UFA & Gorman v. FDNY, 71 OCB 13 (BCB 2003) [Decision No. B-13-2003 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper Practice Proceeding

-between-

KEVIN GALLAGHER, INDIVIDUALLY, and as PRESIDENT o/b/o THE UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, and PETER GORMAN, INDIVIDUALLY, and as PRESIDENT OF THE UNIFORMED FIRE OFFICERS' ASSOCIATION,

Petitioners,

Decision No. B-13-2003
Docket No. BCB-2230-01

-and-

FIRE DEPARTMENT OF THE CITY OF NEW YORK AND FIRE COMMISSIONER THOMAS VON ESSEN,

Respondents.
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DECISION AND ORDER

On August 1, 2001, Kevin Gallagher as President of the Uniformed Firefighters Association of Greater New York ("UFA") and Peter Gorman as President of the Uniformed Fire Officers' Association ("UFOA") (collectively, "Unions") jointly filed a verified improper practice petition against the Fire Department of the City of New York ("City," "Department" or "FDNY"). The Unions allege that FDNY failed to bargain in good faith over the "financial impact and inconvenience" of FDNY's decision to require members of the Department to obtain physical therapy and magnetic resonance imaging ("MRI") services at specified locations rather than at locations which they chose prior to the decision. The Unions seek a determination that the Department refused to bargain over the impact of that decision in violation of the New York

City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). The City argues that FDNY's unilateral change in treatment sites was a proper exercise of its managerial prerogative and that the Unions have not alleged facts sufficient to establish a claim that the unilateral change has caused a practical impact within the meaning of the NYCCBL. This Board holds that the Unions' allegations are insufficient to state a claim of practical impact. The Board also finds that to the extent that the Unions' claim is intended as a demand for an "economic alternative" in response to the location change, the Unions failed to make a demand for bargaining on this issue and, thus, the City was not on notice and did not refuse to bargain. Accordingly, the petition is denied.

BACKGROUND

At all times relevant, FDNY has paid for "necessary medical treatment and medical services" for uniformed Firefighters and Fire Officers ("members") injured in the line of duty. That treatment has included the medical services at issue in the instant petition ("covered services"). For a number of years, members injured in the line of duty were allowed to seek MRI and physical therapy services at locations of their own choice. On April 14, 1999, FDNY entered into an agreement with H&M Hecker P.T. ("H&M") to provide physical therapy services to members at Department headquarters and at satellite facilities in Manhattan, the Bronx, Brooklyn, Queens, Nassau, Rockland and Putnam Counties. On November 8, 2000, FDNY also entered into an agreement with Modern Medical Imaging ("MMI") to provide MRI services for members of the Department at a single, central location in New York City.

Then, on July 13, 2001, FDNY issued an order directing members who sought the

covered services to obtain them only at specific locations designated in the H&M and MMI agreements. In the case of MRI services, this change means that members residing in any legally permitted county must now travel to Brooklyn to obtain these services, rather than to whatever location they previously would have chosen. The Department's stated rationale for requiring members to use the more centralized locations is to save time and money, in that treatment appointments can be scheduled sooner and Firefighters returned to duty on an earlier date than FDNY believed was possible when the members were permitted to choose their own service locations and schedule their own dates for appointments.

By letter dated July 20, 2001, the Unions demanded bargaining with the Department over what that letter described as "the financial impact of this unilateral change of a term and condition of employment." On August 1, 2001, the Unions filed a verified improper practice petition demanding bargaining over the impact of the change in covered service locations. On August 20, 2001, the Union filed a verified petition for injunctive relief in support of its improper practice petition. Following the events of September 11, 2001, the injunctive relief proceeding was closed administratively. Thereafter, the improper practice petition was held in abeyance by agreement of the parties. On January 8, 2003, counsel for the UFA wrote to indicate that the Unions sought to proceed on the underlying improper practice petition. In their verified reply filed on January 16, 2002, the Unions reiterated their demand for bargaining over the impact of the change in covered services locations and additionally alleged that the Department failed to bargain over an "economic substitute" for the changed locations. As a remedy, the Unions seek an order directing the City to cease and desist from bargaining in bad faith, directing the posting of a notice that the City has violated the NYCCBL, and directing the restoration of

the *status quo* by permitting members to receive MRI and physical therapy services at "convenient places."

POSITIONS OF THE PARTIES

Unions' Position

In the improper practice petition, the Unions claim that FDNY unilaterally changed a term or condition of employment when it issued a directive requiring members who sought MRI and physical therapy services to obtain them at specific locations rather than at places the members chose. According to the Unions, the change has meant "longer trips, more time consumed, and greater expense (gas and tolls) than existed prior to the Department's unilateral action" for members who must now travel to the required locations. The Unions state that their challenge is to the City's failure to bargain the financial impact of FDNY's actions and not to its right to make the change.[1] In addition to their impact claim, the Unions allege that the City has

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[1] NYCCBL § 12-307(a) provides, in relevant part: 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 § 12-307(b) provides, in relevant part: It is the right of the city . . . acting through its agencies, to . . . direct its employees . . . ; maintain the efficiency of governmental operations; 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, notwithstanding the above, 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

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refused to bargain over the matter of an "economic substitute" for the change in MRI and physical therapy locations. The Unions submit that the City's assertion of its statutory managerial prerogative is irrelevant "because of the nature of the Petitioners' refusal to bargain charge."

City's Position

The City asserts that while the provision of health benefits may constitute a mandatory subject of bargaining, its choices of locations for MRI and physical therapy services do not. The Department was not required to bargain over a change in locations because its decision was a proper exercise of its managerial right under NYCCBL § 12-307(b). Nor is bargaining required under a theory of practical impact pursuant to NYCCBL § 12-307(b) because the Unions have failed to provide sufficiently specific factual allegations to warrant either a hearing as to whether a practical impact exists or a bargaining order. Moreover, without a finding by the Board that a practical impact exists, any claim that FDNY failed to bargain is premature.

DISCUSSION

In a case in which management action with respect to a subject matter not within the mandatory scope of bargaining has a practical impact on terms and conditions of employment, a duty arises to bargain for the alleviation of the resulting practical impact. NYCCBL § 12-307(b). Allegations of practical impact may relate to, among other things, questions of workload, staffing and employee safety. *Id.* No duty to bargain arises before this Board makes a determination as

[1](...continued)
scope of collective bargaining.

to whether a practical impact exists. *Lieutenants Benevolent Ass'n*, Decision No. B-45-93 at 28, *enforced, Toal v. MacDonald*, 216 A.D.2d 8, 627 N.Y.S.2d 372 (1st Dep't 1995). We have interpreted the language of NYCCBL § 12-307(b) to require initially that a union offer allegations of specific facts in support of its claim of practical impact. Conclusory statements or vague or non-specific allegations are not sufficient to prove practical impact or to warrant a hearing into whether a practical impact exists. *Id.*; *City Employees Union, Local 237, Int'l Brotherhood of Teamsters*, Decision No. B-4-97 at 5-6.

In the instant case, the Unions do not challenge the Department's right to select the locations where the covered services are provided. Rather, the Unions claim that FDNY has refused to bargain over the "financial impact" of its unilateral decision. Yet, the Unions have simply failed to offer sufficiently specific facts either to warrant an evidentiary hearing about whether FDNY's decision necessarily means "longer trips, more time consumed, and greater expense (gas and tolls) than existed prior" or otherwise to support a finding of practical impact within the meaning of § 12-307(b). With regard to MRIs, there are no specific allegations to show how the cost incurred by Firefighters to attend an appointment at the new location compares with what they spent in the past to reach an appointment at a location of their own choosing. As to the change in physical therapy locations, the Department has provided sites in four boroughs and three other adjoining counties, but the Unions have not offered specific allegations as to the way travel to the new locations differs in distance, length of time, or cost compared to travel to the locations previously selected by its members. In sum, we find the petition conclusory and not supported by sufficiently detailed allegations of fact.

It is unclear whether the Unions' claim is limited to an assertion of practical impact under

NYCCBL § 12-307(b) or is also intended as a claimed refusal to bargain over an economic demand. Public employers and certified or designated employee organizations have a duty to bargain in good faith on wages, hours, and working conditions. NYCCBL § 12-307(a). The statute specifies that the term "wages" includes health and welfare benefits. *Id*; *see also City Employees' Union, Local 237, IBT*, Decision No. B-37-01 at 6. It is an improper practice for a public 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. NYCCBL § 12-306(a)(4). A demand concerning "wages," such as a demand for the "economic alternative" suggested by the Unions in the instant case, could require bargaining. *Local 3, Int'l Brotherhood of Electrical Workers*, Decision No. B-23-75 at 15 (a cash equivalent or "economic alternative" for transit passes, or "subway cards," was a mandatory subject of bargaining).

However, here, the Unions refer for the first time in their reply to the fact that they seek an "economic alternative" to the changed MRI and physical therapy locations. Nothing in the record indicates that the Unions had previously made such a demand to the City; nor is there any reason to believe that the City should have been on notice that the Unions were making an economic demand. *Correction Officers Benevolent Ass'n*, Decision No. B-21-81 at 12 (Board disallowed union from having improper practice petition substitute for a demand for bargaining). *United Probation Officers Ass'n*, Decision No. B-38-89 at Under these circumstances, we cannot find that the City has violated its duty to bargain.[2] Thus, we deny the improper practice

[2] A demand for bargaining over an "economic substitute" for the changed MRI and physical therapy locations would be a mandatory subject of bargaining in the negotiations for successor agreements. Here, the Unions' collective bargaining agreements have expired: the UFOA's, on December 31, 2002; the UFA's, on May 31, 2002. Their terms continue in effect

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petition.

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during negotiations for successor agreements pursuant to the *status quo* provisions of § 12-311(d).

NYCCBL § 12-311(d) requires, among other things, that "the public employer shall refrain from unilateral changes in wages, hours, or working conditions. . . ." during the "period of negotiations" for a successor contract. That period means "the period commencing on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed."

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition filed by the Uniformed Firefighters Association of Greater New York and the Uniformed Fire Officers Association, docketed as BCB–2230-01 be, and the same hereby is, denied.

Dated: April 22, 2003
New York, New York

MARLENE A. GOLD
CHAIR

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER