to assist firefighters in distress or in an emergency condition pending the arrival of the Firefighter Assist Team.

In its reply, the City notes that the operating guidelines for light duty Division Aides referred to in Chief DeMeo's affidavit were promulgated on January 4, 1991. According to the City, the guidelines implement and confirm Chief DeMeo's assertion that light duty firefighters assigned as Division Aides will not work in the "hazard area" or perform any of the duties the UFA claims create a risk to safety.

[15] For example, the City states that Dr. Jones will be instructed to screen out any light duty firefighter who is unable, for any reason, to drive in emergency conditions through New York City street traffic. Other examples of persons who may be screened out by the Chief Medical Officer include those persons with uncontrolled hypertension, uncontrolled diabetes,
(continued...)

question remains after reviewing the candidate's medical history, the firefighter will be examined by a specialist in the relevant field of medicine. The City states that "[o]nly those light duty firefighters who are found fit to perform under the operations guidelines will be assigned as Division Aides."

The City further contends that other full duty Chiefs' Aides will be present at all times, at any fire, to serve with the Firefighter Assist Team. In support of its contention, the City notes that in the vast majority of cases, Deputy Chiefs respond to fires where there are at least two Battalion Chiefs and two Battalion Chief's Aides present. In the few remaining cases, at least one Battalion Chief and one Battalion Chief's Aide will be present, in addition to a Chief Officer, a Rescue Company, two or more ladder companies, five or six engine companies, a Tactical Team and a Field Communication Unit. Thus, the City urges, "at all times during a fire will there be adequate firefighter coverage to assure the safety of all firefighters. Moreover, at all times during a fire there will be an adequate number of full duty Aides to serve on the Firefighter Assist Team." For this reason, the City submits, PESH, the official State agency concerned with

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[15](...continued)
persons with serious irregular heartbeats, persons who have organic central nervous system pathology, mental illness requiring treatment with psychotropic drugs, epilepsy, or hearing or uncorrected visual acuity defects.

According to the City, light duty firefighters who are assigned as Division Aides will be reexamined at appropriate intervals to ensure that they are still fit to perform the job of Division Aide. The interval of time between examinations will depend on the condition of the light duty firefighter and the time period over which there might be a change in that firefighter's condition.

employee safety, has determined that the assignment of light duty firefighters to the position of Division Aide, in conjunction with the addition of the Firefighter Assist Teams, constitutes compliance with New York State regulations. The City maintains that contrary to the UFA's assertion, PESH has approved its plan to assign light duty firefighters to the position of Division Aide. It claims that the totality of circumstances, including: (a) PESH's cautionary warning (requiring assurance by the Fire Department that light duty firefighters are not performing interior, structural firefighting operations and are not working in areas where respiratory protection is required); (b) the Fire Department's responsive assurance that light duty Division Aides would be assigned to non-hazardous duty only; (c) issuance of the operating guidelines on January 4, 1991; and (d) the Fire Department's January 8, 1991 clarifying re-statement to PESH that light duty Division Aides would be assigned to non-hazardous duty only, "can only be seen as constructive, if not express condonation by PESH of the non-hazardous, restricted use of light duty [D]ivision [A]ides by Deputy Chiefs pursuant to [Department] Order 168."

The City claims that absent a prima facie case of practical impact the petition must be dismissed on the ground that the assignment of employees is a management prerogative under Section 12-307b of the NYCCBL.[16] In the instant

[16] Section 12-307b of the NYCCBL provides, in relevant part, as follows:

> b. It is the right of the city, or any other public employer, acting through its agencies, to... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted;... and exercise

(continued...)

case, the City argues, the UFA has not alleged that anything in their collective bargaining agreement limits the City's statutory management right to assign work as it deems necessary to maintain the efficiency of operations.

The City asserts that while it may be argued that for purposes of a motion to dismiss the factual allegations of a petition may be deemed true, this cannot mean that "averments wrapped in mistaken assumptions" or conclusionary statements or opinion must be accepted as "facts". Thus, the City asserts, the UFA's arguments concerning the assignment of full duty firefighter duties to light duty Division Aides under Department Order 168 must be disregarded as unrelated to the disputed Order as it will be implemented on or after its effective date, January 1, 1991.

In addition, the City argues that the 1982 Duty Status Determinations of Former Chief of Operations Homer Bishop and Chief Medical Officer Dr. Cyril Jones must be disregarded because they assumed that the firefighters assigned to the Aides positions addressed therein would be light duty firefighters assigned "directly in the fire zone." In any event, the City notes that the letters written by Former Chief Bishop and Chief Jones set forth their opinions, not fact. Even if the letters were deemed to be true statements of opinion, however, the City claims that they are not relevant to the matter

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[16](...continued)
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 employees, such as questions of workload or manning, are within the scope of collective bargaining.

herein before the Board because they were based on assumptions that are not applicable to Department Order 168.

Finally, the City submits that the UFA's reliance on a memorandum written by Chief of Operations William Feehan, dated October 26, 1990, is misplaced. According to the City, at the time Chief Feehan wrote his memorandum opposing "civilianization" of Division Aides, he did not know that Division Aides would be light duty firefighters who would not be assigned the duties of full duty firefighters.

In conclusion, the City maintains that the UFA's scope of bargaining petition does not present any factual evidence to support its assertion that the assignment of light duty firefighters to the position of Division Aide will require them to perform as full duty firefighters. Thus, the City argues, the motion to dismiss must be granted because the UFA has failed to present any factual evidence of a per se practical impact on safety resulting from implementation of Department Order 168.

Petitioner's Position

The UFA claims that the alleged changes in the duties that will be assigned to Division Aides when Department Order 168 is implemented fails to alleviate the practical impact on safety of firefighters assigned as Division Aides, and completely fails to address the impact Department Order 168 will have on the safety of all other firefighters. At best, the UFA contends, whether the proposed changes in the duties of Division Aides will alleviate the practical impact on safety resulting from the assignment of light duty firefighters to that position raises factual issues requiring a hearing and the opportunity to fully litigate the issues. The UFA noted that at the time

it filed its answer to the City's motion to dismiss, the changes in the duties of Division Aides referred to by the City had not been officially announced. Moreover, the "operational guidelines" which the City claimed would be issued prior to implementation of Department Order 168 had not been issued, and the specifics of those guidelines were not known.

The UFA notes that it was never consulted about the policy embodied in Department Order 168, or the proposed changes in the duties of Division Aides. In fact, the UFA claims that it did not learn that the City intended to change the duties of Division Aides until the City submitted an answer to the complaint filed by the Union in Supreme Court, New York County, on or about December 18, 1990.

In any event, the UFA submits that the City "oversimplifies and minimizes" the duties that will be assigned to Division Aides once Department Order 168 is implemented. The UFA notes that in periods of high fire response activity there have been occasions when the Deputy Chief and Division Aide were the first Chief and Aide on the scene. In addition, the UFA argues that the City has completely failed to address the issue of how, when and by whom the "hazard area" will be defined at the fire scene; or how Division Aides can effectively perform the duties referred to by the City while staying out of "this amorphous and undefined 'hazard area'."

The UFA maintains that "the term 'hazard area' is undefinable and any guideline based on keeping light duty Aides away from the undefinable 'hazard area' is totally meaningless as a means of alleviating any impact on safety." The UFA claims that the "hazard area" can and will expand during the course of a firefighting operation, often with little or no warning. It is this type of

fire scene operation, i.e., fires that are escalating and becoming more serious in nature, to which Deputy Chiefs and their Aides, Division Aides, are dispatched. Thus, the UFA argues, a guideline such as that proposed by the City will create confusion at the fire scene in that there can be no uniformity in its application to each fire. Such confusion, the UFA maintains, can cost precious seconds or minutes in the command chain.

The UFA contends that the Chief Medical Officer, two Chief's of Operations and every Staff Chief of the Fire Department has protested the assignment of light duty firefighters to the position of Division Aide based on the impact such assignments will have on safety. Moreover, with respect to the duties the City has indicated a light duty Division Aide will be required to perform, the UFA submits that they cannot be performed effectively if the Division Aide is away from the fire scene or away from the Deputy Chief to whom the Aide is assigned. To the contrary, the UFA contends that:

> Even, assuming, arguendo, the Division Aide can be placed away from the undefinable "hazard area" and away from immediate danger, the Aides' role in communicating the Deputy Chief's orders cannot be accomplished with the same efficiency as the current circumstances. Division Aides are not superfluous personnel at the fire scene, they are integral members of the firefighting unit... the Aide is the Chief's eyes and ears at the fire scene. Respondent's plan to keep them away from the scene effectively eliminates a vital member of the firefighting team. (The Chief can no longer rely on an experienced Aides' observations). This only compromises the overall operation. Instead of taking steps towards reducing the impact on safety, Respondent is taking steps backwards.

The UFA further argues that the medical screening proposed by the City to ensure that light duty firefighters are capable of performing the duties required of Division Aides under Department Order 168 fails to alleviate the

practical impact on safety for a number of reasons. First, the UFA asserts that it is impossible to medically evaluate an individual for every contingency that may arise during a fire scene operation. While a firefighter on light duty due to a knee injury may be evaluated as capable of driving an emergency vehicle, sitting in the car and/or standing and monitoring radios and relaying radio communications, in the event of a building collapse, explosion or simply rapidly deteriorating fire conditions, the light duty firefighter might not be physically capable of getting out of harms way with sufficient speed. Moreover, the UFA submits that the City "takes an incredibly myopic view of the impact those assignments have on the entire bargaining unit." According to the UFA, medical screening does absolutely nothing regarding the impact the loss of a full duty Division Aide has on the overall efficiency of the operation. It cannot be contested, the UFA argues, that a less efficient operation increases the risks confronting firefighters.

The UFA contends that the City's assertion that PESH approved its plan to assign light duty firefighters to the position of Division Aide is a "brazen mischaracterization" of PESH's position on this topic. In support of its contention, the UFA notes that in a letter dated December 3, 1990 from Patricia Adams, PESH Program Manager, to Michael Munns, Associate Counsel of the Fire Department, PESH simply warned the City that if its plan is implemented, the Fire Department should ensure that they are in compliance with OSHA regulations. As confirmed in a letter dated January 2, 1991 from Ms. Adams to Christopher O'Hara, counsel to the UFA, the UFA argues, "PESH did not approve the plan as the City would have the Board believe."

Finally, the UFA asserts that the City's allegation that the scope of

bargaining petition is premature is wholly without merit. The UFA notes that Department Order 168, announced on November 26, 1990, sets forth an effective date of January 1, 1991; and argues that the City has taken steps toward implementing the policy referred to therein. "Surely," the UFA states, "this Board will not require the UFA to wait until a firefighter is injured or killed as a result of this policy before filing the instant petition." Accordingly, the UFA requests that the City's motion to dismiss the scope of bargaining petition be denied, and the processing of the petition be expedited.

DISCUSSION

It is well settled that for purposes of evaluating a motion to dismiss, we must deem the factual allegations of the petition to be true and limit our inquiry to whether, taking the facts as alleged by the petitioner, a cause of action under the NYCCBL has been stated.[17] A respondent is not permitted to assert facts contrary to those alleged by the petitioner in support of a motion to dismiss.[18] It is not the function of this Board, in considering a motion to dismiss, to resolve questions as to the credibility and weight to be given to each of two or more inconsistent versions of a disputed factual matter. Those questions are properly determined after the holding of an evidentiary hearing.[19]

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[17] Decision Nos. B-39-90; B-34-89; B-7-89; B-36-87; B-20-83; B-17-83; B-25-81.

[18] Decision No. B-20-83; B-25-81.

[19] Id.

In the instant matter, the UFA asserts that the City unilaterally announced a change in personnel policy, Department Order 168, without providing the Union with an opportunity to bargain regarding that change. The UFA contends that Department Order 168, the assignment of light duty firefighters to the position of Division Aides, will have a direct, immediate and specific adverse impact on the safety of both light duty firefighters assigned as Division Aides and full duty firefighters. In support of its position, the Union notes that several Chiefs in the Fire Department have protested plans similar to Department Order 168 based upon their findings that such assignments will impact negatively on the safety of firefighters. Accordingly, the UFA claims that the City violated the NYCCBL by refusing to negotiate with the Union prior to its announcement of Department Order 168; and requests that the City be directed to negotiate with the Union over the means to alleviate the practical impact caused by the changes set forth in Department Order 168.

The City's motion to dismiss the UFA's improper practice petition is based, in part, on the premise that the petition is premature. The City asserts that no refusal to bargain can be found where, as here, the alleged change in personnel policy has not yet been implemented and, moreover, no prior determination has been made by the Board that there exists a duty to bargain over the subject matter.

Section 12-307b of the NYCCBL reserves to the employer exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining. This Board has repeatedly construed Section 12-307b to guarantee the City the unilateral right to assign

and direct its employees, to determine what duties employees will perform during working hours, and to allocate duties among its employees, unless that right is limited by the parties themselves in their collective bargaining agreement.[20]

Thus, we find that contrary to the UFA's assertion, it is within the City's statutory management right to promulgate a change in personnel policy, such as that set forth in Department Order 168. Furthermore, we note that the UFA has not referred to any provision of the collective bargaining agreement limiting the Fire Department's right to so act. Rather, the UFA asserts a violation of the NYCCBL based on the City's alleged refusal to bargain concerning the practical impact on safety resulting from implementation of Department Order 168.

As a general rule, there can be no finding of a refusal to bargain in violation of Section 12-306a(4) of the NYCCBL, based on alleged impact until it has been determined by the Board that a practical impact actually exists, and that the employer has not expeditiously acted unilaterally to relieve the impact.[21] The determination of the existence of a practical impact is a condition precedent to the determination of whether there are any bargainable issues arising from the impact. This is a question of fact which may necessitate a hearing.[22]

In prior decisions we have recognized that the existence of a clear

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[20] Decision Nos. B-37-87; B-23-87; B-15-87; B-6-87; B-4-83.

[21] Decision Nos. B-37-87; B-23-87; B-15-87; B-6-87; B-4-83; B-16-81.

[22] Decision Nos. B-31-88; B-38-86; B-18-85; B-2-76; B-16-74.

threat to employee safety may warrant the imposition of a duty to bargain over the impact of a management decision prior to the time the decision is implemented.[23] This does not mean, however, that the union need only claim a practical impact on safety in order to require the employer to bargain. The question of whether there is a clear threat to employee safety, if disputed by the employer, is a matter to be determined by this Board before the obligation to bargain arises. The fact that a threat to safety may justify imposing a duty to bargain prior to the time of implementation does not relieve the union of the burden of first proving the existence of a threat to safety.[24]

Applying the above-stated principles to the instant matter, it is clear that the UFA's assertion that the City has improperly refused to bargain concerning demands for the alleviation of the perceived impact is at best premature where, as in the case herein, there has been no determination by the Board that the management action complained of has created a practical impact on safety. Accordingly, we shall dismiss the UFA's improper practice petition, without prejudice to the filing of another petition in the future in the event circumstances change.

Turning our attention to the City's motion to dismiss the scope of bargaining petition, we find that contrary to the City's assertion, that petition is not premature. As noted previously, the existence of a clear threat to employee safety may warrant the imposition of a duty to bargain over the impact of a management decision prior to the time the decision is

[23] Decision Nos. B-69-88; B-31-88; B-37-82; B-6-79; B-5-75; B-3-75.

[24] Decision Nos. B-69-88; B-31-88; B-37-82; B-5-75.

implemented.[25] Accordingly, we find that contrary to the City's assertion, the scope of bargaining petition was not filed prematurely merely because Department Order 168 was scheduled to go into effect after the scope of bargaining petition was filed. Additionally, we find that the UFA has alleged sufficient facts in support of its claim that issuance of Department Order 168 will have a practical impact on the safety of light duty firefighters assigned as Division Aides and full duty firefighters to withstand the City's motion to dismiss. Therefore, we will deny the City's motion to dismiss the UFA's scope of bargaining petition, and direct the City to file its answer thereto. Upon receipt of the City's answer, the UFA will have an opportunity to file its reply.

Even were we to consider the operating guidelines referred to by the City in its motion to dismiss, and thereafter promulgated on January 4, 1991, our decision with regard to the UFA's scope of bargaining petition would be the same. The UFA has presented sufficient factual evidence in support of its claim of practical impact on safety in its answer to the City's motion to dismiss to withstand the motion to dismiss. In this regard, we note that the UFA disputes the City's assertion that the changes in the duties of light duty firefighters assigned as Division Aides, set forth in the operating guidelines, will alleviate the practical impact on the safety of firefighters resulting from Department Order 168. The UFA contends that the City "oversimplifies and minimizes" the duties that will be assigned to Division Aides once Department Order 168 is implemented. It notes that in periods of

[25] Decision Nos. B-69-88; B-31-88; B-37-82; B-6-79; B-5-75; B-3-75.

high fire response activity, Deputy Chiefs and their Division Aides may be the first Chiefs and Aides on the scene. Furthermore, the UFA maintains that contrary to the City's assertion, PESH has not approved its plan to assign light duty firefighters as Division Aides.

Therefore, for all of the reasons stated above, we shall grant the City's motion to dismiss the UFA's improper practice petition;[26] and deny the City's motion to dismiss the UFA's scope of bargaining petition. It is the Board's well settled policy to expedite the adjudication of matters of practical impact on employee safety. Accordingly, due to the delay already occasioned by the filing of the instant motions to dismiss, and considering the nature of the subject at issue before the Board and the lengthy and specific allegations of fact already submitted by the City in connection with this matter, the City is ordered to serve and file its answer to the UFA's scope of bargaining petition within five (5) days of receipt of the instant decision.

O R D E R

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

DETERMINED, that the request filed by the City of New York for consolidation of the improper practice and scope of bargaining petitions filed by the Uniformed Firefighters Associations of Greater New York, docketed as

[26] In light of our determination herein, we find it unnecessary to address the City's argument that the improper practice petition must be dismissed because it is duplicative of and inconsistent with the scope of bargaining petition.

BCB-1346-90 and BCB-1347-90, respectively, and the improper practice and scope of bargaining petitions filed by the Uniformed Fire Officers Association, docketed as BCB-1350-90 and 1359-91, respectively, shall be denied without prejudice to consideration by the Board of a request for consolidation of the above-referenced petitions at a later stage in these proceedings, and it is further,

DETERMINED, that the motion of the City of New York to dismiss the improper practice petition filed by the Uniformed Firefighters Association of Greater New York, docketed as BCB-1346-90, be, and the same hereby is, granted; and it is further

DETERMINED, that the motion of the City of New York to dismiss the scope of bargaining petition filed by the Uniformed Firefighters Association of Greater New York, docketed as BCB-1347-90, be, and the same hereby is, denied; and it is further

ORDERED, that the City of New York shall serve and file an answer to the scope of bargaining petition docketed as
BCB-1347-90 with five (5) days of receipt of this Interim Decision and Order.

DATED: New York, New York
January 24, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE

MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER