

**UFA, 7 OCB2d 4 (BCB 2014)**  
(Scope) (Docket No. BCB-3008-12)

**Summary of Decision:** The UFA claimed that the City violated the NYCCBL by refusing to bargain over the alleged practical safety and workload impact on Firefighters resulting from the implementation of a nighttime building inspection program. The City argued that the UFA failed to demonstrate that the program has any practical safety or workload impact on its members. After a hearing, the Board found that the record did not support the UFA's claim of a practical impact on safety or workload on Firefighters. Accordingly, the petition was denied. *(Official decision follows.)*

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Scope of Bargaining Proceeding**

*-between-*

**UNIFORMED FIREFIGHTERS ASSOCIATION,  
LOCAL 94, IAFF, AFL-CIO,**

*Petitioner,*

*-and-*

**THE CITY OF NEW YORK,**

*Respondent.*

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**DECISION AND ORDER**

On March 26, 2012, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO ("UFA" or "Union"), filed a verified improper practice and scope of bargaining petition against the City of New York ("City"). The UFA alleges that the City, on behalf of the Fire Department of the City of New York ("FDNY" or "Department"), violated its duty to bargain in good faith when the FDNY implemented a building inspection program that created a present or future threat to employee safety and resulted in an excessive or unduly burdensome workload, in

violation of § 12-306(a)(1) and (a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”).<sup>1</sup> The UFA asserts that a practical impact on the safety and workload of the Union’s members resulted from the implementation of the building inspection program. The City argues that the Union’s claims must be dismissed because the Union failed to demonstrate any practical safety or workload impact on UFA members. The Board finds that the record does not support the UFA’s claim of a practical impact on safety or workload on Firefighters. Accordingly, the petition is denied.

### **BACKGROUND**

The Trial Examiner held three days of hearings and found that the totality of the record established the relevant facts to be as follows:

#### **The Nighttime Inspection Program**

On June 16, 2011, the FDNY Chief of Operations issued an All Borough Commands Memorandum (“Memorandum”) announcing the initiation of a pilot program for the joint inspection, with the New York City Department of Buildings (“DOB”), of one to three-family residential buildings entitled the “Joint Inspection Pilot Program” (“Nighttime Inspection Program” or “Program”). (Pet., Ex. B) The stated purpose of the Nighttime Inspection Program is to “seek out and discover any residential occupancy that ha[s] been illegally converted, and may present a life safety issue in the event of a fire.” (*Id.*) The Memorandum provides that all building inspections conducted pursuant to the Program (“nighttime inspections”) would be

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<sup>1</sup> In its petition, the UFA also alleged that the City failed to furnish requested data, in violation of NYCCBL § 12-306(a)(1), (a)(4), and (c)(4). The City subsequently produced responsive documents which complied with the UFA’s request. As a result, the UFA’s document production claim is no longer in dispute and we find it to be moot.

performed from Monday through Thursday after 6:00 p.m. The Memorandum was issued to “All Borough Commands and Special Operations Command.” (*Id.*)

The Memorandum provides that fire units are administratively assigned to perform nighttime inspections along with a DOB inspector. It also provides that all Borough Commands will receive notification every Friday of the locations where nighttime inspections will be conducted and notification will proceed down the chain of command. Fire battalions and units should “expect a nighttime inspection to be conducted at some point during the upcoming week.”

(Pet., Ex. B) The Memorandum further states:

Fire Units shall be guided by the following:

. . .

- 3) . . . The DOB inspector will call the Boro Dispatchers office upon their arrival at a location and request the response of the administrative unit to their location. The Boro Dispatchers office will then initiate the unit response.
- 4) Upon receipt of a response notification, the unit is to respond and meet the DOB inspector at the location.
- 5) The unit, upon arrival, will together with the DOB inspector request to gain access to the location. Fire units shall not use any forcible entry methods to accomplish this task.
- 6) If access is granted the unit shall conduct an inspection and determine if any Fire Code Violations exist. If so they shall enforce the Fire Code by issuance of a VO, NOV, or Summons. If conditions require such, the unit shall initiate a FDNY vacate of the occupancy or structure and follow the procedures contained in the BISP manual Chapter 4, addendum 4.
- 7) Members shall be aware that regardless of what action is taken by the DOB inspector, they shall be guided by FDNY policy and procedures and take appropriate action if warranted.

(Pet., Ex. B)<sup>2</sup>

FDNY Chief of Department Edmund Kilduff is the Department's highest ranking uniformed officer. He oversees five areas of responsibility for the Department: operations, communications, EMS, training, and fire prevention. Chief Kilduff testified regarding the FDNY's rationale for the creation of the Nighttime Inspection Program. He stated that, following two fatal fires which occurred over a two-week period, both of which involved illegally converted residential buildings in serious states of disrepair, the City was under pressure to discover the locations of illegally converted buildings and the living conditions inside them. An illegally converted building is a potential hazard to Firefighters and residents because its floor plan may have been altered; thus, routes of travel and egress may have been eliminated. Thereafter, the FDNY and DOB were instructed to start an inspection program to identify these buildings and alleviate dangerous conditions.

The locations of the buildings to be inspected under the Program are selected by a computer-generated matrix created by the Mayor's Office and based on factors such as fire incidents, deaths, and complaints registered with the City's 311 line. (Pet., Ex. B) The matrix identifies "high fire risk properties" that will become inspection targets. (City, Ex. 6) Based on the matrix, a building will be identified as a high fire risk property if it is a one, two, or three-family dwelling of seven stories or less with no elevator and meets two of the following four

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<sup>2</sup> The Memorandum further states that the pilot program would be expected to last for 90 days, *i.e.*, through approximately early September 2011, after which time an evaluation would be made to determine if the pilot program's intent had been accomplished. It further provides that, if the pilot program is deemed successful, it will be adopted and expanded to all residential occupancies. It is undisputed that the Nighttime Inspection Program was permanently implemented upon the expiration of the 90-day period.

indicators: constructed before 1938; in foreclosure; has a tax lien against it, and/or is in a high risk neighborhood. (*Id.*)

DOB inspectors do not have the independent capacity to lawfully enter these buildings. Accordingly, fire units are needed to assist them in gaining building access. Chief Kilduff testified that if the fire unit and the DOB inspectors are denied access to the building, they are not permitted to make a forced entrance. If access is granted, both entities enter and look for illegally converted dwellings and indicators that there are multiple tenants in the building. Such indicators include blocked entranceways, multiple mailboxes, and multiple electrical meters. Once inside the building, the fire unit's role is to enforce the fire code, while the DOB inspector's role is to enforce structural issues such as whether there are illegal partitions or other illegal configurations.

Chief Kilduff estimated that a typical nighttime inspection takes approximately 20 to 30 minutes. He stated that, in an average week, the FDNY performs approximately six or seven nighttime inspections Citywide. Chief Kilduff emphasized that approximately 300 illegal conversions have been discovered since the inception of the Nighttime Inspection Program, and that locating these converted dwellings has a direct bearing on the safety of their residents as well as Firefighters who would respond to these dwellings during an emergency.

#### **UFA Witness Testimony Regarding the Practical Safety and Workload Impact Claims**

The UFA called two witnesses, Thomas Cleary and Gerard Fitzgerald, to testify in support of its allegations. Thomas Cleary has served as an FDNY Firefighter since July 2001 and is assigned to Ladder Company 111 in Brooklyn. Firefighter Cleary participated in one nighttime inspection since the inception of the Program and testified regarding his experience. He recollected that on March 12, 2013, the date of the inspection, his fire company received an

“administrative ticket” at 6:01 p.m. The ticket came in “like a run,” which means that the company is not available for an emergency while it is engaged in the nighttime inspection. (Tr. 152) Firefighter Cleary testified that the ticket stated only that the unit was to meet with DOB for a nighttime inspection and that this was not typical because tickets for other types of runs provide more information about the run, such as Critical Information Dispatch System (“CIDS”) data.<sup>3</sup> In this instance, he had no prior knowledge of what the nighttime inspection would involve and did not know what DOB expected of his fire unit. The Firefighters wore their bunker gear (also known as “personal protective equipment” or “PPE”) to the nighttime inspection because they “weren’t certain what this run was.” (Tr. 161)

A total of five Firefighters and one Fire Officer travelled to the nighttime inspection site, which was a four-story residential tenement. The battalion chief arrived shortly thereafter. When they arrived, two DOB inspectors were already outside the building conducting their own inspection. The inspectors informed the Firefighters that DOB had received a report that the building had been converted to single residence occupancies (“SROs”). The Firefighters entered the building with the DOB inspectors and they jointly conducted an inspection. Firefighter Cleary testified that:

[I]nitially, we inspected the basement of the structure and then we went up the interior stairs to check some remaining parts of the building. The building inspectors were speaking more directly with the civilians. Myself and the other members of my company were basically in the stairwell in close proximity to these building inspectors.

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<sup>3</sup> CIDS is a database that provides basic information to fire units about a structure, such as its dimensions, as well as information that is unique to the structure and which could affect fire operations, such as an unsafe stairwell, a building reconfiguration, or the presence of razor wire or pit bulls in the basement.

(Tr. 162) He stated that, in this instance, the apartments in the building had not been converted to SROs, and that each apartment had adequate access to a fire escape. Firefighter Cleary testified that the entire exercise took approximately 45 minutes.

Gerard Fitzgerald, a 14-year veteran of the FDNY and a UFA board member, has served as the UFA's Health and Safety Officer and Sergeant-at-Arms since 2012. In his capacity as UFA Health and Safety Officer, Firefighter Fitzgerald fields complaints from Firefighters about any unsafe conditions they encounter and oversees issues that have a potential safety impact on Firefighters. Firefighter Fitzgerald testified on cross-examination that since becoming the UFA's Health and Safety Officer, he has not received any unusual occurrence reports or direct complaints from members about any incidents involving the Nighttime Inspection Program.

Both UFA witnesses compared and contrasted the logistics of the Program with another FDNY building inspection program, the Building Inspection Safety Program ("BISP"). Under the BISP, fire companies inspect three-family and larger buildings located within their designated administrative area on a regular, pre-scheduled basis. All BISP inspections take place during daytime hours only. Firefighter Fitzgerald testified that a nighttime inspection is "very different" from a BISP inspection for a number of reasons. (Tr. 89) He testified that BISP inspections are performed three times a week at a designated time and pursuant to a fixed schedule. A member of the fire company is assigned as the building inspection coordinator and delegates the buildings to be inspected. Units are thus aware of which buildings they will be inspecting well ahead of time. BISP inspections are additionally limited to publicly accessible areas of the buildings. By contrast, he testified that, under the Nighttime Inspection Program, the Mayor's Office controls which buildings are selected for inspection and the order in which the

inspections are performed. Additionally, the duties of the building inspection coordinator do not extend to nighttime inspections.

Firefighter Fitzgerald further testified that Firefighters performing BISP inspections have resources available to them, such as reference materials and a “BISP hotline” staffed by a light duty officer who they can call to obtain guidance on any issue which may arise during a BISP inspection, which are unavailable during a nighttime inspection. There is no equivalent hotline to provide guidance for Firefighters performing nighttime inspections. Firefighters Cleary and Fitzgerald both testified that they had not received training for nighttime inspections, and Firefighter Fitzgerald stated that he was not aware of any training that is available to Firefighters to assist them with nighttime inspections, nor was he aware of any forms or reference materials provided to Firefighters in conjunction with the Nighttime Inspection Program. He testified that CIDS information does not exist for one and two-family residences, which are inspected pursuant to the Program. By contrast, information from the CIDS database, which is gathered from large structures during BISP inspections, is accessible to Firefighters during an emergency. However, Firefighter Fitzgerald acknowledged the possibility that a fire company would not have knowledge of an illegal conversion to SROs inside one and two-family dwellings unless and until an emergency occurred at the site, and that it would not be safe for Firefighters to respond to an emergency at such a dwelling without knowing that it had been illegally converted.

Both Union witnesses also testified that when a fire unit is taken out of service for any type of building inspection, including a nighttime inspection pursuant to the Program, it can result in delays in the unit’s emergency response time, which would impact upon Firefighters’



safety.<sup>4</sup> A delay in response time may occur when there is an “out of sequence” or “out of order” response to an emergency. Firefighter Fitzgerald testified that an out of sequence response means that there is a deviation from the delegated order of arrival at an emergency site. For example, the “second due” company may arrive before the “first due” company, or the ladder company may arrive earlier than the engine company or vice versa. This can be caused by the unavailability of fire units assigned to the administrative area in which the emergency occurred and may result from the first due company being taken out of service or having to respond to a call from a location outside of the firehouse. An out of order response occurs when a second due company arrives before the first due company.

Firefighter Cleary testified that an out of sequence response to a fire or any emergency results in an increase in potential hazards. For example, the engine company could arrive significantly ahead of the ladder company, and this presents a risk to fire units as well as civilians. If a ladder company arrives without an engine company close behind it, the fire unit could be operating without any water being rapidly applied to the site. Firefighter Fitzgerald testified that when Firefighters respond to an emergency call from a building inspection, the relevant information about the emergency may not reach the unit as quickly as it would have if the Firefighters were in the firehouse and may also be incomplete.<sup>5</sup>

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<sup>4</sup> We note that the UFA raised a similar practical safety impact claim in a prior case, *UFA*, 5 OCB2d 2 (BCB 2012). In *UFA, L. 94*, 5 OCB2d 2, the Union alleged that the FDNY’s creation of an additional weekly BISP inspection period resulted in, *inter alia*, delays in emergency response time, creating a safety impact on its members.

<sup>5</sup> Firefighter Fitzgerald also testified that, when responding to an emergency call from a BISP inspection, firefighters must don their PPE on the sidewalk or the street next to the rig, which also contributes to a delay in response time. When responding from the firehouse, the PPE is always in the same place and organized, which is more efficient and conducive to a quicker response time.

Firefighter Cleary also testified that if a fire unit were put back into service to respond to an emergency from a nighttime inspection, the same safety impact issues that exist when responding from a BISP inspection would be present. He stated that any time fire companies are taken out of service there is an “increased inherent danger . . . to the public and also to the members” of the FDNY. (Tr. 188) He also testified, however, that unlike BISP inspections, during the nighttime inspection in which he participated, the fire unit was informed that it was not available for service if another run came in. Therefore, “if another run came in, we were not going to be available to respond, as opposed to [a] normal daytime building inspection where we would be.” (Tr. 164)

On cross-examination, Firefighter Cleary acknowledged that a company may be placed out of service for myriad reasons, including annual company medicals, “education day” or other training purposes, as well as rig malfunctions. (Tr. 171-72) He also conceded that any given fire company is placed out of service a few times a month, sometimes for an entire day shift, *i.e.*, from 9 a.m. to 6 p.m. However, he stated that in these situations the fire company is given at least a few hours of advance notice before being taken out of service. In contrast, his company was not given any advance notice when it went on the March 12, 2013 nighttime inspection.

#### **City Witness Testimony in Support of the City’s Defense Against the UFA’s Claims**

In response to the Firefighters’ testimony, the City countered with testimony from Chief Kilduff, who also distinguished between BISP inspections and nighttime inspections. Chief Kilduff testified on cross-examination that BISP inspections are performed by Firefighters in a “nonstressful” environment and that part of the reason is that they know they are going to the building in advance and working off a predetermined checklist. (Tr. 223) He conceded that BISP inspections are not limited by time constraints and Firefighters do not have contact with

building residents when conducting them. He also testified that there is no checklist for Firefighters when they conduct a nighttime inspection, and that they are not scheduled far in advance.<sup>6</sup>

However, Chief Kilduff stated that he does not consider nighttime inspections to be a “stressful” activity for Firefighters in the context of their regular duties, nor does he consider them to be unsafe. (Tr. 265) He noted that fire units have specifically been instructed “not to get involved” if they detect or sense anything during a nighttime inspection that would create an unsafe condition. (*Id.*) Moreover, Chief Kilduff testified that there is no reason for Firefighters to feel that there is “criminality” in the building during nighttime inspections. (Tr. 276) He clarified that the labeling of the neighborhoods in which many nighttime inspections take place as “high-risk” refers to the heightened risk to the housing stock that there may be illegal conversions, not a heightened risk of a criminal element. (Tr. 281)

Chief Kilduff testified that no safety issues have come to his attention since the Nighttime Inspection Program was implemented. He is also unaware of any “unusual occurrence reports” regarding events taking place during a nighttime inspection. (Tr. 208) An “unusual occurrence” is something “out of the ordinary” which affects the FDNY or its members and which must be reported up the chain of command. (Tr. 207)

During his testimony, Chief Kilduff clarified that the skills required to perform nighttime inspections are identical to those used to perform BISP inspections and thus there are no skills unique to nighttime inspections that would necessitate a separate training. He testified that

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<sup>6</sup> Chief Kilduff testified that he considers the nighttime inspection to be a “special inspection” because of its limited nature. A special inspection is “anything outside the normal BISP period.” (Tr. 278) It could be a complaint, overcrowding, or a scheduled inspection with a building owner at a mutually convenient time. Characteristic of a special inspection is that it is responsive to a specific hazard and is not scheduled in advance.

Firefighters are already trained in enforcing the fire code and dealing with members of the public, which are the skills needed for nighttime inspections. Moreover, a Fire Officer is present on the scene of a nighttime inspection with the Firefighters.

Chief Kilduff testified that approximately ten percent of all fire units are out of service every day during the day tour for educational, training, or maintenance purposes. He stated that the FDNY adjusts its response patterns accordingly to be able to cover any neighborhoods where there might be a gap with the out of service units. It might also relocate units to that area to have even coverage. Chief Kilduff further testified that the nighttime inspections have little to no impact on the FDNY's overall ability to respond to emergencies because they are performed in the evening, when fewer units are placed out of service. Chief Kilduff testified that if a fire company is taken out of service from a nighttime inspection to respond to a multiple alarm fire emergency, it would have to respond directly from the fire truck, as opposed to the firehouse. While he agreed that this would result in a slight delay in response time, he stated that this delay would occur regardless of whether the inspection took place during the day or at night.

## **POSITIONS OF THE PARTIES**

### **Union's Position**

The UFA contends that the City was required to bargain over the creation and implementation of the Nighttime Inspection Program because of its practical safety and workload impact on Firefighters, and that its failure to do so is a violation of NYCCBL § 12-306(a)(1) and (a)(4).<sup>7</sup> It asserts that, based on the record, it has proven that the performance of nighttime

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<sup>7</sup> NYCCBL § 12-306(a) provides, in pertinent part:

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

inspections pursuant to the Program is an “inherently dangerous endeavor” and creates a practical safety impact on its members in a number of ways. (Union Post-hearing Brief (“Un. Br.”) at 22) First, the Program’s goal is to target buildings where “suspected criminality” exists. (*Id.* at 27) Specifically, it places Firefighters in “direct and proximate contact with criminals” in individual units that are “completely foreign” to Firefighters, but familiar to the “criminal residents” inside. (*Id.* at 23) In addition, the UFA contends that the City and the FDNY failed to consider the safety of Firefighters when creating and implementing the Program. The FDNY has provided Firefighters with very limited guidance and no formal direction for conducting nighttime inspections, reflecting a “careless attitude” toward the health and well-being of the UFA’s members. (Un. Br. at 24) Moreover, Firefighters have not received training in how to perform nighttime inspections with DOB. The FDNY also failed to provide any “adaptive response measures” that would reduce or ameliorate the potential risk involved in performing nighttime inspections. (*Id.* at 25) The UFA further contends that placing fire companies out of service to perform nighttime inspections invites a delayed response to emergencies, increasing

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

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 of all of such activities.

the possibility of an out of sequence or out of order response and thus exacerbating the risk of a safety impact on Firefighters.

The UFA asserts that the Board's determination in the instant matter "must be guided" by *UFA*, 5 OCB2d 2 (BCB 2012). (Un. Br. at 28) That decision, according to the Union, "helped define the parameters of a practical impact on safety concerning Firefighters involved in building inspections." (*Id.*) The Union contends that, in *UFA*, the Board determined that the addition of a third "non-stressful" daytime inspection period, which Firefighters were fully trained to handle, did not create a practical impact on safety. It asserts that the record in the instant matter reflects that Firefighters perform BISP inspections in their work duty uniforms, the inspections occur between the hours of 10 a.m. and 4 p.m., involve a top-to-bottom inspection of the common areas and public spaces of commercial, industrial, and specific residential building, and are designed to obtain "critical structural information while serving as a valuable training tool" for Firefighters, among other characteristics. (Un. Br. at 29)

These characteristics, according to the Union, contrast starkly with the record evidence in the instant case. That evidence reflects that nighttime inspections are "intentionally scheduled" during the hours of 6 p.m. to 9 p.m., require Firefighters to don all of their PPE, target specifically established buildings where "criminality is suspected," and mandate the "visual inspection of each and every room within individual units in small residential buildings," among other characteristics. (*Id.*) The UFA thus maintains that "[g]iven that the Board determined that the BISP inspections do not create a practical impact on the safety of Firefighters, and the nighttime inspections pursuant to the Program are profoundly distinct and contain none of the measures, characteristics, or procedures which the Board deemed to render the BISP inspections

safe, the BCB must conclude that these nighttime inspections do, in fact, create a practical impact on the safety of Firefighters.” (*Id.* at 29-30)

The UFA contends that it has demonstrated that the institution and implementation of the Program also creates a practical impact on the workload of its members. First, fire companies performing nighttime inspections are taken out of service and the FDNY must therefore reconfigure the fire companies in order to ensure proper fire protection coverage. This “dangerous shell game” leaves certain geographic areas without “proper” coverage, thereby exposing firefighters to a heightened risk, should a fire or medical emergency occur in that void. (Un. Br. at 38) In addition, fire units performing nighttime inspections must “stay on the box,” and cannot respond to an emergency in their own first-due response area. (Un. Br. at 38-39) Thus, they are unable to meet their responsibilities. Third, because fire companies performing nighttime inspections are placed out of service, even firefighters who are not performing these inspections are affected because they must replace and relocate fire companies who are engaged in nighttime inspections. Finally, by performing these nighttime inspections, Firefighters are “essentially performing the tasks of the DOB inspectors.” (Un. Br. at 38) These are duties which exist outside of their normal responsibilities and are a “perfect example” of a practical impact on workload. (*Id.*)

### **City’s Position**

The City contends that there is no evidence in the record to support the UFA’s claims of practical impact on the safety or the workload of its members resulting from the implementation of the Nighttime Inspection Program. The City argues that the Union has been unable to show that there was any negative safety impact on its members. It notes that “[n]ot one firefighter was injured or even raised a safety concern” to the UFA Health and Safety Officer or to FDNY

management. (City Post-hearing Brief (“City Br.”) at 9) The UFA also failed to produce any evidence to demonstrate that their members’ work on the Program subjected them to any increased hazards.

In fact, the City argues, the record evidence indicates that the Program makes firefighters safer. It notes that Firefighter Fitzgerald acknowledged on cross-examination that it is unsafe for Firefighters to respond to emergencies at illegally-subdivided buildings and that, if such a condition were discovered and remedied, Firefighters would be safer in the future when responding to emergencies. Firefighter Fitzgerald also testified that, in his capacity as the Union’s liaison with the membership on health and safety issues, he has not received any complaints about the Program. Moreover, over 300 subdivided premises have been identified since its inception. Therefore, the City claims, the chances of firefighter injury have been “significantly reduced” as a result of the Program. (City Br. at 7)

The City asserts that, in making the managerial decision to take part in the Nighttime Inspection Program, the FDNY considered Firefighters’ safety and correctly determined that participation would make them safer. It points to the testimony of Chief Kilduff, who explained that taking units out of service approximately seven times per week for roughly a half hour has a minimum impact on fire operations but keeps Firefighters safer. The City emphasizes that, at the rate of seven per week spread out amongst 330 active fire companies, nighttime inspections take place relatively infrequently. As such, Firefighters’ responsibilities under the Program are sporadic and the majority of fire units have never been called upon to conduct a nighttime inspection. The City asserts that nighttime inspections are more akin to “special inspections,” which exist entirely outside of the BISP but which require no specialized skills or training. (City Br. at 7) The City maintains that the only skills required for performing nighttime inspections



are the ability to deal with the public and to perform building inspections, both of which Firefighters are well-trained in doing.

The City takes issue with the Union's reliance on *UFA*, 5 OCB2d 2, labeling it a "red herring" which has nothing to do with the instant case. (City Br. at 8) It argues that, in the instant case, the management action at issue is not an expansion of the BISP but rather a "small, almost negligible increase" in the number of special inspections which exist outside of the BISP. (*Id.* at 7-8) In addition, in *UFA*, 5 OCB2d 2, the Board did not rely upon the time of day of the BISP inspections but rather dismissed the Union's theories regarding practical impact.

The City urges the Board to disregard the UFA's argument that a safety impact was created by virtue of fire companies being taken out of service when performing a nighttime inspection because it lacks factual support. It notes that Chief Kilduff testified that at any given time, approximately 10% of fire companies are out of service for various reasons. Further, he stated that when units are placed out of service as a result of a nighttime inspection, it simply does not affect the FDNY's overall ability to respond to emergencies.

The City argues that the UFA's claim of a workload impact resulting from the Nighttime Inspection Program is also baseless and lacking in factual support. It asserts that the evidence in this case reflects that there has been no unreasonably excessive or unduly burdensome workload as a result of the Program, and notes to the relative infrequency of inspections. It also points out that Firefighter Cleary testified that he took part in only one nighttime inspection since the inception of the Program which took about 45 minutes, including travel time. According to the City, this is not evidence of an unreasonably excessive or unduly burdensome workload.

## DISCUSSION

The UFA argues that it has established that a practical impact on the safety and workload of its members has resulted from the FDNY's implementation of the Nighttime Inspection Program.<sup>8</sup> This Board finds that on the record before us, the evidence does not establish the existence of a practical safety or workload impact and, accordingly, we deny the petition.

The NYCCBL provides public employers with the discretion to act unilaterally in certain enumerated areas outside of the scope of bargaining, including assigning and directing employees and determining their duties during working hours. *See* NYCCBL § 12-307(b); *EMS SOA*, 79 OCB 7, at 29.<sup>9</sup> However, an employer is required to negotiate over the alleviation of a practical impact on employee safety stemming from managerial action on a non-mandatory subject of bargaining. *See* NYCCBL § 12-307(b); *EMS SOA*, 79 OCB 7, at 30; *UFA*, 43 OCB 70, at 3-4.

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<sup>8</sup> Although the UFA labeled its petition as an "Improper Practice and Scope of Bargaining" petition, "a finding by the Board that a practical impact exists is a condition precedent to the imposition of the duty to bargain." *UFA*, 5 OCB2d 2, at 21 fn. 16 (quoting *EMS SOA*, 79 OCB 7, at 30 (BCB 2007)). That is, "there can be no violation of the NYCCBL by way of a refusal to bargain until the Board has first found that a practical impact has been demonstrated." *Id.* Thus, "any assertion of a refusal to bargain is premature; we will determine only whether there is a sufficient showing of practical impact and, if so, we will direct bargaining over alleviation prospectively." *Id.* (quoting *UFA*, 71 OCB 19, at 3 (BCB 2003)).

<sup>9</sup> NYCCBL § 12-307 (b) provides, in relevant part:

It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city . . . on those matters are not within the scope of collective bargaining, but . . . questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

The Board has held that “it is not enough to allege a threat to employee safety . . . it is incumbent upon the Union to demonstrate that the alleged safety impact results from a management decision or action, or inaction in the face of changed circumstances.” *UFA*, 37 OCB 43, at 17-18 (BCB 1986); *see also UFA*, 43 OCB 4, at 48 (BCB 1989), *affd.*, *Matter of Uniformed Firefighters Assn. v. Off. of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd.*, 163 A.D.2d 251 (1<sup>st</sup> Dept. 1990). Factors considered in determining whether a practical impact on safety exists include whether the employer has adopted measures that offset any potential threat to safety and whether the employees’ adherence to management procedures and guidelines would obviate any safety concerns. *See UFA*, 3 OCB2d 16, at 30 (BCB 2010); *EMS SOA*, 79 OCB 7, at 30-31.

We review the record to determine if there is a practical impact on safety. The UFA has the burden to demonstrate that a practical impact on safety exists and “must substantiate, with more than conclusory statements, the existence of a threat to safety before we will require the employer to bargain.” *EMS SOA*, 79 OCB 7, at 30; *LEEBA*, 3 OCB2d 29, at 44 (BCB 2010); *SEIU, L. 621*, 51 OCB 34, at 9 (BCB 1993). We emphasize that this Board has never “require[d] a union to show that injuries have actually resulted from management’s action in order to demonstrate a practical impact on safety.” *EMS SOA*, 79 OCB 7, at 31; *see also UFA*, 3 OCB2d 16, at 30-31 (BCB 2010); *UFA*, 79 OCB 7, at 31. Notwithstanding this fact, to establish a practical impact on safety, the UFA must show “more than simply a change in the way things are done.” *UFA*, 43 OCB 70, at 4. It “must demonstrate that the exercise of a management right has created a ‘clear and present or future threat to employee safety.’” *UFOA*, 3 OCB2d 50, at 18 (BCB 2010) (quoting *UPOA*, 39 OCB 37, at 5-6 (BCB 1987)); *see also UFA*, 49 OCB 39, at 37 (BCB 1992).

The objections raised by the UFA in support of its allegation that a practical impact on safety results from the FDNY's implementation of the Nighttime Inspection Program can be placed into two categories: safety concerns that are inherent to both BISP and nighttime inspections, and safety concerns that are unique to the performance of nighttime inspections.<sup>10</sup>

We address the safety concerns in the latter category first.

The UFA's primary contention in this regard is that conducting nighttime inspections exposes its members to "criminal residents" and "criminal activity." The UFA failed to provide evidence of any criminals or criminal activity to which Firefighters were exposed during nighttime inspections. Notwithstanding this fact, it appears to argue that both criminal residents and criminal activity are more likely to be found in an illegally converted building than in another type of building. We find that the record is devoid of evidence that firefighters were exposed to any crimes in progress or illegal activity during the course of a nighttime inspection, or that crimes are more likely to occur in illegally converted buildings. We also find no evidentiary basis to equate residents of illegally converted properties to criminals.

The UFA further asserts that the Program's goal is to target buildings where "suspected criminality" exists. The evidence reflects that, in identifying properties as targets for inspection under the Program, a building will be identified as a high fire risk property if it meets certain predetermined criteria, including whether it is in a "high risk neighborhood." In his undisputed testimony, Chief Kilduff clarified that when a neighborhood is identified as "high risk" for

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<sup>10</sup> We note that the UFA contends, in its post-hearing brief, that it has demonstrated that the performance of nighttime inspections is an "inherently dangerous endeavor." (Un. Br. at 22) We have stated that "in order to find that a *per se* practical impact exists, warranting bargaining over alleviation, the Board must be able to determine, based on the pleadings alone, and without benefit of a hearing, that a practical impact exists." *UFA*, 5 OCB2d 2, at 23 (citation omitted). Assuming that, in making this statement, the UFA is alleging a *per se* practical impact, we find that it has not demonstrated a practical impact based on the pleadings alone; thus "the concept of a *per se* practical impact is inapplicable to this matter." *Id.*

targeting purposes, it refers to the heightened risk to the housing stock that there may be illegally converted dwellings and not to any other form of illegal activity. Accordingly, we find that no safety impact has been established on these facts.

Another practical impact on the safety of its members, according to the Union, results from the FDNY's failure to provide training, rules and guidance for conducting nighttime inspections to its fire units. To establish a safety impact based upon a failure to train, the petitioner must show that the lack of training had a direct impact upon safety. *See UFA*, 5 OCB2d 2, at 28; *PBA*, 63 OCB 12, at 7 (BCB 1999), *affd.*, *Matter of Savage v. DeCosta*, Index. No. 120860/1998 (Sup. Ct. N.Y. Co. Dec. 10, 1998) (finding that there is no duty to bargain over training for employees unless it is proven that some level of training is necessary in order for the job to be performed safely). Here, we find that the record evidence does not establish a connection between the absence of training, rules and guidance specifically geared to conducting nighttime inspections and Firefighter safety.

Our conclusions regarding the UFA's safety concerns in this category are bolstered by the testimony of both Chief Kilduff and Firefighter Fitzgerald that neither has received safety complaints since the inception of the Program. Indeed, Firefighter Fitzgerald agreed that finding and remedying safety hazards resulting from illegal conversions in one to three-family dwellings would ultimately make responding to a future emergency at those locations safer for Firefighters.

With regard to the safety concerns inherent to both BISP and nighttime inspections, the UFA contends that there are certain common risk factors. These factors consist of delays in emergency response time due to out of sequence and out of order responses from inspection sites, as well as vacancies in coverage resulting from companies being placed out of service. Further, the UFA asserts that these factors are exacerbated when they occur at night.

Initially, we note that the Board addressed these safety concerns in *UFA*, 5 OCB2d 2, in the context of BISP inspections. In *UFA*, we held, *inter alia*, that the record evidence did not establish that the increase from two to three weekly BISP inspection periods resulted in a practical safety impact on Firefighters. *Id.*, at 21. In response to the petitioners' allegations that responding to an emergency from a building inspection site increases the likelihood of out of order and out of sequence responses, we stated:

Out of order and out of sequence responses are a regular occurrence in firefighting for which Firefighters . . . are trained. Firefighters are in the field for a variety of reasons, including training, restocking supplies, procuring meals, and familiarization drills. Since Fire Companies are not necessarily in the firehouse when not engaged in responding to a call, we cannot conclude that, if not for the additional building inspections period, those Fire Companies would have been in quarters and not in the field and, possibly, outside of their Response Areas.

*Id.*, at 25. This conclusion is applicable here as well. There is no evidence to establish that Firefighters would be in the firehouse and not elsewhere but for the performance of a nighttime inspection.

The UFA's assertion that these risk factors are exacerbated during nighttime inspections lacks support in the record. To the contrary, Chief Kilduff credibly testified that nighttime inspections have no impact on the FDNY's overall ability to respond to emergencies because there are fewer units placed out of service in the evening. He also testified that he is not aware of any incidents of delayed responses to emergencies that occurred as a result of a nighttime inspection.

We are also unpersuaded by the conclusion that the UFA urges the Board to draw by contrasting our findings in *UFA*, 5 OCB2d 2, to the facts in the instant matter. The UFA is correct that, in *UFA*, 5 OCB2d 2, the Board cited certain factors accompanying the increase in

weekly BISP inspection periods, including the training of 96 percent of participants and the fact that the increase was a reallocation amongst pre-existing duties, as the basis for its finding that an additional weekly BISP inspection period did not result in a practical safety impact on Firefighters. Nevertheless, the absence of these factors here does not require us to reach the opposite conclusion where the evidence in the instant matter does not support a finding that the Nighttime Inspection Program causes a practical safety impact.<sup>11</sup> In sum, we cannot conclude that a practical safety impact exists based on the evidence presented. Thus the City has no duty to bargain with the Union.

To establish a practical impact on workload, we have long held that a duty to bargain arises in a case in which the exercise of a management right is shown to create an “unreasonable excessive or unduly burdensome workload as a regular condition of employment.” *UFA*, 71 OCB 19, at 8 (BCB 2003) (citation omitted); *see LBA*, 51 OCB 45, at 30 (BCB 1993) (union’s burden is “to prove that the exercise of a managerial prerogative has resulted in an unreasonably excessive and unduly burdensome workload as a regular condition of employment”). However, “[m]erely alleging that [employees] have been assigned to more difficult or higher level work is insufficient to establish that any unreasonably excessive or unduly burdensome workload has resulted.” *DC 37, L. 1549*, 69 OCB 37, at 11 (BCB 2002).

The record evidence does not reflect that the implementation of the Program resulted in an unreasonably excessive or unduly burdensome workload for Union members. We are unpersuaded that the evidence before us supports an inference that taking fire companies out of

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<sup>11</sup> The UFA asserts that the City has characterized nighttime inspections under the Program in an inconsistent fashion when comparing them with other types of inspections performed by the FDNY and that its positions are therefore not credible. It consequently urges the Board to disregard the City’s positions. We emphasize that our findings of fact are based solely on the testimony and evidence before us and not on either party’s characterizations of it.

service to perform nighttime inspections leaves certain areas without proper coverage, which then results in a practical workload impact. Chief Kilduff credibly testified that the FDNY adjusts its response patterns to cover any neighborhoods where there might be a gap created by an out of service unit, and that fewer units are out of service in the evening. Given this testimony, it is clear that there are, in fact, fewer gaps created by out of service units at night than during the daytime. Moreover, Firefighter Cleary testified that he had participated in one nighttime inspection since the inception of the Program and that the inspection took 45 minutes. One inspection lasting under one hour over the course of a nearly two-year period does not create an “unreasonably excessive” workload. *See DC 37, L. 1549, 69 OCB 37, at 11.* We note that if building access is denied at a nighttime inspection site, no inspection will even take place. Finally, the UFA’s claim that its members are performing the tasks of DOB inspectors during nighttime inspections is conclusory. In fact, Chief Kilduff’s undisputed testimony was that the DOB inspectors and firefighters perform separate and distinct roles when conducting such inspections. Given the clear evidence before us, we find that no practical workload impact exists on this record.

For the foregoing reasons, we conclude that the record does not establish that the FDNY’s implementation of the Nighttime Inspection Program results in a practical impact on the safety or workload of firefighters. Accordingly, we find that the City has no duty to bargain over the implementation of the Nighttime Inspection Program and dismiss the Union’s claims.



**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 and scope of bargaining petition filed by Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, docketed as BCB-3008-12, against the City of New York, is hereby dismissed.

Dated: February 24, 2014  
New York, New York

GEORGE NICOLAU  
MEMBER

CAROL A. WITTENBERG  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

CAROLE O'BLENES  
MEMBER

I dissent.

PETER PEPPER  
MEMBER