UFA v. City, 47 OCB 61 (BCB 1991) [Decision No. B-61-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding	:	
-between-	:	
UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, Petitioner,	:	DECISION NO. B-61-91
	:	DOCKET NO. BCB-1403-91
-and-	:	
CITY OF NEW YORK, Respondent.	:	

DECISION AND ORDER

On July 29, 1991, the Uniformed Firefighters Association of Greater New York ("the UFA" or "the Union") filed a verified improper practice petition against the City of New York ("the City"), charging that the City committed an improper practice when it announced its intention to replace police officers with Fire Marshals on a joint public safety task force. The City, appearing by its Office of Labor Relations, filed a verified answer to the improper practice petition on August 30, 1991. The Union filed a reply on October 17, 1991.

BACKGROUND

On March 26, 1990, a fire occurred at what was alleged to be an illegal social club in the Bronx in which eighty-seven people lost their lives. In response to that tragedy, the Mayor ordered the creation of a Social Club Task Force. The Task Force is responsible for monitoring cabarets, social clubs, and other places of assembly for their compliance with building and fire codes so as to prevent the recurrence of a similar tragedy in the future. Task Force teams originally consisted of six police officers, one police supervisor, one Building Department inspector, and one fire lieutenant.

By letter dated February 11, 1991, Fire Department Deputy Commissioner Leonard A. Mancusi informed the Union that the Department was preparing to hire Fire Marshals and Supervising Fire Marshals to replace police officers

and police sergeants currently assigned to Task Force duty. According to the Deputy Commissioner's letter, the plan already had the approval of John Knox, the Fire Marshals' representative to the UFA.

By letter dated July 3, 1991, the Union's attorneys informed the Department that the UFA objected to the proposed change in Fire Marshals' duties. According to the letter, the change "would constitute a change in their working conditions, which would be a matter subject to mandatory collective bargaining." The letter also challenged the way that the staffing modification plan was to be funded. It asked that the program not be implemented pending clarification of these issues.

The parties have incorporated the current job description for Fire Marshals into their collective bargaining agreement. It

makes no mention of service on a Social Club Task Force. The complete text of the job description is appended to the end of this decision.[1]

POSITIONS OF THE PARTIES

Union's Position

The Union's petition reiterates one of the contentions that its attorneys made in the July 3 letter to the Deputy Commissioner: The Fire Department's announced intention to assign Fire Marshals to the Social Club Task Force is a mandatory subject of bargaining that cannot be imposed unilaterally because the work will include new and additional police duties. The Union claims that Fire Marshals have never before performed this work, and they have received no training for it.

Responding to the defenses raised by the City in its answer, the Union argues that the statutory managerial rights provision is an insufficient justification for the assignment because Task Force work is too far removed from the essential duties and functions of Fire Marshals.

On the matter of timeliness, the Union contends that its petition is neither premature nor time-barred. It argues that

[1] See Appendix A, page 14, infra.

the four-month filing period runs either from the date that the Department made its announcement, or from the date of its implementation, whichever is later. Since the Department has not yet implemented the change, assertedly the claim is not time-barred. On the other hand, the Union contends that the petition is not premature because the Department has announced that is preparing to implement its decision. Thus, the claim is ripe since the impact of the assignment to the Task Force assertedly will occur in the immediate or foreseeable future.

Finally, the Union maintains that the existence of the Fire Marshal job description in the parties' collective bargaining agreement does not divest this Board of jurisdiction over its improper practice charge. According to the Union, the mere existence of the job description does not diminish the Board's power to rule on whether the parties have a duty to negotiate over job assignments. The Union contends that this Board must consider whether the new duties are essential functions of the Fire Marshal position. In its view, they are not. Therefore, the Department's unilateral decision to replace police officers and police sergeants on the task force with Fire Marshals, without first negotiating to impasse with the UFA, assertedly is an improper practice within the meaning of Section 12-306a.

[formerly Section 1173-4.2] of the New York City Collective Bargaining Law ("NYCCBL").[2]

City's Position

The City argues that it has the managerial right, under Section 12-307b. of the NYCCBL,[3] to determine the job assignments of its employees. The City notes that the Union, by its own words, is contesting the assignment of duties to Fire Marshals, and it asserts that managerial decisions on such matters are

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[2] NYCCBL §§12-306a. provides as follows:

> **Improper practices; good faith bargaining.**
> **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 employees in the exercise of their rights granted in section [12-306] 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.

[3] NYCCBL §12-307b., the statutory management rights clause, provides, in pertinent part, as follows:

> It is the right of the city [to] . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work. . . .

not within the scope of collective bargaining.

Secondly, the City contends that this Board lacks jurisdiction over the Union's claim because the parties incorporated the Fire Marshal job description into their collective bargaining agreement. According to the City, once a subject is covered contractually, this Board may not consider a claimed violation of that subject in the context of an improper practice proceeding.

Finally, the City asserts that the Union's claim is premature because the decision to assign Fire Marshals to the social club task force has not yet occurred, and there is no date certain when this assignment will take place. In the alternative, the City contends that because the Department notified the Union of intention on February 11, 1991, and the Union delayed filing its improper practice petition until July 29, 1991, the claim is untimely because it was not filed within four months of the date of the act complained of.

DISCUSSION

This case involves many competing issues. The Union contends that the City's announced change in the composition of the Social Club Task Force amounts to new and unsafe working conditions for Fire Marshals. As such, the announcement allegedly involves a mandatory subject of bargaining that the employer may not impose unilaterally. The City responds that it has the managerial authority to alter the duties of its employees. It also contends that, in any event, the incorporation of the Fire Marshals' job description in the parties' collective bargaining agreement forecloses our jurisdiction in this matter. In addition, the City raises alternate theories of untimeliness. We shall consider each of these assertions in turn, dealing with procedural matters first.

Timeliness

Section 7.4 of the Revised Consolidated Rules of the Office of Collective Bargaining provides that when a public employer has engaged or is engaging in an improper practice, a petition may be filed within four months thereof. Where an action complained of arises more than four months prior to the filing of the petition, and there is no allegation that it continued or occurred at any time within the four month time limitation prescribed by Rule 7.4, the petition will be dismissed as untimely.[4] However, it is also true that a union appropriately interposes itself only after an action of management has had an immediate impact on the employees represented by the union, or that it necessarily entails an impact in the immediate or foreseeable future.[5] Thus, a party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented and the charging party is injured thereby.[6] In this case, the City has yet to assign Fire Marshals to the Task Force. Thus, because the announced intention of the Department has not yet been implemented, there has been no injury and the petition is not untimely.

On the other hand, the City's claim that the petition is premature concerns the question of ripeness, an issue that has arisen traditionally in the scope of bargaining context. We have long held that the policy carried out by the statutory structure of the NYCCBL permits a finding by this Board on the bargainability of a particular subject without requiring the parties to come before us in a procedural posture where one already may have committed an improper practice.[7]

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[4] Decision Nos. B-30-91; B-60-88; and B-18-82.

[5] Decision Nos. B-30-91; B-1-90; B-42-88; B-44-86; and B-25-85.

[6] Decision No. B-30-91.

[7] Decision No. B-5-75.

In this case, there is no question that a controversy exists between the parties on the bargainability of the assignment of Fire Marshals to the Social Club Task Force. The employer has stated its intention to make the assignments, and the Union has stated its opposition. Our duty is to deal with this controversy as expeditiously as possible. If the Union can sustain its claim that the assignments will change Fire Marshals working conditions, we may appropriately issue a bargaining order even though the plan has not yet been implemented. Accordingly, we find that the Union's petition is not premature.

Existence of the Job Description in the Agreement

The presence of the job description for Fire Marshals in the parties' collective bargaining agreement creates a potential foundation for a contractual and, arguably, an arbitrable issue. Alleged contractual violations may be subject to various forms of redress, but they may not be rectified by this Board in the exercise of its jurisdiction over improper practices. Section 205.5(d) of the Taylor Law[8] precludes us from exercising jurisdiction over a claimed violation of a collective bargaining agreement that does not otherwise constitute an improper practice.[9]

In this case, however, the Union's petition was silent on the

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[8] Section 205.5(d) of the Taylor Law, which is applicable to this agency, provides, in pertinent part, as follows:

> . . . the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

[9] Decision Nos. B-47-89; B-46-88; B-35-88; B-55-87; B-37-87; B-29-87; and B-6-87.

possibility that a contractual violation had occurred or was about to occur. The question arose only after the City asserted it as a defense in its answer. Since the Union did not contend, in the improper practice context, that the assignment of Fire Marshals to the Social Club Task Force states a contractual claim, our jurisdiction over this matter does not conflict with Taylor Law Section 205.5(d).

Change of Fire Marshals' Duties As a Mandatory Subject of Bargaining

The New York City Collective Bargaining Law imposes a duty upon the employer, as well as upon the employees' representative, to bargain in good faith on matters that are within the scope of collective bargaining. These matters, which include wages, hours and working conditions, are classified as mandatory subjects of bargaining. This does not mean, however, that every decision of a public employer that may affect a term and condition of employment automatically becomes a mandatory subject of negotiation. Although the parties also remain free to bargain over non-mandatory subjects, generally there is no requirement that they do so.[10]

It is well settled that management has the unilateral right to decide, within a general job description of a title, the duties that are appropriate for employees in that title. Similarly, management has the right to assign work in a way it deems necessary to maintain the efficiency of governmental operations.[11] As long as the tasks assigned are an aspect of the essential duties and functions of the position, there is no mandatory obligation to

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[10] Decision Nos. B-5-90; B-1-90; B-31-89; B-70-88; and B-7-77.

[11] NYCCBL §12-307b.; Decision Nos. B-56-88; B-37-82; B-35-82; and B-5-80.

negotiate when they are amended.[12] Thus, the critical issue for our consideration is whether the announced assignment of Fire Marshals to the Social Club Task Force involves a change in their wages, hours or working conditions, triggering a mandatory obligation to bargain under NYCCBL Section 12-307a.

Based upon the record before us, we cannot conclude that the implementation of the Department's plan necessarily will involve changes in terms and conditions of employment, since it is not apparent what variance, if any, the contemplated new duties will have from the job description for Fire Marshals.

The UFA insists that "the duties to be assigned to Petitioner's members (e.g. providing security for the Task Force Teams and making arrests) have never previously been assigned to Petitioner's members." Yet, the Union offers no proof that these are the actual duties that Fire Marshals will be performing, when and if they are detailed to the Task Force. Conclusory and speculative allegations are all that the Union has put forward. More importantly, even if we were to assume that the Union's assertions are correct, it is clear that sections b) and c) of the current job description already make Fire Marshals responsible for "apprehending" and "effecting arrests of suspects." These sections also seem to imply that Fire Marshals now perform certain types of law enforcement and security work.

Thus, we find no support for the Union's claim that the announced change in assignment of Fire Marshals to the Social Club Task Force has changed or will change an aspect of the essential duties and functions of the Fire Marshals' position. In the absence of a demonstrable change in their working conditions, there can be no mandatory bargaining obligation on the City's part. If there is no mandatory bargaining obligation, the City could not have committed an improper practice when it announced its intention to detail Fire

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[12] Decision No. B-56-88.

Marshals to Social Club Task Force.

We note, however, that possible contractual violations, if any, may remain subject to arbitral review. In dismissing the instant improper practice petition, we do so without prejudice to the Union's recourse in any other forum that it may have.

ORDER

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

ORDERED, that the improper practice petition filed by the Uniformed Firefighters Association of Greater New York and docketed as BCB-1403-91 be, and the same hereby is, dismissed without prejudice to the Petitioner's recourse in any other forum that it may have.

Dated: New York, New York
December 27, 1991

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

GEORGE B. DANIELS
MEMBER

Appendix A

Job Description - FIRE MARSHAL (UNIFORMED)

Duties and Responsibilities

Under supervision, performs responsible work in the investigation of the causes, circumstances and origins of fires and/or explo-sions; performs related work including but not limited to:

a) Looks for and examines evidence at the fire scene to de-termine origin and cause of fire; collects, preserves, and requests analysis of evidence; completes the required forms; directs and/or coordinates photographing fire scene and re-lated evidence; analyzes and interprets laboratory results to determine its potential value and relevance to the investiga-tion.

b) Performs mobile and fixed surveillance, including use of electronic devices, to gather intelligence, to identify, lo-cate and apprehend suspects and to locate witnesses; prepares and serves subpoenas to insure the appearance of witnesses and production of records relevant to the investigation; adminis-ters oaths to witnesses; obtains sworn oral and/or written testimony from witnesses; interviews witnesses and/or suspects to obtain information about investigations.

c) Applies for and executes search warrants and arrest war-rants; effects arrests of suspects; transports suspect to police precinct and central booking and completes related paperwork, including On-Line-Booking Sheet.

d) Gives testimony as expert and lay witness at hearings, jury proceedings, and criminal and civil trials.

e) Operates star-wars handie-talkie and fire department's radio to receive and transmit information.

f) Makes recommendations to immediate supervisor regarding the status of investigations.

g) Coordinates investigative activities with various federal, state, local and private agencies.

h) Provides guidance and assistance to recently trained and graduated

fire marshals.

i) Prepares fire investigation reports, including the comple-tion of related forms.

j) Coordinates, prepares and manages a schedule for daily activities.

k) Maintains and safeguards personal firearms and equipment and demonstrates proficiency in the use of firearms, as re-quired by the department's policy.

l) Ensures the proper maintenance of department vehicles and equipment.

Change of Fire Marshals' Duties As a Subject of Impact Bargaining

A union is at a serious disadvantage when it files an improper practice charge speculating that a planned but unimplemented policy will change a working condition. Unless the harm is self-evident, it can be very difficult to find the factual support necessary to sustain its case for an event that has not yet taken place.[13] A scope of bargaining proceeding, on the other hand, is a less rigorous venue for testing an announced change in the nature of work, because it permits wider latitude for drawing inferences of exceptional circumstances or of contingencies affecting safety.

Although this case arose as an improper practice charge, the City has cited statutory managerial authority as one of its defenses. The Union raised the question of a practical impact on safety by alleging that Fire Marshals will be assigned to the Task Force without training. Since the parties have referred to the issue of safety impact, we will provide a brief analysis of it, as if the Union had brought a proceeding seeking such a finding.

As we have already said, the City has the unilateral authority, under NYCCBL §12-307b., to determine the duties that are appropriate for employees within a general job description of a title, and to assign work in a way it deems necessary to maintain the efficiency of its operations. This authority is not absolute, however. It is qualified by the last sentence of Section 12-307b., which reads as follows:

> Decisions of the city . . . on those matters (managerial rights) are not within the scope of collective bargaining, but, notwithstand-ing the above, questions concerning the prac-tical impact that decisions on the above mat-ters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

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[13] Cf. Decision No. B-16-91, where the employer was found to have committed an improper practice for refusing to bargain over a no-smoking policy that was about to go into effect.

We have held repeatedly, however, that there can be no duty to bargain -- and therefore no violation of NYCCBL §12-306a.(4) by way of refusal to bargain -- arising out of a claim of practical impact until this Board has first made a determination in a proper proceeding that a practical impact exists in a given case as a result of the exercise of a management prerogative pursuant to Section 12-307b.[14] In other words, the Union's right to bargain with regard to a practical impact comes into existence only after this Board makes a finding that management, pursuant to its authority under NYCCBL §12-307b., has acted unilaterally in such a way as to create a condition through which practical impact occurs, and it has failed to alleviate such impact. The Union then is entitled to seek alleviation through negotiation with the employer.[15]

In certain types of cases, we have recognized that the potential consequences of the exercise of a management right are so serious that they may warrant a practical impact finding prior to the time that a management decision is implemented.[16] A clear threat to employee safety is a case of this type. To minimize the risk of exposing employees to danger unnecessarily, upon a minimal showing of details that demonstrate the existence of the alleged safety threat, we will order a hearing during which the parties will be given a full opportunity to present all the evidence that supports their positions.[17]

In this case, however, as we have pointed out already, the Union has provided not a soupçon of factual support for its allegations. Thus, even if we were to consider the Union's claim in the context of a scope of bargaining

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[14] Decision Nos. B-25-91; B-47-89; B-46-88; B-37-82; B-41-80; B-33-80; B-8-80; B-5-80; and B-9-68.

[15] Decision Nos. B-31-89 and B-69-88.

[16] Decision Nos. B-31-89; B-34-88; B-31-88; B-6-79; B-5-75; and B-3-75.

[17] Decision Nos. B-25-91; B-6-90; B-31-89; B-4-89; B-70-88; and B-69-88.

proceeding, we could find no evidence that a safety impact will result once the City assigns Fire Marshals to the Social Club Task Force. We hasten to add, however, that this is an advisory finding. It is without prejudice to the filing of a scope of bargaining petition by the UFA containing sufficient factual allegations of exceptional circumstances or threats to employee safety to warrant our further consideration of such a claim.