L. 2507 & L. 3621, DC 37 v. FDNY & City, 63 OCB 34 (BCB 1999) [Decision No. B-34-99 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition	:	
-between-	:	
DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCALS 2507 AND 3621,	:	
Petitioners,	:	Decision No. B-34-1999 Docket No. BCB-1939-97
-and-	:	
The FIRE DEPARTMENT of the CITY OF NEW YORK,	:	
Respondents.	:	

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DECISION AND ORDER

On October 10, 1997, District Council 37, AFSCME, AFL-CIO, Locals 2507 and 3621 ("Union" or "Petitioner"), filed a verified improper practice petition against the Fire Department of the City of New York ("FDNY," "City" or "Respondent"). The petition alleges that the FDNY violated §12-306(a)(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL")[1] when it unilaterally abolished all light duty and modified duty assignments for Emergency Medical

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

a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in § 12-305 of this chapter;

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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.

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Service ("EMS") employees suffering from non-work related injuries or illnesses. After an attempt to mediate the dispute, the respondent filed its answer on January 16, 1998. The petitioner filed its reply in which it purports to amend the petition on May 1, 1998. With the consent of the petitioner, the respondent submitted a sur-reply on July 17, 1998. With the consent of the respondent, the petitioner filed a response to the sur-reply on August 19, 1998.

BACKGROUND

Local 2507 represents the Emergency Medical Services Specialists, Level I, Emergency Medical Technicians and Level II Paramedics employed by the respondent, EMS Bureau of the FDNY. Local 3621 represents the Supervising Emergency Medical Services Specialists, Level I and Level II, Captains presently employed by the EMS Bureau of FDNY. Petitioner District Council 37 is the current exclusive certified bargaining representative of EMS employees. In March 1996, EMS was functionally transferred from the New York City Health and Hospitals Corporation ("HHC") to the FDNY.

Operating Guide Procedure Number 104-7 ("OGP 104-7") was issued on November 4, 1991 with an effective date of November 11, 1991. The complete text of OGP 104-7 is as follows:

MODIFIED DUTY ASSIGNMENTS

PURPOSE: To establish a procedure for the temporary utilization of all members of the Service in a modified duty assignment capacity.

POLICY: Members who are physically unable to perform full duty, for a limited period of time, will be permitted to return to a productive work assignment, upon approval of application to the modified duty assignment program. The number of modified duty assignments are limited and application to the program does not guarantee a placement. Any modified duty assignment granted under the provisions, outlined herein, shall be for a minimum of one (1) month but shall not exceed one (1) year. Members who are approved for modified duty assignments will be assigned to available authorized positions.

SCOPE: This procedure applies to all members of the Service who are physically unable to perform full duty for a limited period of time, and are qualified for a modified duty assignment.

PROCEDURE: A. Members of the Service requesting modified duty assignment shall:

1. Possess a current state EMT or AEMT-4 certification card and a valid driver's license at the time of application.
2. Be eligible for consideration providing, their disability is not permanent and return to full duty will occur prior to the expiration of their eligibility for a modified assignment.
3. Authorize the release of all relevant medical documentation . . .
4. Apply for modified duty assignment consideration by completing and submitting a Request for Modified Duty Assignment form . . . in person, to the Director of Human Resources . . .
5. Meet the minimum criteria defined in the modified duty assignment description.
6. Comply with all Corporate and Service Regulations when granted a modified duty assignment.

B. Operations/Department Heads shall:
1. Identify funded vacant positions, via Personnel Requisitions, within their commands or departments, which may be appropriate for members requesting modified duty assignment.
2. Forward a description and number of eligible positions and the number of vacant positions to the Director of Human Resources for designation as modified duty assignment positions.
3. Monitor members performance to determine continued effectiveness and appropriateness of the assignment and provide and employee performance evaluation for any/all members on modified assignment pursuant to HHC Operating Procedure 20-40.

C. Human Resources shall:
1. Establish an inventory of positions designated for the use as modified duty assignments based on suggestions from Cost Center Managers.
2. Review all applications for completeness . . .
3. In consultation and cooperation with the Office of Operations match the member of the Service to an appropriate vacant modified duty assignment, only if the employee can perform the functions of the assignment.

NOTE: Members of the Service requesting modified duty assignments shall be selected on a first come first served basis, based on the employee's ability to perform the assignment.

4. Through the Office of Health & Safety, schedule members with the EMS/EHS for medical assessment, as required.
5. Through the Office of Health & Safety, secure determination from the EMS/EHS on the duties a member can perform , and the date anticipated for return to full duty.
6. Notify the member of the disposition of his/her request for modified duty assignment . . .
9. Monitor the modified duty assignment program and make changes, as deemed necessary.

D. Office of Health & Safety, through Employee Health Service, shall:
1. Evaluate and determine the physical ability of members being considered for modified duty assignment, identifying their limitations, and duties

which they can perform.

2. Review and secure all medical documentation submitted by the member . . .
3. Determine the date anticipated for return to full duty of the member of the Service requesting modified duty assignment and forward all relevant information to the Director of Human Resources.
4. Perform periodic medical examinations and assessments on all members assigned to modified duty assignments.

According to the Union, on June 3, 1997, representatives of EMS/FDNY and Local 2507 met and the Locals' representatives asked why a number of employees had been removed from their light duty or modified duty assignments. According to the Union, EMS/FDNY representatives informed the Local's representatives that those particular assignments were non-budgeted assignments, and that non-budgeted light or modified duty assignments for EMS employees with non-work related illnesses or injuries were going to be abolished and eliminated. The City claims that there was an informal meeting held in June of 1997 at which NYFD representatives advised Local 2507 that where an employee was classified as "modified duty" by the Bureau of Health Services ("BHS") and was improperly placed in a non-budgeted modified duty assignment in violation of OGP No. 104-7, the employee would be removed from the improper assignment.

In its petition, the Union argues that it was never formally notified that light and modified duty assignments would be abolished for all non-work related injuries or illnesses. The Union filed its petition on October 10, 1997, alleging that the unilateral changes, including but not limited to the abrogation of OGP104-7, the elimination of non-budgeted light duty and modified duty assignments, the adoption of new medical standards and the utilization of the Three Physician Board to implement new medical review procedures for employees on approved light duty or modified duty assignments, constitute changes in mandatory terms and conditions of employment subject to collective

bargaining. As a remedy, the petition requests that the Board order respondent to (1) restore the status quo ante and return all employees to the modified duty positions they occupied before the unilateral changes were made, (2) reinstate all employees removed from the payroll and reimburse them for lost wages and benefits, (3) provide petitioner with a complete list of all budgeted light and modified duty assignments for Fiscal Years 1997 and 1998, (4) post a notice to employees throughout the FDNY in which respondent agrees not to make any further unilateral changes in mandatory subjects of bargaining without the consent of District Council 37, and (5) for such other relief that the Board deems just and proper.

POSITIONS OF THE PARTIES

Petitioner's Position

The Union alleges that on a date unknown to it, the EMS/FDNY unilaterally abrogated OGP 104-7 by ceasing to identify and establish funded vacant positions appropriate for modified duty assignments, abolishing an established inventory of positions designated for use as modified duty assignments and ceasing to match members of the service to an appropriate vacant modified duty assignment. It states that in conjunction with that conduct, EMS/FDNY unilaterally abolished all light duty and modified duty assignments for EMS employees suffering from non-work related injuries. At the same time, EMS/FDNY established and applied a new medical review standard to all EMS employees assigned to light duty or modified duty assignments, by which said employees were required to be fit for full duty to continue on the payroll. It alleges that employees on approved light duty or modified duty assignments were ordered to submit to a medical examination which was then reviewed by a special Three Physician Board. That Board then declared employees to be fit or

unfit for full duty, without regard to their previous light duty or modified duty assignment. Employees were then informed that their light duty or modified duty assignments had been abolished or eliminated.

The Union argues that employees declared to be fit for duty by the Board were ordered to return to full duty without regard to their previous light duty or modified duty status and those that were declared unfit for duty were informed that they could no longer continue in active employment and were taken off payroll immediately. It contends that those employees were told that they could request medical leave without pay or be terminated from employment.

The Union alleged that on June 3, 1997, representatives of Local 2507 made a formal request for the complete list of all light duty and modified duty assignments budgeted to EMS/FDNY for the current fiscal year. To date, the Union contends, EMS has failed to provide the Union with a complete list of the budgeted assignments.

In its reply, the Union alleges that OGP 104-7 also covered disabled employees who were injured on the job and exhausted their Line of Duty ("LODI") benefits or employees whose claims were denied by the New York City Law Department's Workers Compensation Division. The Union states that the gravamen of the petition is that the respondent's removal of employees from existing modified duty assignments in connection with its unilateral abolition of an existing past practice of granting modified duty assignments constitutes a unilateral change in an aspect of employees' wages and such a unilateral change is a mandatory subject of bargaining.[2] It states that as a direct

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[2] The Union cites *New York State Federation of Police, Inc. (Town of Cortlandt)*, 30 PERB ¶ 3031 (1997) and *City of Schenectady*, 25 PERB ¶ 3022 (1992), *aff'd*, 85 N.Y.2d 480, 28 PERB ¶ 7005 (1995).

consequence of removing these employees from their modified duty assignments and placing them on medical leave, the employees began to use up their accrued annual and sick leave. Moreover, it contends, once these employees exhausted their accrued leaves they were placed on a leave of absence without pay, which triggered the leave-of-absence clock for termination purposes under Civil Service Law §§ 71 and 73.

The Union attempts to rebut the City's claim that OGP 104-7 involves a managerial prerogative by arguing that the procedures of OGP 104-7 are more like an employer's written work rules. It reasons that OGP 104-7 involves a mandatory subject of bargaining, namely, the procedures for continued active employment of disabled employees in modified duty assignments. It argues that whenever a written policy, rule or regulation has a direct impact upon a term or condition of employment such as a disabled employee's ability to continue to work and receive wages and benefits, or conditions, or restricts the employee's continued active employment, those rules or procedures involve a mandatory subject of bargaining and cannot be unilaterally changed.[3]

It also argues that respondent has waived its managerial prerogatives in this case by following the past practice of regularly assigning employees with non-work related injuries and illnesses to budgeted and now budgeted modified duty assignments and by promulgating OGP 104-7. The Union cites Decision No. B-64-89, where the Board found that an employer's managerial prerogative could be voluntarily limited or restricted by an employer's conduct. It further alleges that

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[3] *Cf.* Decision No. B-42-86 (The Union asserts that the Board found that a public employer is precluded from unilaterally revoking a work rule that involved a mandatory subject of bargaining or has a practical impact on employees defined by the NYCCBL). *See also* Decision No. B-16-81 (Modification of work rules contained in a collective bargaining agreement is bargainable).

respondent's violation of § 12-306(a)(4) gives rise to a derivative violation of § 12-306(a)(1) where there has been a violation of § 12-306(a)(4) of the NYCCBL.

The Union states that the City's assertion that there was never an understanding or practice that employees who exhausted their LODI benefits could then qualify for a modified duty assignment pursuant to OGP 104-7 is undermined by the admission that the Fire Department did provide an undisclosed number of employees who exhausted their LODI benefits with modified duty assignments after their LODI benefits ended.

The Union asserts that at no time did EMS personnel inform employees that the reason for their loss of a modified duty assignment was the absence of vacant budgeted positions. It contends that EMS's decision to terminate the modified duty assignments was unrelated to the availability of vacant budgeted positions and cannot be documented by respondent. It also contends that if the respondent would have provided the petitioner with the information it requested, it could confirm or deny the respondent's claim that there were no vacant budgeted modified duty positions.

Respondent's Position

The City asserts that OGP 104-7 was issued while EMS was with the HHC and establishes that members who are physically unable to perform full duty for a limited period of time due to a non service connected injury or illness will be permitted to return to a productive work assignment if they satisfy all the conditions established in OGP 104-7. It asserts that OGP 104-7 states that the number of modified duty assignments is limited and application to the program does not guarantee a placement into a modified duty assignment. It reviews the requirements of the program: that the assignment must be for a minimum of one month, must not exceed one year and that the assignment

must be to an identified, funded vacant position within the EMS. It also asserts that OGP 104-7 is not applicable to employees who suffered an injury on the job, since such an employee is covered by LODI.[4]

The City asserts that prior to the functional transfer of EMS to the NYFD, the EMS Employee Health Services and Goldwater Hospital, a member hospital of the HHC, provided the medical evaluation services required pursuant to OGP 104-7. As a consequence of the transfer, it asserts, EMS was no longer affiliated with HHC or Goldwater Hospital. After the functional transfer, it asserts, the functions of the groups were assigned to the Bureau of Health Services ("BHS") of the NYFD. It asserts that the BHS evaluates employees' fitness for duty through, among other things, its Three Physician Board. The City contends that the function of the Three Physician Board was described to the Union in a letter.[5] It asserts that the medical standards for fitness for duty have not changed since the functional transfer of EMS from HHC to NYFD and that the determinations are still made in accordance with the requirements of OGP 104-7.

The City contends that prior to the transfer of EMS to the NYFD, the NYFD had its own procedures and policies regarding "light duty" for firefighters, unrelated to OGP 104-7 and EMS employees. It asserts that after the transfer of EMS to NYFD, there were times when NYFD physicians and other personnel incorrectly used the term "light duty" when discussing OGP 104-7.

The City asserts that as a result of budget considerations, the handwritten list of vacant

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[4] Line of Duty ("LODI") benefits may be paid to otherwise qualified employees who "[have] been physically disabled as the result of an injury arising out of and in the course the employee's official duties. . .".

[5] The Three Physician Board was explained to the Union in a letter to Kevin Lightsey from the Chief Medical Officer of the NYFD dated June 4, 1997.

budgeted positions has resulted in fewer budgeted vacant positions and for some time, EMS has employed more employees than were allocated by the budget. In 1996, as part of adapting the NYFD to include EMS, the City contends that it was necessary to review compliance with OGP 104-7. According to the City, it was determined that a small number of individuals were improperly assigned to modified duty in violation of OGP 104-7, and as a result, the employees were removed from the improper assignments.

The City asserts that OGP 104-7 does not require the NYFD to create modified duty assignments for those who desire them, and that OGP 104-7 states that the number of the placements are limited. Application to the program does not guarantee a placement and the assignments, when available, are legitimate positions with lower physical demands, designated for titles other than those represented by petitioners. They are positions that would be advertised as employment opportunities for individuals who possessed the appropriate qualifications once approval was received to hire. The City explains that the budgeted vacant positions were generally available for modified duty assignment when there was a hiring freeze: the assignment would be temporary until the freeze was lifted and permanent personnel could be hired to fill the vacancy.

For a first affirmative defense, the City asserts that management's decision on whether to assign a position to an employee with a modified duty status falls squarely within the employer's statutory management rights as enumerated in § 12-307(b) of the NYCCBL.[6] It argues that the

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[6] Section 12-307(b) of the NYCCBL provides, in relevant part:

It is the right of the. . . public employer, acting through its agencies, to determine the standards of service to be offered by its agencies; determine the standards of selection for employment; direct its employees; . . . relieve its employees from duty . . . for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government

(continued...)

Board has "repeatedly construed § 12-307(b) of the NYCCBL to guarantee the City the unilateral right to assign and direct employees, to determine what duties will be performed during work time, and to allocate duties among unit and non-unit employees, unless the right has been limited by the parties themselves in their collective bargaining agreement."[7] It argues that in the instant matter, the Union has not alleged that anything in the collective bargaining agreement requires the employer to bargain regarding its exercise of its managerial rights under § 12-307(b).

The City contends that OGP 104-7 lays out the policy and procedure for obtaining and assigning modified duty positions for individuals in EMS. It contends that the policy plainly states that the number of positions is limited and that there is no guarantee of placement and it also mandates that modified duty assignments will only be made to budgeted vacant positions. The employer has no duty to create, maintain or otherwise assure availability of positions for modified duty personnel, it asserts. It also asserts that the decision to utilize a Three Physician Board or any other organizational structure to determine fitness for duty falls squarely within the management rights cited in § 12-307. Indeed, the City contends, every aspect of OGP 104-7 relates to the employer's management rights.

The City asserts as a second affirmative defense that the petition fails to allege facts sufficient to support a claim of improper practice pursuant §§ 12-306 (a)(1) or (4). Regarding § 12-306(a)(1), the city asserts that the Union failed to allege any facts that support a claim that the employer in any

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[6](...continued)
operations are to be conducted . . . and exercise complete discretion over its organization and the technology of performing its work.

[7] The City cites Decision No. B-37-87, citing Decision Nos. B-23-87; B-15-87; B-6-87; B-4-83 and B-16-81.

way affected the right to self-organization, to form, join, or assist public employee organizations or to bargain collectively through a certified employee organization of their own choosing or that any member was compelled to participate in any such activities against their will.

It contends that the Union has failed to allege any facts that support the claim that the employer failed to bargain over any mandatory subject of bargaining in accordance with § 12-306 (a)(4). It claims that all allegations in this petition arise from a proper exercise of management's rights. The City asserts that in the present case, the Union failed to allege anything but conjecture, speculation and surmise and that all of the pertinent allegations from the Union are simply wrong. It contends that if the Union had properly investigated its members' perceptions, it would have found that OGP 104-7 is still in effect, its purpose and intent have not changed and modified duty assignments will continue in accordance within the limitations of OGP 104-7.

As its third affirmative defense, the City argues that the improper practice petition must be dismissed because the Board lacks jurisdiction over alleged policy and procedure violations and that the appropriate forum for resolution of these allegations, if any at all, is through the grievance mechanisms outlined in petitioners' collective bargaining agreements. The City asserts that the Board has held matters that are more appropriately dealt with under existing contracts will not be heard by the Board in an improper practice filing.[8]

In its sur-reply, the City argues that separate and apart from the LODI agreement, an employee who claims a work related injury or illness may be entitled to Worker's Compensation benefits, but not LODI or the benefits of OGP 104-7. The City contends that the Union incorrectly

[8] The City cites Decision Nos. B-14-95; B-46-92; B-45-88; B-39-88; B-24-87 and B-36-87.

asserted that EMS officials informed the employees that it was the employee's obligation to find a modified duty assignment and that there was a refusal to identify modified duty assignments.

It argues that petitioner still has not made a formal request for information as alleged in the original petition in this case and it argues that the filing of an improper practice petition does not constitute a proper request for information. Additionally, in its sur-reply, the City argues that since the petitioner has not requested information related to a subject over which the respondent is obligated to negotiate, there is no obligation to provide the material the petitioner seeks.[9]

The City argues that the PERB decisions cited by the Union in its reply offer no support for their claims regarding alleged mandatory subjects of bargaining. It contends that the cases offer no support to the petitioner's claim that "elimination" of the "benefits" provided through OGP 104-7 constitutes a unilateral change in an aspect of an employee's wages.

The City asserts that in the instant matter, it has not limited its managerial prerogative by issuing OGP 104-7. On the contrary, it asserts, OGP 104-7 specifically preserves management's rights by limiting the application of OGP 104-7. It contends that the Board has stated that any claim to limit management's exercise of its statutory rights must be based on a clear and explicit waiver or specific statutory proscription[10] and that petitioner has failed to point to anything that supports its claim of such a waiver in this case.

The City argues that all allegations in the reply must be dismissed because they were improperly brought in a reply rather than by an amended petition. It states that the Board has not

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[9] The City cites Decision No. B-39-88.

[10] The City cites Decision No. B-39-88 at pp. 13-14 [citations omitted].

permitted new and independent claims of improper practices to be amended to a petition.[11] The City argues that the new claims change the overall nature of the petition and must be dismissed.

The City states that the new and independent allegations which must be dismissed are: that the NYFD eliminated a benefit established through past practice, therefore, this [action] constitutes a unilateral change in an aspect of employees' wages; that modified duty assignments are an administrative work rule and therefore a mandatory subject of bargaining; the alleged revocation of OGP 104-7 involved a mandatory subject of bargaining because it effects wages and benefits as well as continued employment and use of sick leave; that managerial prerogatives were waived by following a past practice of assigning employees to budgeted and non-budgeted modified duty assignments; that the imposition of non-specific new qualifications for incumbents constitutes a change in terms and conditions of employment; and most significantly, that employees who utilized all the benefits they were entitled to pursuant to the LODI agreements were entitled to modified duty assignments pursuant to OGP 104-7 and a failure to permit them to continue in modified job assignments pursuant to OGP 104-7 constituted an improper practice.

The City also claims that the above-mentioned allegations are also time-barred. It contends that as written in the Reply, the allegations suggest that all complained of actions occurred on or about June, 1997. For this reason, the City urges, it must be concluded that all actions complained of occurred more than four months before the filing of the amendments in the reply on May 1, 1998. As these amendments are all untimely, the City argues that this is a separate ground for their

[11] The City cites Decision No. B-2-83.

dismissal.[12]

Finally, the City argues that there is no duty to bargain what is essentially petitioner's expectation of job security because such bargaining would abrogate management's statutorily reserved rights pursuant to §12-307 of the NYCCBL. It claims that petitioners never suggest that the petition is brought on behalf of individuals who are medically capable of performing their duties. On the contrary, the City urges, the allegations suggest that these individuals may never be able to perform their regular duties.[13] It contends that the petitioner did not complain that coverage by OGP 104-7 was improperly denied to people who qualified. It reiterates that OGP 104-7 is designed to *temporarily* fill *existing* positions and that after the merger, there was no need to fund the same number of positions and several positions fell victim to budget cuts as they became vacant. They assert that the Union really wants to bargain over job security, which is a non-mandatory subject of bargaining.[14]

DISCUSSION

At the outset, we will consider the procedural questions raised by the parties. The City contends that the Union has failed to state a valid claim of improper practice with regard to §§ 12-306(a)(1) and (4) of the NYCCBL. In Decision No. B-33-80, we held that "the mere assertion of an improper practice without factual allegations evidencing the violative activity will not sustain the

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[12] The City cites Decision No. B-2-83.

[13] The City states that it must be assumed that most, if not all of these individuals have been medically unable to perform their regular duties for more than one year, and in some cases far longer than that.

[14] The City cites Decision No. B-3-75 and *Burke v. Bowen*, 40 N.Y.2d 264, 386 N.Y.S.2d 654, 656.

requisite burden of proof . . ." Section 1-07(e) of the Rules of the Office of Collective Bargaining ("OCB Rules") delineates the standard for pleading a charge of improper practice.[15] A petition which materially fails to comply with this standard deprives the other party of a clear statement of the charges to be met and hampers the preparation of a defense.

As its statement of the nature of the controversy, the Union's petition claims that the "unilateral changes to OGP 104-7, including but not limited to the abrogation of OGP 104-7, the elimination of non-budgeted light duty and modified duty assignments, the adoption of new medical standards and the utilization of the Three Physician Board to implement new medical review procedures. . . constitute changes in mandatory terms and conditions of employment subject to collective bargaining. . . ". It is clear that the petition provided respondents with sufficient information to place them on notice of the nature of the Union's claim and to enable them to formulate a response. Therefore, we hold that the petition is sufficient.

In its sur-reply, the City argues that the allegations contained in the reply are time barred because they are specific new and independent allegations asserted for the first time after the four-month statute of limitations had run. While we have reservations about the timeliness of some of the allegations in the reply, we need not decide that issue. We find that the essence of the Union's allegations in their petition and in their reply relate to its claim that its members are being deprived of the opportunity to fill light duty and modified duty positions when they are unable to perform the

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[15] Section 1-07(e)(3) of the OCB Rules states, in relevant part:
Petition - Contents. A petition... shall contain: ...
c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts...

full duties of their job titles. This claim requires us to determine whether the City's actions involve a mandatory subject of bargaining or an exercise of managerial prerogative. Although the parties made a number of other arguments on the merits, we need not reach them.

In prior cases, we have held that the City has the right, under the management rights clause contained in § 12-307(b) of the NYCCBL, unilaterally to determine the job assignments of its employees and that its decisions on such matters are not within the scope of collective bargaining.[16] We have also held that the creation of job titles is an exercise of the City's right under § 12-307(b) of the NYCCBL unilaterally to determine the methods, means and personnel by which governmental operations are to be conducted. We have held that management's prerogative under § 12-307(b) also extends to its determination of the necessary levels of staffing.[17] In addition, we have recognized that, under § 12-307(b), management possesses the right to ". . . relieve its employees from duty because of lack of work or for other legitimate reasons."[18] An exercise of these management rights is not within the scope of mandatory collective bargaining, except to the extent that it is shown to create a practical impact within the meaning of the law. However, the City may voluntarily agree to circumscribe these rights.[19]

In the instant matter, the Union argues that the City's practice of assigning employees unable

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[16] *City of New York v. Uniformed Firefighters Association, L. 94, International Association of Firefighters, AFL-CIO*, Decision No. B-7-69.

[17] *City of New York v. Committee of Interns and Residents*, Decision No. B-10-81.

[18] *City of New York v. Uniformed Firefighters Association of Greater New York*, Decision No. B-4-89 at pp. 326-328.

[19] *City of New York v. Uniformed Firefighters Association*, Decision No. B-43-86.

to perform full duty to non-budgeted modified or light duty assignments has somehow limited its management rights. Such argument could have merit, however, only if the City's actions involved a mandatory subject of bargaining. In the present case, the City made a determination regarding the necessary levels of staffing, which includes a decision on which positions to staff. Its actions involve a management prerogative by which the City may act unilaterally pursuant to the NYCCBL. It necessarily follows that since management had the right to establish the practice at issue here, it also has the right to alter such practice without surrendering its statutory protection.[20]

The argument that the employees will have to utilize their sick leave and medical leave or be removed from active employment because of their removal from light or modified duty assignments is not persuasive. Placement in a light or modified duty assignment only delays the time when an employee may have to use their benefits or be relieved from active duty. The Union has failed to show that these benefits were changed in any way. It also has not established that its members have any entitlement to remain in the light or modified duty assignments indefinitely.

The Union contends that in June 1997 it made a formal request for the complete list of all light duty and modified duty assignments budgeted to EMS/FDNY for the current fiscal year. The City contends that it has never received a formal request and that even if it had, it would be under no obligation to furnish the list. According to the terms of § 12-306(c)(4), the employer has a duty to furnish certain information relating to "subjects within the scope of collective bargaining."[21] This

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[20] An exception may exist where it is established that a "practical impact" on employees results from a management decision in an area reserved in § 12-307(b).

[21] *Civil Service Technical Guild, L. 375, AFSCME, AFL-CIO v. New York City Health and Hospitals Corporation, Joseph Hoffman, Louis Terreri, and Robert Pick*, Decision
(continued...)

duty extends to that which is "relevant to and reasonably necessary for purposes of collective negotiations or contract administration."[22] Since we have found that there are no subjects on which the City is required to bargain under the specific facts presented to us in the instant matter, there is no statutory duty on the part of the City to furnish the information requested. The Union has not alleged that it requires the information to aid it with contract administration, so we do not reach the question of whether that would provide a sufficient basis to require that the information be provided. Therefore, we find that the City has not violated § 12-306(a)(4) regarding any of the Union's allegations. Accordingly, any derivative violation of § 12-306(a)(1) necessarily must fail and the instant improper practice petition is hereby dismissed in its entirety.

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-1939-97 be, and the same hereby is, dismissed in its entirety.

DATED: August 31, 1999

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[21](...continued)
No. B-41-80 at 10.

[22] Id. at 10; Decision No. B-8-85 at 4.

New York, N. Y.

STEVEN C. DeCOSTA
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

SAUL G. KRAMER
MEMBER

RICHARD A. WILSKER
MEMBER

I dissent. CAROLYN GENTILE
MEMBER

I dissent. THOMAS J. GIBLIN
MEMBER