L. 2507, DC 37 v. FDNY, 67 OCB 3 (BCB 2001) [Decision No. B-3-2001 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME AFL-CIO, on behalf of LOCAL 2507

Petitioner,

-and-

THE FIRE DEPARTMENT OF THE CITY OF NEW YORK

Respondent.

Decision No. B-3-2001
Docket No. BCB-2024-98

DECISION AND ORDER

On November 4, 1998, District Council 37 on behalf of Local 2507 ("Union") filed a verified improper practice petition against the Fire Department of the City of New York ("City," "Department" or "FDNY"). The petition alleges that the Department violated §12-306(a)(1) and (4)[1] of the New York City Collective Bargaining Law ("NYCCBL") when the Department unilaterally changed the cap on overtime for Emergency Medical Service ("EMS") employees. The change provides that overtime compensation in either cash or compensatory time will be authorized only up to the allowable annual overtime cap. The effect of this change precludes

[1] Section 12-306(a) provides in pertinent part:
Improper practices; good faith bargaining. a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 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;

employees who reach the cap on cash compensation from working additional overtime for compensatory time. The City filed a verified answer on December 31, 1998; the Union filed a verified reply on March 5, 1999; the City filed a verified sur-reply on April 7, 1999; the Union filed an affidavit on June 1, 1999; the Union filed a verified supplemental improper practice petition on November 12, 1999; the City filed a verified supplemental answer on January 3, 2000; the Union filed a verified supplemental reply on May 19, 2000; and the City filed a verified supplemental sur-reply on June 1, 2000. On June 30, 2000, the City withdrew its verified supplemental sur-reply.

BACKGROUND

When it was part of the Health and Hospitals Corporation ("HHC"), EMS maintained a cap on cash overtime of 50% of base salary for its employees. On March 17, 1996, EMS was transferred from HHC to the FDNY. In March 1997, the Union learned that EMS intended to institute a 5% cap on cash overtime. The City and Union met on April 11, July 7, and August 8, 1997 to discuss the cash overtime cap. As a result of the meetings, the City promulgated Operations Order 97-101 dated August 15, 1997 and 97-102 dated August 18, 1997. Operations Order 97-101 states that:

> For calendar year 1997, the overtime cap for cash reimbursement is set at 25% of the annual salary of each member. The cap applies to members in the title of EMT, Paramedic, EMS Lieutenant and EMS Captain. Members who have reached the 25% overtime mark are officially restricted from working cash overtime.

Operations Order 97-102 sets forth procedures for attempting to equalize the distribution of overtime. Once the Operations Orders were implemented, employees who reached the 25% cash

cap were permitted to work additional overtime to be paid in compensatory time instead of cash.

In June 1998, the Department implemented a new policy in which those who reached the 25% cap could no longer work additional overtime for cash or compensatory time. In response, Michelle Green, Assistant Director of the Department of Research and Negotiations at DC 37, wrote to the Department on September 9, 1998, stating that the Union objects to the change because it conflicts with the agreements the parties had reached concerning overtime. On November 4, 1998, the Union filed the instant improper practice petition.

On July 12, 1999, the Department implemented Bureau of Operation EMS Command Order 99-062. The command order states:

> Compensatory time carries a cost, and therefore should be considered and approved as carefully as the granting of cash overtime. Overtime compensation either in cash or compensatory time will be authorized only up to the allowable annual overtime cap.

The Union subsequently filed its supplemental improper practice petition to address the issuance of Command Order 99-062.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that it had an agreement with the City, that after EMS was transferred to FDNY, it would retain the overtime cap of 50% of base salary that was in effect while at HHC. When the Union learned of the proposed 5% overtime cap in March 1997, it had several negotiation sessions with the City. The Union characterizes the meetings that took place on April 11, July 7, and August 8, 1997, as negotiation sessions. The Union maintains that it advised the Department that an alteration in the overtime cap must be bargained, because EMS

members' terms and conditions of employment were retained when EMS and its employees were transferred from HHC to FDNY, and the cash overtime cap at HHC had been at 50% of base salary. The Union contends that as a result of negotiations, the parties agreed that employees who reach an overtime cap of 25% of base salary would be restricted from working overtime for cash, but could work overtime for compensatory time. The Union maintains that the agreement between the City and the Union is reflected in Operations Orders 97-101 and 97-102.

The Union alleges that once the Operations Orders were issued, employees who reached the 25% cap on cash overtime were permitted to continue to work overtime for compensatory time. However, in the summer of 1998, without any negotiations, the Union asserts that the Department invoked a new policy in which employees were no longer permitted to work overtime for compensatory time once they reached the overtime cap. The Union objected to the change in a letter from Michelle Green.

The Union argues that the change in the overtime cap constitutes a unilateral change in a negotiated agreement. The Union also argues that the Department's action represents a wrongful unilateral change in a procedure which is a mandatory subject of bargaining.

City's Position

The City contends that when EMS was transferred from HHC to the FDNY in 1996, there was no retention of terms and conditions of employment. The City also explains that there was a directive to all agency heads in 1994 "to ensure that overtime is being distributed equitably." The FDNY received a memo on January 31, 1997, stating that two of the City's top overtime earners were employed by the FDNY. The City contends that in a March 7, 1997 memo to the

Bureau of EMS and all EMS chiefs, Chief Jerry Gombo stated that EMS would institute an overtime cap of 5% of base salary. The 5% cap, however, was never implemented.

The City explains that on June 11, 1997, a memo from the Mayor's Office of Operations granted an overtime waiver for EMS personnel and approved an overtime cap of 25% of base salary. Those who reached the cap were restricted from working overtime for cash. Under certain circumstances, employees who reached the cap could work overtime for compensatory time.

The City maintains that the meetings that took place on April 11, July 7, and August 8, 1997, were labor-management meetings and not bargaining sessions. It contends that it stated at the meetings that overtime is a management prerogative, but that it would work with the Union "to minimize discomfort of its members." The City asserts that the Union did not submit demands and that there were no negotiations. Furthermore, there was no signed agreement on the matter nor was there a side letter to the collective bargaining agreement.

In August 1997, Operations Orders 97-101 and 97-102 were issued. Operations Order 97-101 announced the 25% cap and 97-102 set forth procedures for implementing equalization of overtime.

According to the City, after almost a year of allowing employees who reached the cap to work overtime for compensatory time, the Department determined that it did not comply with the Mayoral Directive requiring equitable distribution of overtime or with the June 11, 1997 overtime waiver from the Mayor's office approving an overtime cap of 25% of base salary. Therefore, on June 18, 1998, Chief Jerry Z. Gombo, EMS Bureau of Operations, informed all

Chiefs of Divisions and the Commanding Officer of the Resource Coordination Center of the names of the employees who reached the 25% cap and instructed them that those employees should not be authorized to fill any overtime vacancy "irrespective of cash or compensatory compensation."

The City contends that the assignment of overtime is a management right. The City emphasizes that this is not a situation in which the employer has made a unilateral change in a mandatory subject of bargaining nor a situation in which the employer has made a unilateral change that contradicts an agreement that has been bargained and included in the collective bargaining agreement. Furthermore, to the extent that the petition objects to the involuntary assignment of overtime to employees who have not reached the cap on cash overtime, the City argues that its discontinuance of a past practice, *i.e.* reliance on voluntary overtime, and its reversion to a practice embodied in the Citywide Agreement, *i.e.*, the assignment of "ordered involuntary overtime," does not constitute an improper practice.

DISCUSSION

In the present case, the Union argues that the meetings that took place on April 11, July 7, and August 8, 1997 were negotiation sessions that culminated in an agreement reflected in Operations Orders 97-101 and 97-102. The City, on the other hand, contends that the meetings were merely discussions with the Union – not collective bargaining – and that the Operations Orders were unilaterally issued by the City and not the result of an agreement. Based upon our analysis of whether the subject of overtime distribution is mandatorily bargainable, we need not decide this issue.

We have said as a general proposition that the scheduling and assignment of overtime falls within the City's management right to determine the methods, means and personnel by which government operations are to be conducted.[2] The decision as to when and how much overtime is to be authorized or ordered is outside the scope of the City's obligation to bargain collectively.[3] As set forth in the Citywide Agreement, the City has the right to assign ordered involuntary overtime when necessary.

The issue in this case, however, does not concern when or how much overtime the Department deems necessary. Rather, the issue concerns the system that the Department utilizes in distributing overtime to employees, after it has determined the need for overtime. In *City of New York v. Local 621, S.E.I.U., AFL-CIO,*[4] we determined that a union demand concerning the distribution of overtime was a mandatory subject of bargaining. We find that bargaining over a method for the distribution of overtime would not interfere with the employer's managerial prerogative to schedule necessary overtime.

Moreover, the record reflects that the only factor that the Department considers in implementing its system is an economic one.[5] In EMS Command Order 99-062, the Department has determined that an employee may not earn cash or compensatory time, once he or she has

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[2] *United Probation Officers Assoc. v. New York City Dept. of Probation*, Decision No. B-29-87 at 4; *New York City Off-Track Betting Corp. et al. v. Local 858, International Brotherhood of Teamsters*, Decision No. B-29-92 at 13.

[3] *Id.*

[4] Decision No. B-34-93 at 16.

[5] The Department does not allege that the system is based upon managerial concerns (*e.g.* special need, special skills or safety).

reached the 25% cap on overtime. This Board has held that employee compensation is a mandatory subject of bargaining.[6] Accordingly, we find that the system used by the Department to distribute available overtime is a mandatory subject of bargaining.

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[6] *Correction Officers' Benevolent Assoc. v. New York City Department of Correction,* Decision No. B-26-1999 at 9; *City of New York v. Uniformed Firefighters Assoc. of Greater New York,* Decision No. B-4-89 at 36.

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 Fire Department of the City of New York cease and desist from implementing Bureau of Operation EMS Command Order 99-062 until such time as the parties negotiate the issue of overtime distribution.

Dated: January 9, 2001
New York, New York

MARLENE A. GOLD
CHAIR

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

BRUCE H. SIMON
MEMBER

RICHARD A. WILSKER
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