UFA, 7 OCB2d 19 (BCB 2014)

(IP) (Docket No. BCB-3059-12)

Summary of Decision*:** The Union alleged that the City and the FDNY violated NYCCBL § 12-306(a)(1) and (4) when the FDNY unilaterally created and implemented a two year commitment policy for the civil service title Fire Marshal (Uniformed). The City argued that the Union's claims were untimely, did not involve any unilateral changes, and concerned subjects within the scope of the City's management rights pursuant to NYCCBL § 12-307(b). The Board found the petition timely. However, it did not find that the record established that the FDNY unilaterally imposed a commitment policy for the Civil Service title Fire Marshal (Uniformed). Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, LOCAL 94, IAFF, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On December 3, 2012, the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO ("Union"), filed a verified improper practice and scope of bargaining petition alleging the City of New York ("City") and the New York City Fire Department ("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 creating

and implementing a two year commitment policy ("Two Year Policy") for the civil service title Fire Marshal (Uniformed) ("Fire Marshal"). The Union contends that the implementation of the unilateral change restricts Firefighters who are on the Fire Marshals and Lieutenants list from being promoted to the rank of Fire Marshal based on their rank on the Lieutenants list, and restricts Fire Marshals that are on a promotional list for the rank of Lieutenant from receiving that promotion based on the amount of time they have served in the title of Fire Marshal. The City contends that the Union's claims are untimely, do not involve any unilateral changes, and concern subjects within the scope of the City's management rights pursuant to NYCCBL § 12-307(b). This Board finds the petition timely. However, on the record before us, this Board does not find that the FDNY unilaterally imposed a Two Year Policy for the title Fire Marshal (Uniformed). Accordingly, the petition is denied.

BACKGROUND

Three days of hearings were conducted in the instant matter. The Trial Examiner found that the totality of the record established the relevant background facts to be as follows:

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 Bureau of Fire Investigation ("BFI") is responsible for investigating the origin and cause of all complex, fatal, or suspicious fires in New York City and identifying citywide fire patterns and trends. BFI acts as the FDNY's liaison to other law enforcement agencies and provides security protection for the FDNY. The City asserts that, as of January 2013, BFI was comprised of approximately 98 Fire Marshals and 23 Supervising Fire

Marshals. The Union is the certified collective bargaining representative of FDNY employees in the civil service titles Firefighter and Fire Marshal.

The FDNY has multiple eligibility requirements for promotion to Fire Marshal as outlined in the Notice of Examination ("NOE") published by the New York City Department of Citywide Administrative Services ("DCAS"). (Pet. Ex. A) The NOE for Fire Marshal does not require Fire Marshals to remain in that title for any minimum period of time. Employees, typically Firefighters, who take the Fire Marshal civil service examination, receive a passing score, and meet all of the other requirements for promotion to Fire Marshal, will be placed in descending score order on a civil service eligible list created by DCAS. Upon promotion, Fire Marshals enter extensive training programs for which they receive college-level credits. Similarly, promotion to the rank of Lieutenant, from either the rank of Firefighter or Fire Marshal, requires an eligible member to satisfy multiple requirements. For example, a candidate must have 60 college-level credits. According to the Union, some employees use Fire Marshal training credits to satisfy the college-level credit requirement for promotion to Lieutenant.

Section 4.7.1(c) of the Personnel Rules and Regulations of the City of New York ("Personnel Rules") is the City corollary to the New York Civil Service Law § 61(1).[1] Personnel Rules § 4.7.1(c) states in pertinent part:

[1] Section 61(1) of the CSL, "Appointment or promotion from eligible lists," commonly known as the "One-in-Three Rule," states in part:

> Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion…

> Appointment or promotion from an established eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the commissioner of citywide administrative services or the head of the certifying agency, as the case may be, as standing highest on such established list who are qualified and willing to accept such appointment or promotion.

The City's witness, Martha Pierre, is a Director in the Certification Unit of DCAS ("Director"). The primary functions of the Certification Unit are to establish civil service lists, certify the lists, and monitor hiring pools. The Director testified that placement on an eligible list guarantees consideration, but it is not a guarantee of employment. The One-in-Three Rule is the mechanical way of selecting available and qualified individuals from a civil service list. The Director explained that there are a number of circumstances that will exclude an individual from the One-in-Three calculus, including if someone declines the position, fails to report to the hiring pool, is found unqualified, or lacks sufficient credits. If someone sends a declination letter to DCAS, they are removed from the list and must thereafter request to be put back on. Upon completion of the appointment process, agencies return their lists to DCAS for audit and certification. The Director confirmed that the October 2012 and March 2013 Fire Marshal certifications were audited and closed by DCAS.[2] In reference to the scope of the audit, the Director stated that "[w]e do not micromanage the agency … [t]hey may have information about the candidate that we do not have, the disciplinary action, attendance, so on and so forth. So it's at their discretion who they appoint." (Tr. 280)

Steven Tagliani became the Fire Marshal Representative ("Union Representative") on the UFA Executive Board in February 2011. He testified that, in the fall of 2011, a two-year grant

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(New York Civil Service Law §61(1))

[2] The Director was not specifically asked about DCAS' audit of any other Fire Marshal classes.

that had been created to increase the number of Fire Marshals was set to expire. As a result of the grant expiring, he believed the number of Fire Marshal positions was going to be reduced. Around August 2011, the Union Representative began hearing that prospective Fire Marshals were being asked to spend a certain amount of time in the position of Fire Marshal. He testified that approximately four Firefighters called the Union about the alleged request. However, there was no evidence of an official policy or implementation at that time.

August 2011 Interview

In August 2011, candidates were interviewed by Chief Fire Marshal Robert Byrnes ("Chief Fire Marshal") and Fire Marshal Wong for the September 2011 Fire Marshal class.[3] Firefighter Justin Horigan (currently Fire Marshal), Firefighter John Drumm (currently Lieutenant), and Firefighter Nelson Roman (currently Lieutenant) testified about their August 2011 Fire Marshal interviews.[4] As specified below, all three Firefighters testified that the Chief Fire Marshal requested that if they were promoted to Fire Marshal, they remain in that position for two years.

Firefighter Horigan testified that during his August 2011 Fire Marshal interview, the Chief Fire Marshal informed Firefighter Horigan that he was requesting that applicants remain in the Fire Marshal position for two years because of the expense of training Fire Marshals and because the number of Fire Marshals had decreased. Firefighter Horigan agreed to the request, however, he was not offered the Fire Marshal position in the fall of 2011. He did not inform the Union about the Chief Fire Marshal's statement about the Two Year Policy at that time. In the

[3] Neither Chief Fire Marshal Byrnes nor Fire Marshal Wong testified at the hearing.

[4] Current titles are as of on or about July 30, 2013.

fall of 2012, Firefighter Horigan learned that another Fire Marshal class was being organized. He called BFI to inquire about his status of being interviewed and was told he was not being promoted to Fire Marshal because he was on the Lieutenants list. He spoke with the Chief Fire Marshal later that day, and the Chief confirmed this information. The Chief Fire Marshal said that, in the past, candidates had agreed to the two-year commitment and then failed to honor their agreement. The Chief Fire Marshal said he could try to remove his name from the Lieutenants list. Firefighter Horigan signed, and submitted to the FDNY, a document dated October 3, 2012 in which he wrote that if he was selected from the Lieutenants list, he would decline the promotion to Lieutenant.[5] (City Ex. 1) Sometime before August 2, 2013, Firefighter Horigan was promoted to Fire Marshal.

Similarly, Firefighter Drumm was interviewed for the Fire Marshal position in August 2011. During the interview, the Chief Fire Marshal asked him to agree to remain in the role of Fire Marshal for two years, if promoted. The Chief Fire Marshal explained that he was making the request because of the high cost of training Fire Marshals. Firefighter Drumm testified that:

> On that day I didn't feel that they were saying that it was a requirement to give a said amount of time. I never saw anything in writing that said there was a required amount of time that you had to be a fire marshal … but I did agree. I did feel that it was a request as a gentleman… that a handshake meant something… I shook his hand and I agreed to the request.

(Tr. 198-99) He too, however, was not offered the Fire Marshal position. In October 2012, Firefighter Drumm learned that another Fire Marshal class was being organized. He called Fire Marshal Wong to ask about his status and was told that he was not being promoted to Fire

[5] The Director testified that this letter was not an example of a declination letter that DCAS would receive.

Marshal because he was on the Lieutenants list. Thereafter, he spoke to a Chief, who told him that in order to be promoted to Fire Marshal he would have to sign a letter stating that he agrees to remove his name from the Lieutenants list. Firefighter Drumm decided against signing the letter. He was never promoted to Fire Marshal, but he was later promoted to Lieutenant.

Firefighter Roman was also interviewed for the Fire Marshal position in August 2011, and testified as follows. During the interview, the Chief Fire Marshal "basically said that … on a handshake, I'm going to request you do two years as a fire marshal, and I agreed to it." (Tr. 39) In September 2011, Firefighter Roman was promoted to Fire Marshal. He testified that, during his Fire Marshal training, the Chief Fire Marshal spoke to his class and said that he expected them to remain in the Fire Marshal position for two years. Firefighter Roman completed the training and was appointed to the role of Fire Marshal around December 2011. In the summer of 2012, he alleges that he received a call from the Chief of Personnel's secretary who told him that he was eligible to be promoted to Lieutenant. He declined the promotion for what he explained were a number of reasons. In September 2012, he received another call offering him the promotion to Lieutenant and he accepted. At that point, he had been a Fire Marshal for less than one year. Thereafter, in fall 2012, he was not notified of a promotion date so he contacted the Union Representative and told him that the two-year "request" had become a commitment.

The Union Representative testified that he spoke with the Chief Fire Marshal who told him that Firefighter Roman was not being promoted to Lieutenant because he reneged on his two year commitment. The Chief Fire Marshal said that the commitment was in effect because the grant was running out and the commitment was necessary to maintain a sufficient number of Fire

Marshals and limit the expense of training them. In January 2013, Firefighter Roman was promoted to Lieutenant.[6]

The Union Representative testified that, upon promotion of the October 2012 class, additional Firefighters, like Firefighter Roman, contacted him alleging that they would not be promoted to the Fire Marshal position unless they removed their names from the Lieutenants list.

August 2012 Interview

In August 2012, candidates were interviewed by the Chief Fire Marshal and Fire Marshal Wong for the October 2012 Fire Marshal class. Firefighter Daniel Cintron testified that, in August 2012, during his Fire Marshal interview, the Chief Fire Marshal told him that if he was promoted he would be expected to stay for at least a year because too many members leave for another promotion or they do not give the job a chance. Firefighter Cintron agreed to the one-year commitment. In October 2012, he learned that a new Fire Marshal class was being inducted. He contacted BFI and spoke with Supervising Fire Marshal Haloran who told him to come down and withdraw his name from the Lieutenants list if he wanted to be promoted to Fire Marshal. Firefighter Cintron did not withdraw his name from the Lieutenants List. He had not been promoted to Fire Marshal or Lieutenant as of July 30, 2013.[7]

[6] In its answer, the City asserts that Nelson Roman, Raymond McPolin, and Michael DeAngelis were all appointed to Fire Marshal on September 17, 2011 and then promoted to Lieutenant on January 3, 2013, less than two years later. The Union did not refute this contention and indeed Nelson Roman's testimony corroborated that he was promoted to Fire Marshal in September 2011 and Lieutenant in January 2013.

[7] Firefighter Cintron testified that, as of July 30, 2013, his name had not yet come up for promotion to Lieutenant.

March 2013 Interview

In March 2013, Firefighter Barry Harpur was interviewed by the Chief Fire Marshal, Fire Marshal Wong, and one other individual for the April 2013 Fire Marshal class. During the interview, he was asked by the Chief Fire Marshal if he was on the Lieutenants list. Firefighter Harpur confirmed that he was. Thereafter, the Chief Fire Marshal told him that they were not calling anyone for Fire Marshal that was within the top 600 names on the Lieutenants list because "training costs a lot of money and guys were agreeing to become fire marshals and stay for two years and weren't actually staying, that they would take the promotion so he was training guys that he was losing." (Tr. 251) Firefighter Harpur was not asked to agree to a minimum commitment. As of August 3, 2013, he had not been promoted to either Fire Marshal or Lieutenant.

No Interview

Firefighter Paul DeLeo took the Fire Marshal exam in 2008 and the Lieutenants exam in 2009, but he was never interviewed for the Fire Marshal position. He testified that a firefighter with a higher Fire Marshals list number was promoted in the April 2013 Fire Marshal class. Thereafter, he was told by the Bronx Trustee that if you were within the top 600 names to be called from the Lieutenants list "you were being passed over for promotion to Fire Marshal." (Tr. 232-33) As of August 3, 2013, he had not been promoted to either Fire Marshal or Lieutenant.

As a remedy, the Union requests that the FDNY be ordered to cease and desist from imposing a Two Year Policy for Fire Marshal, rescind any directive and/or decision that implemented a Two Year Policy that affected any member of the UFA's bargaining unit, make

all affected employees whole, notify the Union's members in writing that there is no Two Year Policy for Fire Marshal, maintain the *status quo*, and post conspicuous notices of the violation of the NYCCBL throughout the FDNY.

POSITIONS OF THE PARTIES

Union's Position

The Union maintains that the petition is timely because it was filed within four months of the time the Union knew or should have known that the FDNY began imposing an unwritten Two Year Policy. Specifically, the Union asserts that it was first advised of the enforcement of the Two Year Policy in fall 2012. Shortly thereafter, on December 3, 2012, the Union filed its petition. Moreover, the Union contends that the City waived its right to assert the affirmative defense of timeliness by not raising the issue in its Answer.[8] Assuming, *arguendo*, that the City has the right to raise the defense of timeliness, the Union contends that the City failed to produce any witnesses to rebut the Union's evidence.

The Union argues that the City, through the FDNY's BFI, unilaterally created the Two Year Policy without bargaining, and, thus, it violated NYCCBL § 12-306(a)(1) and (4).[9]

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[8] At the hearing, the Trial Examiner granted the City's motion to amend the City's Answer to include a timeliness defense.

[9] NYCCBL § 12-306(a) provides, in pertinent part, that:

> 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;
>
> * * *

According to the Union, "[p]rior to this unilateral decision to require a two year minimum commitment for members who either hold, or aspire to hold, the rank of Fire Marshal, the FDNY never had a prior written or verbal policy, or express limitation, or any factual basis from past practice of such a requirement." (Pet. ¶ 8, 27) Although the City has denied the existence of a Two Year Policy, the Union argues that the unchallenged evidence presented by the Union has clearly demonstrated that one exists. Specifically, multiple witnesses testified that during their Fire Marshal candidate interviews, the Chief Fire Marshal requested that they give a two-year commitment before becoming a Lieutenant, and in some cases candidates were told that their names would be removed from the Lieutenants list completely. Additionally, at least one Fire Marshal candidate testified that the Chief Fire Marshal indicated that he would not promote Firefighters to Fire Marshals if they were within 600 names of being called from the Lieutenants list. Thus, the Union argues that the Board must find that the Two Year Policy was unilaterally implemented.

The Union also contends that the Board must draw an adverse inference due to the City's failure to produce witnesses within its control and which it was naturally expected to produce. Specifically, the Union claims that the City failed to produce any FDNY representatives as witnesses to contradict or refute the Union's showing that a Two Year Policy exists.

> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees;

NYCCBL § 12-305 provides, in pertinent part, that: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities."

The Union asserts that "requiring members who hold the title Fire Marshal to work in that title for a minimum specified period of time is a mandatory subject of bargaining … such minimum work commitments are subject to bargaining." (Pet. ¶ 32-33) Thus, Respondents' implementation of the Two Year Policy without bargaining with the Union constitutes a refusal to bargain in good faith and, accordingly, violates NYCCBL § 12-306(a)(1) and (4).

Finally, the Union contends that the City's defenses of managerial prerogative under NYCCBL § 12-307(b) and managerial discretion under the CSL One-in-Three rule are not applicable where, as here, a term and condition of employment, a Two Year Policy, was unilaterally instituted without first bargaining. Thus, NYCCBL §12-307(b) and the One-in-Three rule do not obviate the City's bargaining obligation.

City's Position

The City argues that the Union's claim is untimely. According to the City, the Union Representative testified that he learned of the alleged Two Year Policy as early as August 2011. In a letter dated July 31, 2013, the City asserted, "[b]ut for the [Union's] allegation [in its Petition] that they learned of this alleged practice in the Fall of 2012, the City would have raised this issue in its answer and sought this matter dismissed in its entirety." (July 31, 2013 City Letter) Accordingly, the City amended its answer to include the defense that the Union had knowledge of the alleged Two Year Policy for over four months before it filed this Petition, and, as such, the claim is untimely.

The City insists that no Fire Marshal Two Year Policy exists. Further, the Union has not presented any evidence of a unilateral change and thus, it has not satisfied its burden of proving that a change actually occurred. However, assuming, *arguendo*, the Board finds a unilateral

change, criteria pertaining to appointment of a candidate from an eligible list involves hiring and selection, which are express managerial rights. Pursuant to NYCCBL § 12-307(b), the City may "determine the standards of selection for employment; … determine the methods, means and personnel by which government operations are to be conducted." Further, the One-in-Three Rule allows the City and FDNY to exercise managerial discretion in the selection of candidates from an eligible list. The City asserts that these employees took an exam and were placed on an eligible list pursuant to the CSL. Then, the FDNY, within its managerial discretion under NYCCBL § 12-307(b), chose to appoint or promote some candidates based on their experiences and not others.

The City argues that the Union seeks to characterize the FDNY's failure to appoint certain employees as the imposition of a unilateral change that involves a mandatory subject of bargaining. However, even if the Board finds that the instant matter involves a mandatory subject of bargaining, the evidence demonstrates that the alleged Two Year Policy was not created or imposed. The City asserts that the FDNY "has promoted numerous Fire Marshals with less than two years of service over the last five years, including three members of the [January 2013 Lieutenants] class." (Ans. ¶ 102) Further, one witness testified that he agreed to make a two year commitment to the position of Fire Marshal. Then, within a year and a half of his appointment to Fire Marshal he was offered, and accepted, a promotion to Lieutenant. Thus, none of the Union's evidence demonstrates that the FDNY imposed a policy requiring members to stay in the title of Fire Marshal for two years. Even if the Chief Fire Marshal did request a two year minimum commitment, that request, does not establish that the FDNY imposed the alleged Two Year Policy.

Moreover, to the extent the Union seeks as a remedy an order from the Board directing the FDNY to make all affected members whole by retroactively promoting the affected individuals and issuing them back pay, the City argues that Petitioner's request must be denied. According to the City, the Board has never ordered the City to promote an individual who was passed over for promotion from a civil service eligible list, even where retaliation for Union activity was involved. *See Fabbricante*, 71 OCB 30, at 39 (BCB 2003). The only remedy for defects in civil service appointments is reconsideration for appointment after the defect has been corrected.

Finally, the City contends that the Union has failed to establish a claim of a failure to bargain in good faith. Thus, the Union's derivative claim of a violation of NYCCBL §12-306(a)(1) should also be denied.

DISCUSSION

As a threshold matter, we address the timeliness of the petition. The City avers that the Union had knowledge of the alleged Two Year Policy as early as August 2011, while the Union contends that it was initially advised of the enforcement of the Two Year Policy in fall 2012. The petition was filed on December 3, 2012.

Pursuant to NYCCBL § 12-306(e) and § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"), the statute of limitations for an improper practice petition is four months.[10] Thus, "an improper

[10] NYCCBL § 12-306(e) provides, in pertinent part:

> A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging

practice charge 'must be filed no later than four months from the time the disputed action occurred or from the time the petitioner knew or should have known of said occurrence.'" *DC 37, L. 420,* 5 OCB2d 19, at 7 (BCB 2012); (*see Mahinda*, 2 OCB2d 38, at 9 (BCB 2009), *affd., Matter of Mahinda v. City of New York.*, Index No. 117487/09 (Sup. Ct. N.Y. Co. Oct. 7, 2010) (Scarpulla, J.), *affd.*, 91 A.D.3d 564 (1st Dept. 2012)); (*Raby*, 71 OCB 14, at 9 (BCB 2003), *affd., Matter of Raby v. Office of Collective Bargaining*, Index No. 109481/03 (Sup. Ct. New York Co. Oct. 8, 2003) (Beeler, J.); (NYCCBL § 12-306(e)); (OCB Rule § 1-07(d)). However, "[w]e do not necessarily consider an action to have occurred on the date a party announces an intended change. The statute of limitations begins to run after the intended action is actually implemented and the charging party is injured thereby." *UFT*, 4 OCB2d 2, at 9 (BCB 2011) (quoting *DC 37, L. 1508*, 79 OCB 21, at 19 (BCB 2007)) (quotation marks omitted).

Here, no agency-wide announcement as to the alleged Two Year Policy was ever made. In fact, the City avers that no such policy exists. Further, the testimony of Firefighter Roman and Fire Marshal Tagliani, both of whom stated that they first became aware of the alleged implementation of the Two Year Policy in September 2012 when Firefighter Roman sought promotion to Lieutenant, was not refuted. Thus, the evidence shows that the earliest that the Union had notice of the alleged change was fall 2012. Therefore, we find that the petition was

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> in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence.

OCB Rules § 1-07(b)(4) provides, in pertinent part, that an improper practice petition filed pursuant to NYCCBL § 12-306 "must be filed within four months of the alleged violation."

timely filed on December 3, 2012, within four months of the Union's discovery of the alleged implementation.

On the merits, the Union asserts that Respondents interfered with the statutory rights of the Union's members and failed to negotiate in good faith over a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(1) and (4) when the FDNY unilaterally created and implemented a Two Year Policy without first bargaining with the Union. The Union contends that the change unfairly restricts Fire Marshals on a promotional list for the rank of Lieutenant from receiving that promotion to Lieutenant if they have not served enough time in the title of Fire Marshal. Additionally, the Union contends that the change unfairly restricts Firefighters on both the Fire Marshals and Lieutenants lists from receiving a promotion to Fire Marshal based upon their rank on the Lieutenants list.

Pursuant to NYCCBL § 12-306(a)(4), it is an improper practice for an employer 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." It is well-established that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012). In order to establish an improper practice the petitioner must "demonstrate the existence of such a change from the existing policy or practice' [and establish] . . . that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *DC 37*, 4 OCB2d 19, at 22 (BCB 2011) (citations omitted).

We first examine whether, as alleged, a new requirement was created and implemented. It is undisputed that the Chief Fire Marshal interviewed multiple candidates for Fire Marshal and

requested that they agree to stay in the role of Fire Marshal for a specified period of time.[11] However, we find that, on this record there is no evidence that the Chief Fire Marshal made anything more than a request or that any of the witnesses were required to remain a Fire Marshal for two years before being promoted. A review of the evidence demonstrates that Firefighter Roman was promoted to Fire Marshal in September 2011 and Lieutenant in January 2013, Firefighter Horigan was promoted to Fire Marshal and had served less than two years in that role at the time of the hearing, and Firefighter Drumm was promoted directly to Lieutenant. Firefighter Roman testified that during his Fire Marshal interview he agreed to stay in the role of Fire Marshal for two years, if selected. Even so, he was in the role for less than a year before he was called in the summer of 2012 and offered a promotion to Lieutenant, which he declined. Thereafter, in January 2013, he was promoted to Lieutenant after serving less than a year and a half as a Fire Marshal. Thus, there was no evidence on this record of a single Fire Marshal that remained in the role of Fire Marshal for a two year period. Conversely, at least one Fire Marshal was promoted to Lieutenant without serving as a Fire Marshal for a two year period. Thus, the evidence is not sufficient to conclude that the alleged Two Year Policy was ever implemented.

Further, we cannot conclude that the City unfairly restricted Firefighters' promotion to Fire Marshal based on their rank on the Lieutenants List. The Union offers as evidence of this claim limited testimony that a few individuals heard or were told that if a Firefighter was within a certain number of names of being called from the Lieutenants list they were being passed over for promotion to Fire Marshal. In fact, two Firefighters testified that they were told that Firefighters within the top 600 names on the Lieutenants List were not being called from the Fire

[11] Multiple firefighters testified to similar discussions with the Chief Fire Marshal, and their testimony was credible and unrebutted.

Marshals List. This testimony is not, in and of itself, probative of an improper practice, whatever evidentiary weight it may have in the context of a claimed violation of other Civil Service Law provisions is outside of the scope of the Board's jurisdiction. *See Matter of Drumm v. Cassano*, Index No. 1095/2013 (Sup. Ct. N.Y. Co. Sept. 16, 2013) (Bunyan, J.).

We do not find that the *City of Mt. Vernon* and *CSBA*, which the Union cites, are controlling here. *CSBA*, 65 OCB 9 (BCB 2000); *City of Mount Vernon*, 17 PERB ¶ 4591 (Crotty, ALJ 1984), *affd.* 18 PERB ¶ 3020 (Board 1985). In those cases, minimum commitment policies that included either financial sanctions or other adverse employment actions were found to be mandatory subjects of bargaining. *Id*. However, the record in this matter, demonstrates that this element is lacking here.[12]

Accordingly, the petition is denied.

[12] The Supreme Court, Kings County found that the very actions alleged here did not violate the Civil Service Law. *Matter of Drumm v. Cassano*, Index No. 1095/2013 (Sup. Ct. N.Y. Co. Sept. 16, 2013) (Bunyan, J.). The Court found that, as a "discretionary consideration" in selecting between eligible applicants on a civil service list, the Commissioner included "consideration of whether petitioners intended to use the rank of Fire Marshal (Uniformed) as a gateway to promotion to a higher office." *Id*. We note that the Supreme Court findings are entitled to deference, if not preclusive effect, on the questions necessarily decided by that Court. *See Holmes*, 3 OCB2d 51, at 12, n. 5 (BCB 2010) (citing cases); *see also Jeffreys v. Griffin*, 1 N.Y.3d 34, 39 (2003). We note also that we have previously held that criteria for selection between eligible candidates for promotion are not a mandatory subject of bargaining. *See generally UFA*, 4 OCB2d 3, at 8 (BCB 2011), *affd., Matter of Uniformed Firefighers Assn. v. City of New York*, Index No. 10817/2011 (Sup. Ct. N.Y. Co. Oct. 4. 2011) (Huff, J.), *affd.*, 106 A.D.3d 616 (1st Dept. 2013).

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 verified improper practice petition filed by the Union, Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO, docketed as BCB-3059-12, is hereby denied.

Dated: June 24, 2014
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CAROLE O'BLENES
MEMBER

Joins dissenting opinion of Peter Pepper.

CHARLES G. MOERDLER
MEMBER

I dissent in a separate opinion attached hereto.

PETER PEPPER
MEMBER

UNIFORMED FIREFIGHTERS ASSOCIATION OF

GREATER NEW YORK, LOCAL 94, IAFF, AFL-CIO

Petitioner,

-and-

THE CITY OF NEW YORK and

THE FIRE DEPARTMENT OF CITY OF NEW YORK

Respondents.

(Docket No. BCB-3059-12)

I dissent. I must disagree with the majority as to whether the Fire Department of New York ("FDNY") unilaterally implemented a two year commitment policy for the civil service title Fire Marshal. In this view, to state that there was no evidence that anyone promoted actually remained in the position of Fire Marshal misses the point. There consistently appears to have been clear statements made and then followed by an expectation candidates remain in the position for requested two years. At the hearings, the UFA appears to have proven that a minimum work commitment policy was implemented by the Chief Fire Marshal of the BFI, as well as by Chiefs from the FDNY Office of Personnel despite the fact that the City has adamantly denied the existence of this policy.

Initially, it is very clear that any discussion of managerial discretion under the "One-in-Three" rule in the NYS Civil Service Law, and management prerogative under NYCCBL § 12-307(b), respectively, are not the issues in this matter.

As noted by the majority, NYCCBL 12-306 (a)(1) and (4) requires public employers to bargain in good faith over wages, hours, and working conditions, as well as any subject with a significant or material relationship to a condition of employment, with certified or designated representatives of its public employees. Although the board has traditionally held that certain procedural revisions which pertain only to supervisory functions are not mandatorily negotiable, this change appears to go beyond such a revision.

It is unrebutted that prior to the unilateral decision, the FDNY never had a prior written or verbal policy which contained a requirement that a Fire Marshal remain in the position for a fixed period of time after being promoted. .

The decision states the union presented multiple witnesses who testified that during their Fire Marshal candidate interviews, the Chief Fire Marshal requested that they give a "two-year commitment before becoming a Lieutenant, and in some cases that their names would be removed from the Lieutenant list completely." It is difficult to believe that this statement would not have a chilling effect on this process. In addition, it also appears that the City did not produce any witnesses to contradict the Union's assertion that a Two Year Policy existed.

It is clear, that the UFA's claim that the City unilaterally imposed a minimum work commitment policy for Fire Marshals and that this was improper because mandatory negotiations were required prior to the implementation of the policy has validity and it is because of this and it because of this I dissent and would grant the petition.

New York, New York

June 6, 2014

Peter Pepper

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Alternate Labor Member

Charles G. Moerdler

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Labor Member