UFA, L. 94, 5 OCB2d 2 (BCB 2012)

(Scope) (Docket No. BCB-2668-07)

Summary of Decision: The UFA and UFOA filed a petition alleging that the FDNY violated the NYCCBL by refusing to bargain over the alleged *per se* and practical safety and workload impact of increasing the number of building inspection periods from two to three per week per Fire Company. The City argued that the Unions failed to establish that the additional building inspection period had a *per se* or practical impact on safety or workload. After a hearing, the Board found that the record failed to demonstrate a *per se* or practical impact on safety or workload. Accordingly, the petition is denied. ***(Official decision follows).***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Scope of Bargaining Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, and UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854,

Petitioners,

-and-

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

Respondents.

DECISION AND ORDER

On November 7, 2007, the Uniformed Firefighters Association, Local 94 ("UFA"), and the Uniformed Fire Officers Association, Local 854 ("UFOA")(collectively, "Unions"), jointly filed a verified scope of bargaining/improper practice petition against the Fire Department of the

City of New York ("FDNY" or "Department") and the City of New York ("City"). The Unions argue that increasing the number of building inspection periods from two to three per week per Fire Company has a *per se* and a practical impact on its members' safety and workload and is therefore a mandatory subject of bargaining within the meaning of § 12-307 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The Unions further argue that, by refusing to bargain, the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4). The City argues that the Unions fail to demonstrate that the additional building inspection period has a *per se* or practical impact on safety or workload. The Board finds that the entire record, including the evidence adduced at the hearings, as well as the pleadings, exhibits and post-hearing briefs, does not establish either a *per se* or practical impact on safety or workload and, accordingly, we the deny the petition.

BACKGROUND

The Trial Examiner held five days of hearing and found that the totality of the record established the relevant facts to be as follows:[1]

Building Inspection Safety Program

The FDNY has been conducting building inspections to ensure compliance with the fire code since at least 1968. Chief of Operations Robert Sweeney testified that the FDNY considers building inspections to be an ongoing part of Firefighter training and that building inspections

[1] The pleadings were completed on February 11, 2008. After several joint requests by the parties to hold the case in abeyance, hearings were held on November 19, December 3 and 17, 2010, and January 14 and February 22, 2011. Briefs were submitted on April 19, 2011.

serve to familiarize Firefighters under "non-stressful situations during daylight hours" with the types of buildings in which they will have to operate in an emergency. (Tr. 318) The principle objectives of building inspections are to prevent fires by identifying potential fire risks and to ensure compliance with the fire code. In addition, the FDNY conducts building inspections to gain valuable information about buildings, including unique characteristics and any other aspects of the buildings that impact how Firefighters respond to an emergency. Traveling to building inspections also helps familiarize Firefighters with routes and traffic patterns. Chief Sweeney testified that the type of valuable information gained through building inspections includes: that renovations had altered the building's layout; that the stairways would allow for a hose to be run straight up (as opposed to wrapped around each flight); that heavy machinery on the roof could compromise structural integrity; and that roof access may be impeded by a penthouse. All types of buildings are inspected (row frames, apartment buildings, stores, commercial buildings, high rises, warehouses, public assemblies, schools, and hospitals) and every building is scheduled to be inspected at least once every five years. Areas inspected include the basement, roof, exits, fire escapes, sprinklers, standpipes, heating elements, as well as building occupancy cards.

The job specification for Firefighters list as a typical task the performance of "apparatus field inspections and other such inspections as directed by the Commissioner." (City Ex. 12) Prior to November 2007, the building inspections program was known as "Apparatus Field Inspection Duty" ("AFID"). On November 5, 2007, the Department revised Fire Prevention Manual Chapter 3, retitling the inspection program the "Building Inspection Safety Program"

("BISP").[2] Chief Sweeney testified that the revisions were motivated in large part by the death of two Firefighters in a fire at the Deutsche Bank building on August 18, 2007. The building was being demolished and abated, and that impacted how the Department fought the fire.[3] Since the Deutsche Bank tragedy, the Department is tracking construction, demolition, and abatement of buildings "very comprehensively." (Tr. 312)

Building inspections are scheduled in three hour periods.[4] Under the AFID, *i.e.* prior to November 2007, each Fire Company was scheduled for two three-hour building inspection periods per week. The November 2007 revision increased the number of building inspection periods to three per Fire Company per week. Other than the addition of one more inspection period, the duties of Firefighters under the AFID and BISP remain substantially identical. The

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[2] Along with the revisions, the FDNY provided additional training concerning how to conduct building inspections, the 2008 revisions to the Fire and Building Codes, and how information gained during building inspections is entered into the Department's databases. Not every firefighter received this training, and the FDNY did not document it, but Chief Sweeney explained that the Department is confident that approximately 96 percent of Firefighters received this training. Each firehouse's roster is divided into 25 groups, and its schedule is divided into four tours. The trainers visited each firehouse four times, corresponding to the four normally scheduled tours. However, since six groups are normally scheduled for every tour, and the FDNY did only one rotation of training, it estimates that one out of every 25 firefighters missed the training. Chief Sweeney also noted that, in addition to the written materials, the Department maintains a BISP hotline to provide guidance.

[3] Abatement is the comprehensive removal of asbestos, and Chief Sweeney explained that this complex process requires areas to be sealed off, which impacts both means of egress and air flow.

[4] However, due to interruptions for emergencies and other cancellations, only approximately half of the scheduled time is actually spent on building inspections. City Exhibit 10 lists the hours scheduled for building inspections and the percentage of time lost due to interruptions for 2003 through 2007.

record does not establish how the additional time now spent on building inspections was utilized prior to November 2007.

The information gained from building inspections is entered into the Department's Critical Information Dispatch System ("CIDS"), which "alerts units to dangerous or hazardous conditions which are not necessarily apparent from the front of the building." City Ex. 1: FDNY Communications Manual, Ch. 4.[5] Firefighters use this information to perform "size up"—the gathering and evaluation of information that assists Firefighters and Fire Officers in making efficient, effective, and safe decisions *en route* to and at the site of an emergency. Size up begins with the receipt of the alarm and continues until the fire is under control.

Dispatching

Chief Sweeney explained that Fire Companies conducting building inspections are classified "10-8." (Tr. 338) That is, although they are outside of the firehouse, the Fire Companies are considered to be available to respond to an emergency. Responding from outside of the firehouse is known as a "field response." Field responses are "not unusual" and occur for a variety of reasons, such as when units are out of the firehouse conducting hydrant inspections, on meals, shopping, restocking, training, on familiarization drills, and out on informal or unofficial errands. (Tr. 339) The FDNY sends the Fire Companies, whether in the firehouse or in the field, a Dispatch Ticket with the pertinent information. Dispatch time is measured from

[5] Data entered into CIDS comes from a variety of sources, not just FDNY building inspections.

the time a FDNY dispatcher receives an emergency call to the time a Fire Company is assigned to respond.[6]

Data Introduced: Response Times

The City introduced data and extensive testimony regarding response times from FDNY Associate Commissioner of Management Initiatives Michael Vecchi, whose duties include management analysis and planning, which includes data management. The FDNY creates monthly Borough Activity Reports ("BAR") based on the data entered by Fire Officers and dispatchers through which it tracks response times, comprised of dispatch time and travel time. Travel time is measured from the time a Fire Company is assigned the call to the arrival of a unit at the emergency. The City introduced three exhibits regarding response times created from BAR data.

The first exhibit, City Exhibit 7, is an eight year (2003 through 2010) comparison of response times for the nine month periods of January 1 through September 30. City Exhibit 7 breaks down the data by the type of call (Structural Fires, Non-Structural Fires, Non-Medical Emergencies, Medical Emergencies, and Malicious False Alarms). City Exhibit 7, however, does not break down the data by whether the Fire Companies are responding from the firehouse or the field; nor does it break response time down into its components dispatch and travel times. City Exhibit 7 indicates that the average response times were quicker in 2008 through 2010 (*i.e.*,

[6] Since May 2009, the City has used the Unified Call Taker ("UCT") system, under which the 911 operator now asks preliminary questions, and then transfers the call to the FDNY. Hearings regarding alleged practical impact claims related to the UCT system are currently ongoing before the Board in another matter, BCB-2840-10.

when there were three BISP periods per week) than they were pre-October 2007 (*i.e.*, when there were two BISP periods per week). For example, City Exhibit 7 indicates that the average response time for the period January 1–September 30, 2008, was eleven seconds quicker than the same nine month period in 2007.[7]

The other two response time exhibits were charts documenting response times from Monday through Friday for all of 2006 (City Ex. 9) and 2010 (City Ex. 8). Like City Exhibit 7, City Exhibits 8 and 9 list overall average response times as well as response times by type of emergency (Structural Fires, Non-Structural Fires, Non-Medical Malicious False Alarms, Medical Emergencies, Non-Medical Emergencies, and Structural Fires with Medical Emergencies). However, unlike City Exhibit 7, the response times listed in City Exhibits 8 and 9 are also broken down into responses from the firehouse and from the field, and the response times are broken out into its component dispatch and travel times.[8] Further, City Exhibits 8 and 9 break out the data into two time periods: the full 24-hour day and the hours that building inspections are conducted (Monday through Friday, 10:00 a.m. to 4:00 p.m.). City Exhibits 8 and 9 show that in both 2006 and 2010, across all categories and times, response times from the field were faster than response times from quarters. In 2006, during the hours that building

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[7] The Unions argue that the introduction of the UCT system in May 2009 effected the calculation of dispatch times such that pre-May 2009 and post-May 2009 data are not directly comparable. Pre-UCT, the 911 operator would transfer the call to a FDNY operator, starting the dispatch time clock, while under the UCT system, the 911 operator asks many of the preliminary questions, before transferring the call to the FDNY, starting the dispatch time clock. The Unions maintain that this artificially reduces response times.

[8] Comparable data for 2007, 2008, and 2009 was not entered into the record during the hearing.

inspections are conducted (Monday through Friday, 10:00 a.m. to 4:00 p.m.), the average response time from the field was eight seconds quicker than the average response time from the firehouse; in 2010 it was nine seconds quicker.

Administrative Districts and Response Areas

An Administrative District is the area for which a Fire Company is responsible for conducting building and hydrant inspections. Each Fire Company has its own Administrative District, regardless of whether it is a single or a double Company. Thus, Ladder and Engine Companies have separate Administrative Districts and conduct separate building inspections. Each Fire Company also has Response Areas designated by the order in which they are expected to arrive at an emergency. The area in which a Fire Company is expected to be the first to arrive is designated its First Due Response Area; the area in which it is expected to be the second to arrive is designated its Second Due Response Area, and so on.[9] A Fire Company's Administrative District may overlap with or be completely separate from its Response Areas, and can even be several miles away from its First Due Response Area.[10] The Unions' witnesses testified that the firehouses of 137 units are outside of their Administrative Districts.

[9] Response Areas are not determined by geographic proximity alone because, due to traffic patterns and other factors, a Fire Company geographically farther away may be able to reach a location quicker than a Fire Company that is geographically closer.

[10] Maps created by the FDNY show that part of Ladder Company 144's Administrative District is six miles from its First Due Response Area and that part of Ladder Company 127's Administrative District is outside of its First, Second, and Third Due Response Areas.

Alleged Safety Impacts

The hearing adduced testimony and exhibits regarding alleged safety risks that stem from: responding to an emergency from a building inspection site as opposed to from the firehouse; the impact on size up of the information received at and *en route* from building inspection site as opposed to at the firehouse; and the alleged physical risks of injury related to dressing in the field, driving, and dehydration.

Claimed Risks From Responding from a Building Inspection Site

The most significant safety risk alleged by the Unions is a claimed increase in the risk of out of order and out of sequence responses stemming from Fire Companies responding separately from building inspections sites as opposed to responding together from quarters. An "out of order" response occurs when a Ladder Company arrives before an Engine Company. An "out of sequence" response occurs when a Fire Company arrives before or after it was designated, such as when the Second Due Ladder Company arrives before the First Due Ladder Company. The Union provided extensive testimony as to two heroic rescues occurring during out of order responses. On March 26, 2006, Firefighter Keith Lagan and his unit, Ladder Company 41, were conducting building inspections when they received a call for a smoke condition. The location of the emergency was extremely close to the building inspection site—much closer than it was to the firehouse—resulting in Ladder Company 41 arriving before the First Due Engine Company. As a result, Firefighter Lagan and his unit began search and rescue operations before an Engine Company could put water on the fire. On the third floor, Ladder Company 41 found smoke pouring out from under an apartment door. The Ladder Company

forced the door and Firefighter Lagan entered the apartment even though the only water available to put on the fire came from a colleague's portable 2.5 gallon extinguisher. Firefighter Lagan located an incapacitated individual, whom he rescued. The second incident occurred on December 18, 2008, when Lieutenant Tate Hunt and his unit, Ladder Company 166, responded from their firehouse to a call for a heavy smoke condition. While *en route* to the emergency, the unit was informed that the responding Engine Company, which was responding from a building inspection site, would be delayed. Ladder Company 166 arrived before the Engine Company and began search and rescue operations. Notified of an apartment with a trapped resident, Lieutenant Hunt entered the apartment, which was filed with an intense fire and heavy smoke, to search. Lieutenant Hunt ordered that the door of the apartment be closed after him to contain the fire as there was not yet an Engine Company on the scene to put water on the fire. Lieutenant Hunt located the resident and dragged him to safety. The resident unfortunately succumbed to his injuries the next day.

The Unions' examples illustrate cases in which out of order responses led a Ladder Company to begin search and rescue operations before an Engine Company could put water on a fire. Chief Sweeney, however, testified that out of order and out of sequence responses are a normal part of firefighting for which Firefighters are trained. They are caused by "a myriad of reason[s]," including traffic conditions or by any reason a Fire Company is in the field, such as training, restocking supplies, procuring meals, and familiarization drills. (Tr. 348) The FDNY provides procedural bulletins so that the units know how to respond in these situations. *See, e.g.*, City Ex. 6: Safety Bulletin 6: Precautions to Ensure a Safe Response to Alarms. Further, Chief

Sweeney testified that "ladder company members are trained to operate by themselves until an engine company comes." (Tr. 393) He noted that "[i]t takes a lot longer to stretch a hose than to walk up three flights of stairs or take an elevator ten flights and force entry into an apartment" such that, even when Fire Companies arrive in the proper order and sequence, "ladder companies are always operating for some time in the apartment by themselves." (Tr. 394) Chief Sweeney also noted that the FDNY still has many single Ladder Companies, which, when located closer to a call, "are obviously going to get there before the nearest Engine Company because they're closer." (Tr. 387) The record does not contain any evidence tending to establish whether there has been any change in the frequency of out of order or out of sequence responses since the addition of the third building inspection period.

The Unions also allege that responding from a building inspection site may lead to delay. First, since a Fire Company's Administrative District can differ from its Response Areas, it may not be in position to respond in its designated order when it is at a building inspection site.[11] Firefighter Joseph Miccio, UFA's Recording Secretary and a 20-year FDNY veteran, testified that when a Fire Company receives a call when it is significantly outside of its Response Areas due to a building inspection, it would not always communicate to dispatch that it would be delayed. Second, Firefighter Lagan testified that responding from a building inspection site can

[11] Similarly, the Unions allege that the additional building inspection period exacerbates the safety concerns arising from the UCT system. Richard Farino, a Supervising Fire Alarm Dispatcher, testified that some 200 units per day are assigned to building inspections. However, full information about these units is not known by the call takers, who only know that the unit is available but do not know when a Fire Company is on a building inspection and not in or near its Response Areas. Thus, the call takers may not assign the most appropriate unit, which can create additional delay.

take longer than the orderly response from the firehouse because the Firefighters must first exit the building (which can take 25-30 seconds), then locate the apparatus (which could be blocks away), then retrieve their Personal Protection Equipment ("PPE") and don it in the streets of New York while trying to listen to the Chauffeur and process the information being relayed to them. Additionally, when dressing in the street, Firefighters misplace items, don them in the wrong order, or don another Firefighter's gear, increasing dressing time.

Claimed Risks from How Information is Relayed to Firefighters

The Unions allege that the information relayed to Firefighters at the firehouse is more complete than the information relayed at a building inspection site, and that this impacts size up. Firefighters Romaka and Lagan both testified that at a building inspection site, the information is relayed to the unit by the Chauffeur, who may not relay all the information on the Dispatch Ticket, while at the firehouse, the house watchman reads aloud all the information contained on the Dispatch Ticket. Firefighter Romaka testified that there is no standard procedure as to how and what information the Chauffeurs should relay and that, when a Fire Company receives a call when it is outside of the firehouse, it does not receive information regarding the other units that are *en route*. The Unions allege that the abbreviated, non-standardized way information is relayed to Firefighters at a building inspection impacts size up and can lead to an improper evaluation. Additionally, pertinent CIDS reports are not always relayed to the field.

The City countered with extensive testimony from Chief Sweeney regarding the Department's Computerized Assisted Dispatch System ("CADS"). CADS sends the same essential information to units whether in the firehouse or in the field. In the firehouse, CADS

transmits to a computer terminal with a printer that prints out a Dispatch Ticket. In the field, CADS transmits to Mobile Data Terminals ("MDTs") located on every engine and ladder apparatus. Each apparatus has two MDTs: one in the cab; the other in the passenger section. The MDTs in the apparatuses' cabs have printers and print out a Dispatch Ticket, while the MDTs in the apparatuses' passenger section display the same information contained on the Dispatch Ticket.[12] The Dispatch Ticket, whether printed from the firehouse terminal or from a MDT on an apparatus, contains the same information, including the address, the type of emergency, the type of building, and the order in which units are expected to arrive. This information is also accessible on the MDT terminal in the passenger section of the apparatus. CIDS information is usually, but not always, available via CADS. If a pertinent CIDS report exists but is not automatically sent via CADS, the dispatcher would notify the Fire Officer, who can separately request the CIDS report.[13]

Claimed Physical Risks

The Unions also alleged that there are physical risks associated with responding from a building inspection site. Firefighter Lagan testified that, when getting dressed in the street, Firefighters worry "about getting hit by cars" (Tr. 156), while Firefighter Romaka testified that, depending on how the apparatus is parked, it may not be easy for all the Firefighters to get

[12] Firefighter Romaka also testified that Firefighters do not always have access to the MDT screen in the passenger section, such as when seated facing away from the MDT screen.

[13] Chief Sweeney provided two examples under which a pertinent CIDS report may not be automatically sent by CADS. Both can occur when the unit is in quarters or the field. The first is due to technical difficulties or flaws in the system; the second is when there is a pertinent CIDS report for a different but nearby address.

dressed on the sidewalk. Firefighter Romaka, however, acknowledged that FDNY has "regulations about getting dressed in the street." (Tr. 49) The Unions also allege that increasing building inspections increases the risk of road accidents due to increased driving time, unfamiliarity of Chauffeurs with the routes and traffic patterns, and because Chauffeurs are unfamiliar with the responding routes of other units. Chief Sweeney, however, disagreed with the Unions' witnesses' analysis, testifying that while the routes to emergencies from building inspections differ than those from the firehouses, they are not unfamiliar, as these routes would be from a Fire Company's Administrative District to its Response Areas.

UFA Health and Safety Program Manager Bernadette Royce, a certified Paramedic, testified extensively as to the physical risk from dehydration. Dehydration stresses the body's cardiovascular system and increases the risks of fatigue, mistake, stroke, and heart attack. Royce explained cumulative dehydration, the loss of small amounts of fluids over time leading to dehydration, and noted that "for one percent dehydration in body weight, there will be a three percent decrease in performance." (Tr. 129) Royce explained that it is more difficult for the body to rehydrate in an alert state, such as when conducting building inspections, than in a relaxed state, such as when in quarters. Thus, the Unions allege that the increase in the number of building inspection periods can contribute to a failure to properly hydrate. Firefighter Romaka, however, acknowledged that the risks of dehydration exist under any circumstance that Firefighters are out of the firehouse. Additionally, the Unions note that, in 2007, the last year that the FDNY required two building inspection periods per week, the FDNY recorded 92 incidents of thermal stress injuries while, in 2008, the first year that the FDNY required three

building inspection periods per week, the FDNY recorded 250 thermal stress injuries.[14] Thermal stress injuries consist of frostbite and heat exhaustion. The record does not show how many thermal stress injuries were related to building inspections, nor does the record indicate how many of the thermal stress injuries were heat-related, and, thus, may be related to dehydration, as opposed to cold-related.

Chief Sweeney testified as to the FDNY's measures to address dehydration, which include: suspending all non-emergency activities, including building inspections, when the temperature-humidity index exceeds 105; providing training regarding summer heat stress and safety bulletins regarding operating in high heat environments outside of a fire; and having water coolers with five gallons of drinkable water on every apparatus.[15] Chief Sweeney testified as to City Exhibit 4, entitled Safety Bulletin 87: Summer Heat Stress ("SB 87"), which states that "[p]rovisions must be made to provide timely relief of members before they become physically over stressed." *Id.* § 3.2. SB 87 further instructs that "Firefighters must constantly monitor and be aware of their own physical stress levels. Members often concentrate on the task at hand to the exclusion of their own personal safety. Members should inform their Officers of the need for relief prior to becoming physically over-stressed." *Id.*, at § 3.3. Chief Sweeney also described the Department's five mobile Rehabilitation and Care ("RAC") units that provide Gatorade, wet

[14] The FDNY documents introduced by the Union reflecting thermal stress injuries also indicated a decrease in the number of heart attacks and strokes (from 29 in 2007 to 1 in 2008). *See* Union Ex. L.

[15] Firefighter Romaka testified that the five gallon jug of drinking water each rig carries is insufficient for proper hydration because Firefighters do not have the opportunity to stop and hydrate and because five gallons is an insufficient amount of water for the entire crew.

towels, and misting fans, and also have medical personnel. *See also* City Ex. 5: AUC 230: Medical, Recuperation and Care Procedures ("AUC 230"). The Unions, however, note that the RAC units are only designed to address dehydration caused by fighting fires and do not address the effects of cumulative dehydration. AUC 230 contains a section on Hydration and Rehydration that advises Firefighters on how to improve their hydration. It notes that dehydration can occur "even when confined within an apparatus while responding to a series of alarms . . . and for reasons of personal health, and safety must be remedied as soon as physically possible." *Id.*, at § 10.6.1. AUC 230 advises Firefighters to "DRINK COLD FLUIDS . . . DRINK UNTIL NEARLY FULL . . . CONTINUE DRINKING . . ." *Id.* (emphasis in original).

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue that the addition of a third building inspection period has a "practical impact on the safety and workload of the members of the Unions." (Unions' Brief at 1) Any risks associated with requiring Firefighters to conduct building inspections increases along with the increase in the time Firefighters spend conducting building inspections. Thus, the increase in building inspection periods has a *per se* impact on members' safety, which is a bargainable subject under NYCCBL § 12-307. Alternatively, the Unions argue that the increase in building inspection periods has a practical impact on the safety of their members. Management's unilateral right to determine job assignments is not unfettered and is tempered by the NYCCBL, which expressly places decisions that have a practical impact on the safety of employees within

the scope of bargaining. Thus, the City violated NYCCBL § 12-306(a)(1) and (4) by refusing to bargain over such safety impacts.

The Unions argue that they need not demonstrate any actual injury, but, rather, only potentially unsafe conditions, and that they have highlighted the following significant practical impacts on safety stemming from the increase in building inspection periods: (i) the failure in 2007 to provide the new training to all Firefighters; (ii) that a Fire Company's actual location may be outside of its Response Areas when it receives a call can cause delay; (iii) that Firefighters do not have access to the same information when responding from a building inspection site as they do when responding from quarters; (iv) that the difference in information relayed can impact size up; (v) that responding from a building inspection site takes longer and is more hazardous due to dressing in the street than compared to the orderly response from the firehouse; (vi) that it increases the likelihood of out of order and out of sequence responses; (vii) that it exacerbates the safety concerns arising from the UCT system; (viii) that it increases cumulative dehydration and the health risks associated therewith; and (ix) that it increases the risk of road accidents due to increased driving time over unfamiliar routes. To the extent that these risks existed previously, the 50 percent increase in building inspections periods has significantly increased these risks.

The Unions argue that the City's attempts to justify and rationalize the unilateral imposition of the third building inspection period lack merit. No additional safety measures have been added to correspond to the increase in inspection periods. Nor has the City alleviated any safety impact through increased training, as Firefighters today receive the same training that they

received when they were scheduled to only two building inspection periods per week. The training currently provided does not address the difference in information relayed during a building inspection as compared to that relayed at the firehouse, the lack of standardization regarding how Chauffeurs relay the information, or the negative impact Chauffeurs relaying abbreviated information has on size up. The appearance of a reduction in response times was created by changing the way in which response times are calculated. In 2006, the entire time a 911 caller was on the phone with a dispatcher was included in the response time. Since the introduction of the UCT system, all calls go first to a non-FDNY operator and the response time clock does not begin to run until the call is transferred to the FDNY operator, which the Unions estimate to be an average of 30 seconds later. The City's claim that response times from the field during 10 a.m. to 4 p.m. have been reduced are similarly misleading, as the category of field responses includes far more than building inspections and includes situations where both the Engine and Ladder Companies are in the field together.

Finally, the City's argument that, if the Board finds a safety impact, it should be allowed to attempt to unilaterally alleviate that impact, relies on outdated case law. Current case law dictates that "once . . . a safety impact exists, the duty to bargain over alleviation begins immediately." (Unions' Brief at 44) (quoting *COBA*, 49 OCB 40, at 18 (BCB 1992))

City's Position

The City argues that increasing the number of weekly building inspection periods is clearly a management right under NYCCBL § 12-307(b). Building inspections help prevent fires and benefit both the public and the responders; they are part of ongoing Firefighter training and

provide an additional level of familiarity with buildings types under non-stressful circumstances. Through building inspections, Firefighters acquire knowledge about potential hazards and unusual physical characteristics of a building. This information is entered into the CIDS database. Further, the BAR data establish that there has been a decrease in average response times since the third inspection period was added in November 2007. Thus, to the extent that the Unions argue that response times should be considered an indicia of safety, they do not indicate that there has been a safety impact from increasing the number of building inspection periods.

The record does not establish that the additional inspection period increased the hazards Firefighters face, and thus does not create a duty to bargain over safety. The record does not contain even a single instance of an adverse safety consequence stemming from the additional building inspection period. The alleged risks claimed by the Unions are "attenuated and speculative." (City's Brief at 25) There are a variety of reasons why a Fire Company may be outside of its Response Areas and responding from the field. Firefighters are fully trained to deal with the routine occurrences of out of order and out of sequence responses. The two out of order examples described by the Unions' witnesses were not caused by building inspections as the units involved in those instances would have been similarly affected regardless of why the units were out of quarters. No causal connection was shown between the additional building inspection period and an elevated risk of dehydration. The FDNY provides guidance and training about the importance of hydration, maintains RAC units to address this concern, and provides insulated water coolers on every apparatus. Regarding donning the PPE outside of

quarters, the Unions acknowledged that "putting on bunker gear in the street is not inherently risky." (City's Brief at 26)

Further, Fire Companies in the field receive the same information as when they are dispatched from the firehouse. Two MDTs are on every apparatus, one with a printer and a second with a screen to provide the dispatch information to the Firefighters riding in the rear compartments. Thus, Firefighters are not deprived of necessary information and the increased number of building inspection periods does not negatively impact size up. Board precedent holds that a causal link has to be established between the alleged lack of training and the alleged impact. The Unions failed to establish such a causal link. (*Id.* at 23) (citing *PBA*, 63 OCB 12 (BCB 1999))

The Unions' claim that an additional inspection period increases safety risks are "illusory" and dependent on a host of "what-if[s]." (*Id.* at 23, 24) They have not met their burden of proof and have failed to establish the "extraordinary and substantially adverse effect" necessary to prove a safety impact. (*Id.* at 22) (quoting *UFA*, 43 OCB 70, at 3 (BCB 1989)) Thus, there is no duty to bargain. Further, the duty to bargain over a practical impact does not arise until the Board finds such an impact. As the Board has not yet made any such finding, the Unions' allegations that the City has violated NYCCBL § 12-306(a)(4) are premature, and the petition should be denied in its entirety.

DISCUSSION

The Unions argue that the increase in the weekly number of building inspections has a *per se* impact on safety or, alternatively, that they have established the existence of a practical impact on safety and workload.[16] This Board finds that, after careful consideration of the evidence adduced at the hearings, as well as the pleadings, exhibits and post-hearing briefs, the record does not establish the existence of either a *per se* or practical impact on safety or workload, and, accordingly, we deny the petition.[17]

NYCCBL § 12-307(b) provides public employers the discretion to act unilaterally in certain enumerated areas outside of the scope of bargaining, including assigning and directing employees and determining their duties during working hours.[18] *See EMS SOA*, 79 OCB 7, at

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[16] Although the Unions labeled the instant petition as an "Improper Practice/Scope of Bargaining" petition, "a finding by the Board that a practical impact exists is a condition precedent to the imposition of the duty to bargain." *EMS SOA*, 79 OCB 7, at 30 (BCB 2007). That is, "there can be no violation of the NYCCBL by way of a refusal to bargain until the Board has first found that a practical impact has been demonstrated." *Id.* Thus, "any assertion of a refusal to bargain is premature; we will determine only whether there is a sufficient showing of practical impact and, if so, we will direct bargaining over alleviation prospectively." *UFA*, 71 OCB 19, at 3 (BCB 2003); *see also UFA*, 3 OCB2d 16, at 35 (BCB 2010); *UFA*, 1 OCB 9, at 5 (BCB 1968).

[17] The Unions alleged a workload impact in the instant petition and in their post-hearing brief. However, no evidence of such was adduced in the hearings, submitted to the Board, or argued in the briefs. Thus, the Board does not find a workload impact.

[18] NYCCBL § 12-307 (b) provides, in relevant part:

> It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . 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

29; *UFA*, 43 OCB 70, at 2 (BCB 1989), *affd., Uniformed Firefighters Assn. v. Office of Collective Bargaining*, Index No. 1065/90 (Sup. Ct. N.Y. Co. Nov. 26, 1990), *affd.*, 173 A.D.2d 206 (1st Dept. 1991), *affd.*, 79 N.Y.2d 236 (1992). An employer is required to negotiate over the alleviation of a practical impact on employee safety stemming from managerial action in a non-mandatory subject. *See* NYCCBL § 12-307 (b); *EMS SOA*, 79 OCB 7, at 30; *UFA*, 43 OCB 70, at 342. However, "it is not enough to allege a threat to employee safety . . . it is incumbent upon the Union to demonstrate that the alleged safety impact results from a management decision or action, or inaction in the face of changed circumstances." *UFA*, 37 OCB 43, at 17-18 (BCB 1986); *see also UFA*, 43 OCB 4, at 48 (BCB 1989), *affd., Matter of Uniformed Firefighters Assn. v. Office of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd.*, 163 A.D.2d 251 (1st Dept. 1990). Factors considered in determining whether a practical impact on safety exists include whether the employer has adopted measures that offset any potential threat to safety and whether the employees' adherence to management procedures and guidelines would obviate any safety concerns. *See UFA*, 3 OCB2d 16, at 30 (BCB 2010); *EMS SOA*, 79 OCB 7, at 30-31.

The Board recognizes that the distinction between *per se* practical impact and a "regular" practical impact can easily "become 'to some extent blurred.'" *UFA*, 4 OCB2d 30, at 28 (BCB

> performing its work. Decisions of the city . . . on those matters are not within the scope of collective bargaining, but . . . 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.

2011) (quoting *UFA*, 47 OCB 25A, at 28-29 (BCB 1991), *affd. sub nom. Matter of Uniform Firefighters Assn. v. City of New York*, (Sup. Ct. N.Y. Co., Dec. 26.1990), *affd.*, 173 A.D.2d 206 (1st Dept. 1991), *affd.*, 581 N.Y.S.2d 734 (1992)). Thus, we recently reiterated that "in order to find that a *per se* practical impact exists, warranting bargaining over alleviation, the Board must be able to determine, based on the pleadings alone, and without benefit of a hearing, that a practical impact exists." *UFA*, 4 OCB2d 30, at 29. In the instant case, we find that a practical impact cannot be determined on the pleadings alone; thus "the concept of a *per se* practical impact is inapplicable to this matter." *Id.*[19]

We review the record to see if there is a practical impact on safety. The Unions have the burden to demonstrate that a practical impact on safety exists and "must substantiate, with more than conclusory statements, the existence of a threat to safety before we will require the employer to bargain." *EMS SOA*, 79 OCB 7, at 30; *LEEBA*, 3 OCB2d 29, at 44 (BCB 2010); *SEIU, L. 621*, 51 OCB 34, at 9 (BCB 1993). The City urges the Board to consider that the record does not contain "a single instance . . . of an adverse safety consequence" stemming from the additional building inspection period. (City Brief's at 22) However, this Board has never "require[d] a union to show that injuries have actually resulted from management's action in order to demonstrate a practical impact on safety." *EMS SOA*, 79 OCB 7, at 31; *see also UFA*, 3 OCB2d 16, at 30-31 (BCB 2010) (citing *SBA*, 23 OCB 6, at 25 (BCB 1979), *affd., Matter of Sergeants' Benevolent Assn. v. Board of Collective Bargaining*, Index No. 11950/79 (Sup. Ct.

[19] In *UFA*, 4 OCB2d 30, at n. 5, we noted that "[t]o date, the only factual allegations found by the Board to result in a *per se* practical impact have involved employee layoffs." *See also UFA*, 47 OCB 25A, at n. 19.

N.Y. Co. Aug. 7, 1979); *UFA*, 79 OCB 7, 31 (BCB 2007)). Thus, the Unions need not show any actual injury.

However, to establish a practical impact on safety, the Unions must show "more than simply a change in the way things are done." *UFA*, 43 OCB 70, at 4. The Unions "must demonstrate that the exercise of a management right has created a 'clear and present or future threat to employee safety.'" *UFOA*, 3 OCB2d 50 (BCB 2010) (quoting *UPOA*, 39 OCB 37, at 5-6 (BCB 1987)); *see also UFA, L. 854*, 49 OCB 39, at 37 (BCB 1992). In the instant case, we find that the evidence does not establish that a practical impact on safety of Firefighters or Fire Officers exists.

While the Unions argue that risks exist as a consequence of the building inspection program, and that those risks increased in proportion to the increase in building inspection periods, they do not argue that the act of conducting building inspections is itself inherently dangerous. It is undisputed that for decades the FDNY has required Firefighters and Fire Officers to conduct building inspections and that the manner in which building inspections are conducted has not changed. The alleged change at issue in this case is the increase from six to nine hours per week in the amount of time Firefighters and Fire Officers are scheduled to conduct building inspections.[20] The increase in building inspection periods was a reallocation amongst pre-existing duties and, thus, this change, on its face, does "not establish a case of

[20] The evidence submitted did not meaningfully differentiate responding from a building inspection site from other field responses. Further, the record does not show what duties have been supplanted by the additional building inspection period, and thus the record does not establish whether there has been any change in the total amount of field responses.

practical impact within the meaning of the NYCCBL." *UFA*, 43 OCB 4, at 48; *see also UFA*, 37 OCB 43, at 17-18; SBA, 41 OCB 56, at 17 (BCB 1988).[21] Therefore, we must examine whether the several consequences alleged by the Unions to have resulted from this change demonstrate the existence of any practical impact on Firefighter safety.

Regarding risks associated with out of order and out of sequence responses, there is nothing in the record indicating that there has been an increase in the number of out of order and out of sequence responses since the number of building inspection periods was increased. Out of order and out of sequence responses are a regular occurrence in firefighting for which Firefighters and Fire Officers are trained. Fire Companies are in the field for a variety of reasons, including training, restocking supplies, procuring meals, and familiarization drills. Since Fire Companies are not necessarily in the firehouse when not engaged in responding to a call, we cannot conclude that, if not for the additional building inspection period, those Fire Companies would have been in quarters and not in the field and, possibly, outside of their Response Areas. As for risks occasioned to a Fire Company by not informing dispatch that it is outside of its Response Areas and will not be able to respond in the order designated due to a building inspection, such should not be attributed to the Department. *See UFA, L. 854*, 49 OCB 39, at 38 (risks associated with failure to follow rules does not make out a safety impact); *COBA*, 49 OCB 40, at 14-15 (BCB 1992). As for the other causes of the delays described by the Unions (exit the building, locate the apparatus, retrieve and don PPE), these are present in many other

[21] In the instant case, the risks associated with field responses are independent of the decision to increase building inspection periods and we cannot find on this record a change in the number of field responses.

field responses. The data submitted does not directly address whether response times from building inspections, a sub-set of field responses, are quicker than response times from the firehouse. However, the response time data introduced by the City does not indicate that response times from the field are slower; to the contrary, the City's data indicates that response times from the field are quicker than from the firehouse. The record, therefore, does not establish that the alleged delays inherent in responding from building inspections constitute a safety impact. Thus, while there may be real risks associated with out of order and out of sequence responses, those risks are independent of the decision to increase building inspection and do not establish a practical impact. *See UFA*, 43 OCB 4, at 48.[22]

Regarding the allegation that information is more fully relayed at the firehouse than at a building inspection site, and that this impacts size up, while Firefighters may find it easier to comprehend information being relayed in the orderly confines of the firehouse, the record does not establish that the relaying of information at a building inspection site constitutes a safety impact. The testimony of Chief of Operations Sweeney establishes that the same information is available to Firefighters in the field as at the firehouse. While a pertinent CIDS report may not be automatically relayed, it is still available to the Fire Officers. Regardless of what information Chauffeurs choose to verbally relay, or how they relay it, it is undisputed that all pertinent information is available to Firefighters through the MDTs. If an individual Firefighter does not have direct visual access to a MDT, he need only inquire from a Firefighter who does. *See EMS*

[22] As to the exacerbating the risks associated with the UCT system, the increase in the number of building inspection periods preceded the institution of UCT system by almost a year and half, so that decision could not and did not have a practical impact *vis-à-vis* the UCT system.

SOA, 79 OCB 7, at 34-35 (failure to access MDT or to ask for information does not support the finding of safety impact).[23]

As for the alleged physical risks, while we recognize Firefighters' concerns regarding the dangers of donning PPE in the streets, this is not a practical safety impact in light of the testimony that Department regulations instruct Firefighters not to get dressed in the street. *See Local 2507 & Local 3621, DC 37*, 71 OCB 12, at 10 (BCB 2003); *see also UFA, L.854*, 49 OCB 39, at 38 (risks associated with failure to follow rules does not make out a safety impact). As for the allegations of a possible increase in driving accidents, nothing in the record indicates that there has been any increase in road accidents since the number of building inspection periods was increased. Indeed, while the time Fire Companies spend driving to and from building inspections has increased, we cannot determine from the record if the amount of total driving time or distance has increased. The record also does not establish that Chauffeurs are unfamiliar with the routes or traffic patterns. The Administrative Districts and the locations of the buildings each Fire Company is responsible to inspect did not change with the increase in building inspection periods. Further, every route driven by a Fire Company was once an unfamiliar route, and there may well be an advantage to Chauffeurs learning the routes under non-stressful daylight conditions. It also has not been established that there is an increase in the unfamiliarity of the routes other Fire Companies will take to an emergency.

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[23] In *EMS SOA*, 79 OCB 7, at 34-35, we noted that "the MDT stores information transmitted which can be reviewed at a later time" and that we could not find that a Fire Officer "miss[ing] safety information transmitted via the MDT . . . rises to the level of a safety impact because [the Fire Officer] . . . could have stopped to read the MDT."

Regarding cumulative dehydration, at issue is the reallocation of an hour and a half per week among existing duties, and the record does not support a finding of practical safety impact of dehydration related to increasing the number of building inspection periods.[24] Any duty that puts Firefighters in the active state creates the same risks of cumulative dehydration as conducting building inspections. Nothing in the record would allow us to find that the time now spent on the third building inspection period was previously spent by Firefighters in a relaxed state in the firehouse. Thus, we cannot find that increasing the number of building inspection periods resulted in an increased risk of cumulative dehydration.[25]

Finally, as for the fact that not all Firefighters received additional training in 2007, to establish an allegation of a safety impact based upon a lack of specific training, it must be established that the failure to train itself impacted upon safety. *See PBA*, 63 OCB 12, at 7 (BCB 1999); *UFA*, L.854, 49 OCB 39, at 39. Here, the record indicates that 96 percent of the Firefighters and Fire Officers received the training that accompanied the increase in building inspections periods in November 2007, and the record is devoid of any evidence or testimony as

[24] While the amount of hours scheduled for building inspections increased by three hours (from six to nine), City Exhibit 10 indicated that half of all scheduled hours are lost due to responding to emergencies and other cancellations. Therefore, the increase in time actually conducting building inspections is only approximately one and a half hours.

[25] The Unions introduced FDNY data showing that the number of thermal stress injuries in 2007 was significantly less than in 2008. However, nothing in the record establishes a cause and effect between the increase in building inspections and the increase in thermal stress injuries. Further, "the intrinsic weakness of this *post hoc [ergo p]ropter hoc* reasoning is underscored by the fact that" the number of heart attacks and strokes—both risks linked to dehydration by the Unions' witnesses—significantly decreased (from 29 to 1) after the number of building inspections increased. *CWA*, 31 OCB 6, at 9 (BCB 1983).

to any consequences that may result from the fact that four percent did not. Further, the training at issue concerned how to conduct building inspections and how to enter the data gained from building inspections into the Department's databases. Thus, the record does not establish that the failure to train four percent of the Firefighters in these areas impacted safety.

Therefore, we find that the record before us does not establish a practical impact on safety or workload arising from the decision to increase the number of building inspection periods from two per week per Fire Company to three per week per Fire Company. Accordingly, the petition is dismissed.

DETERMINATION AND ORDER

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 increase in building inspection periods from two per week per Fire Company to three per week per Fire Company did not involve a *per se* or practical impact on safety or workload; and it is further

ORDERED, that the improper practice/scope of bargaining petition filed by the Uniformed Firefighters Association, Local 94, and the Uniformed Fire Officers Association, Local 854, docketed as BCB-2668-07, be and the same hereby is, dismissed.

Dated: New York, New York
January 25, 2012

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

I dissent CHARLES G. MOERDLER
MEMBER

I dissent PETER PEPPER
MEMBER