DC 37, L. 2507, 6 OCB2d 5 (BCB 2013)

(IP) (Docket No. BCB-3025-12)

Summary of Decision: The Union claimed that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4) by unilaterally discontinuing a five-year recertification program for certain emergency medical services employees and replacing it with a three-year refresher program. The City argued that it did not violate the NYCCBL because its decision to set forth the policy and procedures for required certifications and licenses was an exercise of its statutorily granted management rights. The Board found that the Union's claims may be resolved in whole or in part by the arbitration of two pending grievances. Accordingly, the Board deferred the Union's claims to arbitration without prejudice to the Union's right to reopen the petition for specified reasons. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCALS 2507 & 3621,

Petitioners,

-and-

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

Respondents.

INTERIM DECISION AND ORDER

On June 15, 2012, District Council 37, AFSCME, AFL-CIO, Locals 2507 and 3621 (collectively, "Union") filed a verified improper practice petition against the City of New York ("City") and the Fire Department of the City of New York ("FDNY"). The Union claims that the City and the FDNY violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally

discontinuing a five-year recertification program for certain emergency medical services employees and replacing it with a three-year refresher program. The City argues that it did not violate the NYCCBL because its decision to set forth the policy and procedures for required certifications and licenses was an exercise of its statutorily granted management rights. This Board finds that the Union's claims may be resolved in whole or in part by the arbitration of two pending grievances. Accordingly, the Board defers the Union's claims to arbitration without prejudice to the Union's right to reopen the petition for reasons specified below.

BACKGROUND

The FDNY is a City agency responsible for protecting the lives and property of New York City residents and visitors as a first responder to fires, medical emergencies, and other types of public safety disasters. The FDNY's Emergency Medical Service ("EMS") is the primary provider of pre-hospital emergency care in New York City. The Union is the certified collective bargaining representative of FDNY EMS employees in civil service titles Emergency Medical Specialist - EMT ("EMT"), Emergency Medical Specialist - Paramedic ("Paramedic"), and Supervising Emergency Medical Specialist Levels I and II ("EMS Supervisors").[1]

The instant dispute concerns the FDNY's recertification program for EMTs, Paramedics, and EMS Supervisors (collectively, "Emergency Medical Specialists"). Emergency Medical Specialists are required by law to maintain various certifications and licenses established by the New York State Department of Health ("NYS DOH") for the duration of their employment. Prior to July 13, 2007, Emergency Medical Specialists were recertified pursuant to a three-year

[1] EMTs and Paramedics provide timely pre-hospital emergency medical care and basic life support to anyone who requests and/or requires it; Paramedics additionally provide advanced life support. EMS Supervisors supervise the activities of EMTs and Paramedics in addition to performing the duties of these two emergency medical specialist titles.

recertification program, which, among other things, required attendance at a two-week training program and the passing of a New York State examination. On April 21, 2006, during the negotiations that led to the 2002-2006 Emergency Medical Services Agreement ("Agreement"), the parties executed a side letter ("Side Letter") memorializing their support for legislation allowing the FDNY to implement a five-year recertification program pursuant to the New York State Pilot EMS Recertification Program. The Side Letter provides that:

> The parties agree to jointly support legislation that will enable the FDNY to create a five year certification program for EMTs and Paramedics.
>
> The parties agree to jointly take steps necessary to ensure that the NYS Department of Health 5 year Certification pilot program is opened up to include the New York City Emergency Medical Service, and that the NYS DOH extend the pilot program as may be required.
>
> If the parties are unsuccessful, for whatever reason, in implementing such change including if the provision is overturned by a judicial or administrative tribunal, the parties agree to reopen the contract to bargain over alternative savings that are equivalent in value to which the union was credited under the contract.

(Pet., Ex. 9) The parties also included this language in a Memorandum of Agreement ("MOA") entered into on April 21, 2006

The parties represented that such legislation was enacted and, on July 13, 2007, the FDNY implemented a five-year recertification program. In contrast to the prior three-year recertification program, the five-year recertification program focused primarily on continuing medical education and included journal assignments and practical skill drills. In lieu of a state-sponsored written examination, Emergency Medical Specialists demonstrated their proficiency through the direct observation of the FDNY Medical Director or his or her designee.

On January 12, 2012, the FDNY informed the Union that it desired to transition to a three-year challenge refresher program for the recertification of Emergency Medical Specialists. Accordingly, the FDNY rescinded the five-year recertification program on February 15, 2012, and implemented a new three-year challenge refresher program effective March 1, 2012. The new recertification program requires Emergency Medical Specialists to take a state-mandated written examination every three years. Emergency Medical Specialists who fail the test on multiple occasions could lose their certification, which is a job requirement. No such tests were required pursuant to the five-year recertification program.

Notwithstanding the above, the City maintains that the five-year recertification program contained substantial requirements that were not present in the three-year challenge refresher program. For example, the City asserts that under the five-year recertification program Emergency Medical Specialists were required to demonstrate proficiency of skills in a one-on-one setting with an instructor. According to the City, if Emergency Medical Specialists did not satisfactorily demonstrate the required skills, they would be restricted from patient care duties and could similarly lose their certification.

On May 18, 2012, the Union filed two related requests for arbitration, claiming that the FDNY's rescission of the five-year recertification program and implementation of the new three-year challenge refresher program violated the terms of the Side Letter. The City challenged the arbitrability of the grievances, and the petitions challenging arbitrability were decided today in *DC 37, L. 2507*, 6 OCB2d 6 (BCB 2013).

Here, the Union alleges that the City and the FDNY refused to bargain in violation of the NYCCBL by unilaterally discontinuing the five-year recertification program and implementing the three-year challenge refresher program. As relief, the Union requests that the Board order the

City and the FDNY to rescind EMS OGP 104-03, to bargain with the Union over any changes to the five-year recertification program, and to post appropriate notices. The Union further requests that the Board order such other relief as may be just and proper.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4) by unilaterally rescinding the five-year recertification program and implementing a new three-year challenge refresher program instead. According to the Union, qualifications and certifications required for current employees as a condition of continued employment are mandatory subjects of bargaining. Moreover, the Union contends that the Board has held that the imposition of new qualifications for recertification on incumbent employees constitutes a unilateral change the terms and conditions of their employment.

Pursuant to the five-year recertification program, Emergency Medical Specialists were not required to take a state examination in order to maintain their recertification. However, under the new unilaterally implemented three-year challenge refresher program, Emergency Medical Specialists are required to take a state examination.[2] If Emergency Medical Specialists were to fail the examination on multiple occasions, they could lose their certification, which is a requirement for continued employment. Therefore, the Union argues that, by requiring Emergency Medical Specialists to pass the state examination for recertification, the City and the FDNY unilaterally implemented a new qualification for continued employment.

[2] Although Emergency Medical Specialists had to pass this examination as qualification of employment at the time of their hiring, they did not need to pass the examination for recertification between July 2007 and March 2012.

The Union asserts that, even if the recertification program is viewed as employee training, as the City contends, such training still is required as a qualification for continued employment. The Union does not dispute that the FDNY could order as much training as it deems necessary. However, the Board has recognized an exception to the general principle that decisions concerning the quantity and quality of employee training are within the City's statutory management rights when the training is required by the employer as a qualification for continued employment. The Union maintains that it is undisputed that the new three-year challenge refresher program is a qualification for continued employment. Therefore, the Union contends that the program is a mandatory subject of bargaining even if it is considered employee training.

Lastly, the Union argues that its bargaining demands are irrelevant to the ultimate question of whether the City made a unilateral change to a mandatory subject of bargaining. According to the Union, an employer's unwillingness to agree to a demand in bargaining does not affect the analysis of whether a subject is mandatorily negotiable.

City's Position

The City argues that the petition must be dismissed because the Union's claims concern the FDNY's exercise of a statutorily-granted management right. According to the City, NYCCBL § 12-307(b) guarantees the City the right to direct its employees and to determine the methods, means, and personnel by which government operations are to be conducted, including the quantity and quality of training required to achieve the extent of services that it chooses to deliver to the public. Therefore, the FDNY's decision to comply with the requirements of the three-year challenge refresher program was an exercise of its management rights.

The City asserts that the three-year challenge refresher program does not create a new qualification for continued employment, as the Union contends. In contrast to *DC 37, Local*

2906, 4 OCB2d 62 (BCB 2011), in which the Board found that the requirement that sludge boat Captains obtain an additional license for certain waters was a new qualification for continued employment, maintenance of the required NYS DOH certification is not a new requirement for continued employment. Emergency Medical Specialists were required to maintain the same licenses and certifications under the five-year recertification program.

Furthermore, Emergency Medical Specialists were required to pass the state written examination in order to be certified as an EMT or a Paramedic prior to the commencement of their employment. The City contends that the requirement of a written examination is not new because a vast majority of Emergency Medical Specialists were subject to the requirement to take the examination for a number of years over the course of their employment. Moreover, some of the Union's members did not qualify for inclusion in the five-year recertification program, and these employees have always taken the state examination in order to maintain their respective licenses.

The Union's allegation that its members could be terminated for failing the written examination is not persuasive because Emergency Medical Specialists have always been subject to an examination testing their proficiency in skills required to perform their duties and tasks. Regardless of whether Emergency Medical Specialists failed to maintain their certification due to a low score on a written examination under the three-year challenge refresher program or a lack of demonstrated skill proficiency under the five-year recertification program, they have always been subject to termination for failure to maintain their certification.

Assuming *arguendo* that the Board finds a duty to bargain, the petition should be dismissed because the Union's requests concern issues that do not involve requirements for certification or qualifications for continued employment. The Union's primary complaint, as expressed at labor-management meetings, was the possibility that the FDNY could utilize operational drills in

the future. However, operational drills are not a requirement for recertification pursuant to the three-year challenge refresher program. Therefore, the Union's requests for "assurances" or demands do not involve any requirements for continued employment and do not fall within any exception to the general rule that the City has the management right to determine the quantity and quality of employee training. (Ans. ¶ 57) Therefore, the City does not have a duty to bargain over the possible future utilization of operational drills, and the City alleges that the Union seeks to compel the City to bargain over this subject through the filing of the instant petition.

Lastly, the City argues that there is no violation of the duty to bargain because public policy supports the FDNY's ability to craft training programs that are necessary to ensure that the FDNY's mission is accomplished. As a public employer, the FDNY's decisions are not bargainable when they inherently and fundamentally relate to the FDNY's central mission. The FDNY's Emergency Medical Specialists must be properly trained and certified in order to carry out the FDNY's central mission of protecting the lives and property of City residents and visitors by appropriately responding to medical emergencies. The City maintains that the decisions cited by the Union do not implicate any public policy concerns like the one presented in this matter, which involves the safety and protection of the public.[3]

DISCUSSION

The Union claims that the City and the FDNY violated NYCCBL§ 12-306(a)(1) and (4) by unilaterally discontinuing the five-year recertification program and implementing the three-year challenge refresher program. The Union has also filed two related grievances challenging the same conduct as a contractual violation. For the following reasons, we defer this dispute to the

[3] The City also argues that there is no derivative violation of NYCCBL § 12-306(a)(1) because there is no violation of NYCCBL § 12-306(a)(4).

parties' contractual grievance process.

Pursuant to CSL § 205(5)(d), expressly applicable to the NYCCBL, the Board has long recognized that it lacks jurisdiction to enforce contractual rights. *See NYSNA*, 3 OCB2d 55, at 7-8 (BCB 2010) (citations omitted); *NYSNA*, 69 OCB 21, at 7-9. Accordingly, the Board's policy is to defer "improper practice claims where the improper practice allegations arise from and require interpretation of a collective bargaining agreement." Similarly, the Board will defer improper practice claims "where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement." *DC 37*, 1 OCB2d 4, at 8-10 (BCB 2008); *see also DC 37, Local 1508*, 79 OCB 11, at 10 (BCB 2007). The Board's policy of deferring disputes to arbitration is "consistent with the declared policy of the NYCCBL to favor and encourage . . . final, impartial arbitration of grievances between municipal agencies and certified employee organizations." *DC 37, L. 1508*, 79 OCB 21, at 21 (BCB 2007) (internal quotation marks omitted).

Here, we find that the Union's improper practice claims arise out of the same transactions as the Union's contractual claims and, therefore, may be resolved in whole or in part by the arbitration of the pending grievances. In resolving the contractual claims, the arbitrator will determine whether the Side Letter was violated and/or whether, pursuant to its terms, bargaining is required. Accordingly, we defer the Union's improper practice claims to arbitration. Since the Union has already initiated the parties' grievance and arbitration procedure, we leave the parties to pursue their claims and defenses in that particular forum. *See NYSNA*, 3 OCB2d 36, at 12, n.5 (BCB 2010). In so ruling, we note that this deferral is "without prejudice [to the Union's right] to reopen the charge should the City raise during the arbitration any argument that forecloses a determination on the merits of the grievance[s] or should any award be repugnant to rights under the NYCCBL." *UFA*, 1 OCB2d 16, at 10 (BCB 2008). Furthermore, this Board "will retain

jurisdiction over these claims in the event that the arbitration decision does not resolve the question of whether an improper practice has been committed or does not conform with the NYCCBL." *United Prob. Officers Assn.*, 47 OCB 38, at 15 (BCB 1991).

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 claims contained in the verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO, Locals 2507 and 3621, docketed as BCB-3025-12, are hereby deferred to the parties' grievance and arbitration procedure without prejudice to the right to reopen this matter should a determination on the merits of the contractual claims be foreclosed or should any award be repugnant to rights under the New York City Collective Bargaining Law.

Dated: March 6, 2013
New York, New York

MARLENE A. GOLD
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