OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Proceeding

-between-

LOCAL 1182, COMMUNICATIONS WORKERS OF AMERICA,

Petitioner,

Decision No. B-11-2003 (ES)
Docket No. BCB-2322-03

-and-

NEW YORK CITY POLICE DEPARTMENT,

Respondent.

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DETERMINATION OF EXECUTIVE SECRETARY

On March 7, 2003, the Communications Workers of America, Local 1182 ("Union") filed an amended verified improper practice petition pursuant to the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") against the New York City Police Department ("NYPD"). The Union alleges that NYPD unilaterally changed evaluation standards for unspecified employees without bargaining over the practical impact of these changes. For the reasons set forth below, the petition is dismissed.

BACKGROUND

According to the Union, it represents Traffic Agents in the NYPD. The Union alleges that on December 10, 2002, NYPD issued a memorandum changing the evaluation standards relating to the performance of overtime work in the Traffic Control Division. The Union complains that NYPD made this change without notifying the Union, without bargaining, and without using the usual work measurement procedures to determine acceptable performance levels.

According to the NYPD memorandum attached to the amended petition, there will be a

revised evaluation standard "whereby PED personnel will be rated by their performance of overtime by reporting for duty on time and being prepared, as well as satisfactorily completing the assignment of the overtime event." The Union claims that this revised evaluation has resulted in the following practical impact: (1) poor evaluations for probationary employees can result in termination of the employees' job position; (2) Traffic Agents are subject to "command disciplines" and when determining the penalty imposed, NYPD will consider, among other things, performance evaluations; (3) Traffic Agents have the opportunity to apply for upgrades and NYPD will consider, among other things, performance evaluations; and (4) Traffic Agents have the opportunity to work in the desirable specialized unit called the "Nighthawks" and NYPD will consider, among other things, performance evaluations.

The Union recognizes that the parties' collective bargaining agreement ("CBA") allows NYPD to establish and revise performance standards and that such standards may be used to determine acceptable performance levels buts claims that questions concerning practical impact are within the scope of bargaining. The Union alleges that NYPD has violated NYCCBL §§ 12-305, 12-306(a)(1) and (4) and 12-306(c) and seeks a determination from the Board of Collective Bargaining ("Board") that NYPD's acts constitute an improper practice and an order that, *inter alia*, NYPD bargain with the Union.[1]

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[1] NYCCBL § 12-305 provides: 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. However, neither managerial nor confidential employees shall constitute or be included in any bargaining unit, nor shall they have the right to bargain collectively; provided, however, that public employees shall be presumed eligible for the rights set forth in this section, and no employee shall be deprived of these rights unless, as to such employee, a determination of managerial or confidential status has been rendered by the board of certification; and provided further, that nothing in this chapter shall be construed to: (i) deny to any managerial or confidential employee his or her rights under section fifteen of the civil rights law or any other rights; or (ii) prohibit any appropriate officials of a public employer as defined in this chapter to hear and consider grievances and complaints of managerial and confidential employees concerning the terms and conditions of their employment and to make recommendations thereon to the chief executive officer of the public employer for such action as such chief executive officer shall deem appropriate. A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public

On February 12, 2003, the Union filed an improper practice petition arising out of the same December 12, 2002, NYPD memorandum. By letter dated February 13, 2003, the Executive Secretary found the petition deficient pursuant to § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). The reason for deficiency was that: (1) there were no facts or other particulars describing how the unilateral change in evaluation standards had resulted in a practical impact; (2) the petitioner failed to attach the specific provisions of the CBA relied upon; (3) the petitioner failed to set forth the legal basis why these allegations constituted a violation of the NYCCBL; (4) to the extent petitioner alleged that NYPD violated the CBA by failing to give notice of the change, such claims should have been brought under the parties' contractual grievance procedures; and (5) petitioner's practical impact claims should have been brought as a scope of bargaining petition pursuant to NYCCBL § 12-307 and Rule § 1-07(c). On March 7, 2003, the Union filed the instant amended verified improper practice petition as well as an identical scope of bargaining petition which has been docketed as BCB 2328-03.

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employees in the appropriate bargaining unit.

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 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 § 12-306(c) provides: The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
(1) to approach the negotiations with a sincere resolve to reach an agreement;
(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
(4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;
(5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

DISCUSSION

First, to the extent the Union claims that NYPD violated the CBA by failing to give notice of the changes in evaluation standards, such claims should be brought as a grievance/arbitration proceeding not as an improper practice petition. Alleged contractual violations may not be rectified through the filing of improper practice charges. *Local 237, International Brotherhood of Teamsters*, Decision No. B-31-98 at 7; *Local 1182, Communications Workers of America,* Decision No. B-8-96 at 11; Civil Service Law § 205.5(d).

Second, the gravamen of the Union's petition is that NYPD's actions have resulted in a practical impact. A practical impact claim must be based upon the last sentence of NYCCBL § 12- 307(b) which states:

> Decisions of the city . . . on those matters (managerial rights) are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

The Board has held that there can be no duty to bargain – and therefore no violation of NYCCBL § 12-306(a)(4) by way of refusal to bargain – arising out of a claim of practical impact until the Board has first made a determination in a scope proceeding that a practical impact exists as a result of the exercise of a management prerogative pursuant to NYCCBL § 12-307(b). *Communications Workers of America, Local 1180*, Decision No. B-47-89 at 17. Typically, improper practice petitions which allege practical impact are converted into scope of bargaining petitions. *Doctors Council, S.E.I.U*, Decision No. B-24- 2002 at7; *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-16-2002 at 5. Here, the Union has not alleged a violation of NYCCBL § 12- 307(b) but instead filed an identical scope petition alleging a violation of that section. Accordingly, the instant improper practice petition is dismissed so that the issues raised herein may properly proceed in the pending scope proceeding.

Since the improper practice petition is dismissed on the grounds that the issues raised will be addressed in the scope of bargaining proceeding, there is no need to review the sufficiency of the improper practice petition. Accordingly, the petition is dismissed.

Dated: New York, New York
March 21, 2003

Alessandra F. Zorgniotti
Executive Secretary