Local 1182, CWA, 5 OCB2d 41 (BCB 2012)

(IP) (Docket No. BCB 3033-12)

Summary of Decision*:** The Union claimed that the NYPD violated NYCCBL §§ 12-306(a)(1), (4), and 12-306(c) by failing to bargain over the practical impact on the safety of Traffic Enforcement Agents ("TEAs") resulting from a change in their duties. The specific change in duties giving rise to the claim of a failure to bargain over practical impact was that Level II TEAs are no longer authorized to issue tickets for traffic and moving violations. The City argued that it had no duty to bargain over the change in job duties because NYCCBL § 12-307(b) gives it the authority to unilaterally determine these duties. The City also argued that should the Board consider the instant petition as properly stating a practical impact claim, it must be dismissed, as the Union has not identified with specificity any practical impact on the safety of its members. The Board found that the change in the duties of Level II TEAs was a non-mandatory subject of bargaining and that the petition did not allege facts sufficient to warrant a hearing on whether a practical impact on safety resulted. Accordingly, the Board denied the petition in its entirety. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On July 16, 2012, Local 1182, Communications Workers of America ("Union") filed a verified improper practice petition against the City of New York ("City") and the New York City

Police Department ("NYPD" or "Department"). In the petition, the Union alleges that Respondents violated §§ 12-306(a)(1), (4), and 12-306(c) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to bargain over the practical impact on the safety of Traffic Enforcement Agents ("TEAs") resulting from a change in their duties. The specific change in duties giving rise to the claim of a failure to bargain over practical impact is that Level II TEAs are no longer authorized to issue tickets for traffic and moving violations. The City argues that it had no duty to bargain over the change in job duties because NYCCBL § 12-307(b) gives it the authority to unilaterally determine these duties. The City also argues that, should the Board consider the instant petition as properly stating a practical impact claim, it must be dismissed, as the Union has not alleged any specific practical impact on the safety of its members. The Board finds that the change in the duties of Level II TEAs is a non-mandatory subject of bargaining and that the petition does not allege facts sufficient to warrant a hearing on whether a practical impact on safety resulted. Accordingly, the petition is denied in its entirety.

BACKGROUND

The Union represents Level I and II TEAs who work in the NYPD's Traffic Enforcement Unit ("TEU"), which is a specialized unit within the Department's Transportation Bureau. The Transportation Bureau is responsible for traffic enforcement, traffic management, and highway safety, and the TEU is charged with the enforcement of City and State traffic laws and regulations.

There are four assignment levels of TEAs. According to the TEA job specification, Level I TEAs are responsible for patrolling an assigned area to enforce laws relating to the

movement, parking, stopping, and standing of vehicles. In this capacity, Level I TEAs issue summonses for parking and pedestrian violations. Level II TEAs perform the same duties as Level Is, and they also direct and control traffic in order to maintain the efficient and safe flow of vehicles and pedestrians. Additionally, for about 30 years, Level II TEAs issued moving violations to motor vehicle operators, although this duty is not listed in the typical tasks section of the Level II job specification. This practice ended in April 2012, when Level II TEAs were instructed to cease performing vehicle stops and issuing moving violations.[1]

Once appointed to the title of TEA, the employee will enter the Traffic Enforcement Academy where TEAs receive eleven weeks of training in City and State laws, rules, and regulations. TEAs are also trained in departmental rules and regulations, including radio protocol, and the proper issuance of summonses. Upon promotion to a new assignment level, the TEAs receive additional training tailored to the needs of that position. According to the City, Level II TEAs receive training in the control and direction of traffic and are also given a basic one and a half hour lesson in vehicle stop tactics.[2] The Union argues that Level II TEAs also receive additional, on-the-job training in stopping vehicles and issuing summonses.

The City claims, and the Union denies, that while directing traffic Level II TEAs generally do not have a partner working with them. Therefore, if the TEA conducts a vehicle

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[1] Level III TEAs are primarily responsible for removing or immobilizing illegally parked vehicles. Level IVs are responsible for the enforcement of street construction and truck weight regulations. Level IV TEAs issue traffic and moving violations as well as environmental control summonses. According to the City, Level IV TEAs are also Special Patrolmen, defined as "Peace Officers," in Article 2 of the New York State Criminal Procedure Law. Level III and IV TEAs are represented by a different union, District Council 37, AFSCME, AFL-CIO.

[2] Level III TEAs receive training in the immobilization and removal of vehicles. Upon promotion to Level IV, TEAs receive a 35-hour Basic Peace Officer Training from the New York State Division of Criminal Justice Services and they are registered with the New York State Registry for Police Officers and Peace Officers. They also receive training in Construction Compliance and Truck Enforcement.

stop, according to the City, it is usually done while working alone. Michael Pilecki is the Commanding Officer of the Traffic Enforcement District. At some point in 2012, he became aware that some Level II TEAs had been leaving their assigned intersections and running after motorists to issue moving violations to those who did not follow their instructions. According to the City, Pilecki viewed this as a dangerous situation, since Level IIs do not carry firearms, wear bulletproof vests, or have extensive training in car stops or a partner to back them up. Pilecki considered these risks and determined that Level II TEAs should no longer perform vehicle stops or issue moving violations. Consequently, in April of 2012, Level II TEAs were given an oral directive to cease performing these duties. It is undisputed that the City did not notify or bargain with the Union prior to implementing this change in duties.

The NYPD thereafter developed a new procedure for issuing moving violations. Currently, if a Level II TEA witnesses a motorist committing a violation that the TEA believes warrants the issuance of a traffic ticket, the TEA must call for supervisory and police assistance. Additionally, Level IV TEAs continue to perform vehicle stops and issue summonses for moving violations.

POSITIONS OF THE PARTIES

Union's Position

The Union asserts that the NYPD failed to bargain over a change in duties of Level II TEAs in violation of NYCCBL § 12-306(a)(1), (a)(4), and (c).[3] Specifically, the Union claims

[3] 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;

that the NYPD's directive that Level II TEAs no longer conduct vehicle stops or issue traffic tickets has a practical impact on their safety because these duties are integral to the TEAs' protection from drivers who operate their vehicles dangerously and unlawfully in crowded intersections. The Union argues that the underlying safety implication of the NYPD's directive is made clear by the fact that the City admits that the decision to change the Level II TEAs' duties was made out of a concern for their safety. The Union therefore argues that the Board should find that there is a *per se* practical impact on safety and that the NYPD had a duty to bargain over that impact before its directive was implemented. In the event that the Board has additional factual questions regarding the safety implications at issue, the Union argues that it should order a hearing on the matter.

City's Position

The City argues that the NYPD's actions constituted a legitimate exercise of its managerial rights under NYCCBL § 12-307(b), which gives it the authority to unilaterally determine its employees' duties.[4] Additionally, there is no provision in the parties' collective

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> (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[.]

NYCCBL § 12-306(c) provides that public employers and certified or designated employee representatives shall bargain in good faith, *inter alia*, with respect to matters within the scope of collective bargaining.

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

> It is the right of the [C]ity . . . acting through its agencies, to . . . direct its employees; . . . 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

bargaining agreement that limits the NYPD's right to determine the duties of Level II TEAs. Therefore, the City argues that the NYPD's directive that Level II TEAs cease performing vehicle stops and issuing moving violations is not a mandatory subject of bargaining. Absent a mandatory subject of bargaining, the City argues that the Union cannot meet its burden of proving that the City had a duty to bargain in good faith over the change in duties.

The City additionally argues that the Union's petition is vague and clearly does not allege a *per se* practical impact on employee safety. As there is no duty to bargain over a practical impact of the TEAs' change in duties unless and until the Board first determines that a practical impact exists, the Union's practical impact claim is premature at this time and must be dismissed.

The City asserts that the proper procedure for the Union to bring forth a claim based on a practical impact is a scope of bargaining petition. Should the Board consider the instant petition as such, the City argues that it should be dismissed because the Union has not identified with specificity any practical impact on the safety of its members. Rather, the Union has made only conclusory and unsubstantiated allegations that do not demonstrate the existence of a "clear and present or future threat to employee safety," as is required by Board precedent to establish a practical impact.

> 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 terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

DISCUSSION

The Union asserts that the City had a duty to bargain over the practical impact of the NYPD's directive that Level II TEAs no longer conduct vehicle stops or issue summonses. This Board finds that based upon the record presented, there are insufficient facts to support the claim that a practical impact on safety has resulted from the Level II TEAs' change of duties.

Under NYCCBL § 12-307(a), public employers and public employee organizations have the duty to bargain in good faith over wages, hours, and working conditions.[5] "It is an improper practice under § 12-306(a)(4) for a public employer to refuse to bargain in good faith on matters within the scope of collective bargaining." *SSEU, L. 371*, 2 OCB2d 16, at 10 (BCB 2009) (citing *NYSNA*, 71 OCB 23, at 11 (BCB 2003)). However, pursuant to § 12-307(b), the City has the managerial right to act unilaterally in certain enumerated areas that are outside the scope of mandatory bargaining. "[I]t is well-settled that § 12-307(b) . . . gives management the express right to determine what duties should be included in a job specification and which employees should be assigned to perform particular jobs." *DC 37, L. 1549*, 69 OCB 37, at 6 (BCB 2002) (citations omitted); *see also UFA*, 4 OCB2d 3, at 8 (BCB 2011), *affd., Matter of Uniformed Firefighters Assn. v. City of New York*, Index No. 101817/2011 (Sup. Ct. N.Y. Co. Oct. 4, 2011) (Huff, J.). Consequently, the City may act unilaterally in those areas unless the parties have agreed to limit that right in their collective bargaining agreement. *Local 333, UMD, ILA, AFL-*

[5] NYCCBL § 12-307(a) states in pertinent part:

> Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public 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) [and] working conditions . . . .

CIO, 5 OCB2d 15, at 12 (BCB 2012) (citations omitted). Here, it is undisputed that no provision in the parties' collective bargaining agreement limits the NYPD's right to assign the duties its employees will perform. Therefore, the NYPD's decision to change the Level II TEAs' duties is not a mandatory subject of bargaining.

Notwithstanding that the NYPD acted within its managerial rights, if this right is exercised "in a manner that has an adverse effect on terms or conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact." *NYSNA*, 71 OCB 23, at 11. "However, there is no duty to bargain–and therefore no violation of NYCCBL § 12-306(a)(4) by way of refusal to bargain–arising out of a claim of practical impact until the Board has first found that a practical impact exists as a result of the exercise of a management prerogative pursuant to NYCCBL § 12-307(b)." *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 13 (citing *Local 1180, CWA*, 43 OCB 47, at 17 (BCB 1989)).

The City argues that the instant petition should be dismissed as premature because the Board has not yet made the determination that a practical impact exists and, therefore, the Union should be directed to file a scope of bargaining petition. Although a scope of bargaining petition is the proper procedural mechanism through which to assert a claim of practical impact, the Board has in the past exercised its discretion to consider the claims as alleged in an improper practice petition. *See, e.g., Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15; *NYSNA*, 71 OCB 23; *SBA*, 41 OCB 56 (BCB 1988)). Therefore, notwithstanding the petition's technical defects, we will consider the Union's scope of bargaining claims. Accordingly, we now turn to the determination of the Union's claim of a practical impact on employee safety.

The Union argues that because the City admits that the reasoning behind its decision to prohibit Level II TEAs from issuing summonses was to protect their safety, there is a *per se*

practical impact on safety regardless of whether this impact was positive or negative. However, as this Board has articulated, in order to find that there is a *per se* practical impact on safety, the proper inquiry is whether there is a "clear present or future *threat* to employee safety." *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 13 (emphasis added); *see also UFOA*, 3 OCB2d 50, at 17 (BCB 2010); *UFA*, 71 OCB 19, at 7 (BCB 2003). The use of the word "threat" establishes that the Union must demonstrate that the alleged practical impact on its members' safety is an *adverse* one. *See UFOA*, 3 OCB2d 50, at 16 ("We have recognized that when an employer exercises a management right in a manner that has an adverse effect on terms and conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact.").

In cases "[w]here the existence of such a threat is not clear, the Board may require a hearing to resolve a factual dispute on the issue . . . ." *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 13-14. However, there is a particular pleading standard that must be met in order for the Board to order a hearing. Specifically, the Board has stated:

> We have interpreted the language of NYCCBL § 12-307(b) to require initially that a union offer allegations of specific facts in support of its claim of practical impact. Conclusory statements or vague or non-specific allegations are not sufficient to prove practical impact or to warrant a hearing into whether a practical impact exists.

UFA, 5 OCB2d 3, at 14 (BCB 2012) (quoting *UFA*, 4 OCB2d 30, at 30 (BCB 2011)) (additional citations omitted).

The NYPD's decision to no longer allow Level II TEAs to issue summonses was made in an effort to better protect them from unsafe conditions that result from TEAs chasing after vehicles in traffic and conducting stops without backup. The Union argues that this change in duties adversely affects the TEAs' safety because they can no longer protect themselves from

drivers who operate their vehicles dangerously and unlawfully. While it is true that safety implications were clearly at issue when the NYPD issued its directive, the petition does not allege with the requisite specificity how or why this directive has actually resulted in an increased threat to TEAs' safety. Here, as in *Local 333, UMD, ILA, AFL-CIO*, "[a]lthough the Union submits affidavits that address the generally dangerous nature of the position and relate past incidents[,] . . . the affidavits do not allege specific facts about an increase in such safety risk to [the employees] currently at issue here that can be attributable to the City's staffing actions." 5 OCB2d 15, at 14. There is no apparent increase in safety risks to Level II TEAs by prohibiting them from leaving their assigned posts to conduct vehicle stops and issue summonses. The pleadings contain only general and conclusory statements in support of the Union's position. Consequently, the Board declines at this time to order a hearing on the question of the practical impact on the safety of Level II TEAs.

For the reasons stated above, we dismiss the Union's claim that the City's change in the Level II TEAs' duties will result in a practical impact on employee safety that would give rise to a duty to bargain. This holding is without prejudice to the Union's right in the future to submit a petition alleging sufficiently specific facts claimed to constitute a safety impact.

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, docketed as BCB-3033-12, filed by Local 1182, Communications Workers of America, hereby is denied in its entirety.

Dated: December 18, 2012
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST F. HART
MEMBER

GWYNNE A. WILCOX
MEMBER