UFOA v. City & OLR, 71 OCB 6 (BCB 2003) [Decision No. B-6-2003 (IP)]

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

-between-

UNIFORMED FIRE OFFICERS ASSOCIATION,
LOCAL 854, IAFF, AFL-CIO,

Decision No. B-6-2003
Docket No. BCB-2218-01

Petitioner,

-and-

THE CITY OF NEW YORK and the NEW YORK CITY
OFFICE OF LABOR RELATIONS,

Respondents.
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DECISION AND ORDER

The Uniformed Fire Officers Association ("UFOA" or "Union") filed a verified improper practice/scope of bargaining petition against the City of New York ("City") and the New York City Office of Labor Relations on May 29, 2001, alleging that the City 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 changing the procedure by which a Fire Officer can obtain the necessary educational requirements for a promotion in rank. The City asserts that the changes are a proper exercise of its managerial rights because the changes involve the establishment of qualifications for promotion. The Board holds that to the extent that the changes involve the establishment of qualifications for promotion, the petition is dismissed, but

to the extent that the changes relate to procedures, the petition is granted.

BACKGROUND

Prior to April 6, 2001, a Fire Officer who was promoted and sought to obtain tenure in certain ranks was required by the New York City Fire Department ("FDNY") to have completed certain college-level educational requirements. As described in PA/ID 1-97, issued May 15, 1997, newly promoted Fire Officers were required to obtain the requisite educational credits in the first ten months of their probationary period. In addition, a Fire Officer could obtain a six-month extension to complete the requirements at the discretion of FDNY.

PA/ID 1-97 also states that:

> 2.2 In order to receive credit for the specific college level educational requirements for tenure, the member must submit one or more of the following documents to the Bureau of of Personnel Resources . . .
> 2.2.1 Official transcript of completed courses from the Fire Academy which have been credited by the National Program on Noncollegiate Sponsored Instruction (PONSI). See Addendum 2 - ACCREDITATION OF FDNY ACADEMY COURSES.

Paragraph two of Addendum 2 of PA/ID 1-97 states that:

> The Department accepts the credit recommendations assigned by National PONSI towards fulfilment of the educational requirements of this PA/ID.

The Addendum then lists the PONSI-evaluated FDNY Academy courses.

On July 9, 1999, FDNY issued Departmental Order No. 71 ("DO 71"), which stated, among other things, that PONSI-evaluated FDNY Academy courses will be accepted only when an accredited college or university credits those courses on an official school transcript. The City claims that the Order simply restated FDNY's policy as it had existed since at least 1997, and the clarification was a result of the Union's stated belief that PONSI credits were accepted without

gaining college accreditation. The Union disputes that the Order restated existing policy.

In September 1999, FDNY sent the Union a draft revision of PA/ID 1-97 which re-stated the PONSI-related content of DO 71. The Union objected to the revised PA/ID, arguing that FDNY was changing the procedures for using PONSI credits by requiring college accreditation. The City advised the Union that its policy regarding PONSI credits had not changed, but to resolve the dispute, FDNY agreed to apply PONSI credits toward the educational requirements for members promoted to Lieutenant and Captain from two specific exams and for those members remaining on both eligible lists.

On March 20, 2001, FDNY sent the Union a copy of a further revised PA/ID 1-97 for comments. This revised version requires that an Officer meet the educational requirements for the rank to which the Officer is to be promoted one month *prior* to the date of promotion. The revised PA/ID also states that PONSI-evaluated FDNY Academy courses will meet FDNY requirements only when accredited by a college or university. On April 4, 2001, the Union objected to the FDNY's implementation of the new policy without bargaining.

The revised version of PA/ID 1-97 was officially issued on April 6, 2001. FDNY represented that the new policy would be put into effect at the time of the next cycle of Notice of Examinations, examinations, and subsequent promotions. The new policy was not applicable to any Notice of Examinations that already had been issued, nor was it applicable to any promotions from those eligible lists already promulgated or soon to be promulgated.

On December 17, 2002, the Trial Examiner held a conference to resolve the factual dispute over whether the further college or university accreditation of PONSI-evaluated FDNY

courses is a new requirement. At this conference, the parties made additional submissions supporting their respective positions on this issue.

As a remedy, the Union asks that the Board issue an order directing the City to restore the status quo regarding the April 6, 2001, PA/ID 1-97, to bargain over its implementation and impact, and to rescind any personnel decisions made pursuant to that order.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the unilateral change in procedures for promotion has subjected UFOA members to altered economic conditions and promotional opportunities. The Union claims that the changes in question are procedural and not a matter of qualification. As such, these changes are mandatory subjects of bargaining.

According to the Union, because the credits must be obtained prior to appointment, a newly promoted Officer is forced to commit a material amount of time and financial resources to obtain educational credits for a position to which the Officer may never be promoted. The Union estimates that a Lieutenant seeking a promotion to Captain under the new PA/ID 1-97 will need to invest 1,170 hours in class hours alone and $10,800 to satisfy educational requirements for a position to which the Lieutenant may never be promoted. This change limits the opportunities available to a Fire Officer who may not be willing or able to expend the necessary resources on a promotion the Officer may never receive.

The Union rejects the City's position that FDNY always required Officers to submit

PONSI credits to an accredited institution and points out that the original PA/ID 1-97 and other documents issued by FDNY make no mention of such a requirement. Instead, the original PA/ID provides: "The Department accepts the credit recommendations assigned by National PONSI towards fulfilment of the educational requirements of this PA/ID." However, under the April 6, 2001, PA/ID, the City will not consider PONSI-evaluated Fire Academy courses in satisfaction of the educational requirements until accredited by college or university. The Union asserts that although certain accredited institutions will evaluate PONSI credits, many will not accept them or give only partial credit for the course work. The institution will also charge the individual a fee for every PONSI credit it accepts.

Finally, all of FDNY's changes have an immediate and *per se* impact on the terms and conditions of unit members' employment. These changes impact the promotional procedure and opportunities for Fire Officers and the City should be ordered bargain over such an impact.

City's Position

The City contends that as an establishment of qualifications for promotion, the change in deadline for completion of the requirements for promotion is a proper exercise of its managerial rights under § 12-307(b) of the NYCCBL.[1] The Board has held that § 12-307(b) of the

[1] Section 12-307(b) provides in pertinent part:

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; 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. . . . 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

NYCCBL guarantees the City the unilateral right and flexibility in determining the standards of selection for employment and qualifications for promotions. Consequently, FDNY's requirement that Officers complete the educational requirements for the position one month prior to the date of promotion is a proper exercise of managerial prerogative.

The City emphasizes that this policy is applicable only to future Notice of Examinations, examinations, eligible lists, and promotions. FDNY is not adding any new requirements that would preclude an Officer from any opportunity. The only change is the time period within which the Officer must complete the educational requirements. Requiring Officers to fulfill the requirements one month prior to the date of promotion ensures that these Officers will have a better chance than under the previous policy at succeeding in their new position.

The City asserts that there has been no change in the requirement that PONSI-evaluated FDNY courses should be accredited by a college or university and argues that there is no impact, *per se* or otherwise, from the exercise of its management prerogative. The Union must make more than its conclusory statements of practical impact in order to bargain or to warrant a hearing to present further evidence.

DISCUSSION

The first issue presented here is whether a requirement that a Fire Officer meet educational prerequisites one month prior to promotion, rather than during the Officer's

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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.

probationary period, is a mandatory subject of bargaining. It is an improper practice under § 12-306(a)(4) of the NYCCBL for a public employer or its agents:

> 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.

Both PERB and this Board have stated that a term and condition of employment is a mandatory subject of bargaining, but that setting qualifications for initial employment or for promotion is not a mandatory subject of bargaining. *Rensselaer City School District*, 13 PERB 3051 (1980), *aff'd*, 15 PERB 7003, 87 A.D.2d 718, 488 N.Y.S.2d 883 (3d Dep't 1982); *Patrolmen's Benevolent Ass'n*, Decision No. B-24-87, *aff'd*, *Caruso v. Anderson*, 138 Misc. 2d 719, 525 N.Y.S.2d 109 (S.Ct. N.Y. Co. 1987), *aff'd*, 145 A.D.2d 1004, 536 N.Y.S.2d 689 (1st Dep't 1988), *leave denied*, 73 N.Y.2d 709, 540 N.Y.S.2d 1004 (1989).

In *West Irondequoit Board of Education*, 4 PERB 4511, *aff'd*, 4 PERB 3070 (1971), PERB stated that the establishment of qualifications is a fundamental right of management, and defined the term "qualifications" as:

> preconditions, not conditions of employment. They define a level of achievement or a special status deemed necessary for optimum on-the-job performance.

In *Committee of Interns and Residents*, Decision No. B-38-86, this Board relied on *West Irondequoit Board of Education* to consider the question whether a Health and Hospital Corporation ("HHC") requirement that newly appointed Chief Residents possess a New York State medical license was a qualification and, thus, a non-mandatory subject of bargaining. The Board interpreted the management rights set forth in § 12-307(b) to provide that HHC may fix

the qualifications of its employees. As HHC determined that a New York State license will contribute to the optimum performance by Chief Residents, the issue of licenses for new appointments to Chief Resident was a non-mandatory subject of bargaining. However, the Board stated that any application to those currently holding the position of Chief Resident would be a mandatory subject of bargaining because the requirement then became a condition of continuing employment rather than a precondition or qualification for employment.

Here, the City seeks to "define a level of achievement or a special status deemed necessary for optimum on-the-job performance" by requiring new applicants for promotion to complete their educational requirements prior to that promotion. The completion of certain educational requirements for new applicants, like the acquisition of a medical license, constitutes a qualification which management may impose unilaterally on its employees. The City does not seek to apply these requirements to those who have already applied for a promotion, so those requirements cannot be deemed a condition of continuing employment. Therefore, this aspect of the Union's demand is a non-mandatory subject of bargaining, and that portion of the petition is dismissed.

We now turn to the Union's contention that the City must bargain over FDNY's policy requiring that a university or college accredit PONSI-evaluated Fire Academy courses. The record supports the Union's contention that this further accreditation constitutes a change in its requirements for PONSI-evaluated FDNY courses. Indeed, the language of the prior May 15, 1997, PA/ID, affirmatively states that "the Department accepts the credit recommendations assigned by National PONSI towards fulfilment of the educational requirements of this PA/ID,"

without referencing a need for further accreditation. Therefore, the Board finds that this requirement is new.

We have held that the determination of the quantity and quality of training provided is a management prerogative. *Communications Workers of America*, Decision No. B-7-72 at 6. Furthermore, the establishment of training procedures, in most circumstances, is a matter of management right and not a mandatory subject of bargaining. *Ass'n of Building Inspectors*, Decision No. B-4-71 at 12-13. However, the Board has established an exception when training is required by an employer as a qualification for continued employment, for improvement in pay or work assignments, or for promotion. *District Council 37*, Decision No. B-20-2002 at 5-6; *Uniformed Firefighters Ass'n*, Decision No. B-43-86 at 15; *New York State Nurses Ass'n*, Decision No. B-2-73 at 15. In these situations, in-house training procedures are a mandatory subject of bargaining because they affect a term and condition of employment.

We find that the change regarding the procedure for acceptance of PONSI-evaluated FDNY courses does not involve a matter of qualification. The City does not claim that the content of the PONSI-evaluated FDNY courses is now unacceptable to prepare a Fire Officer for the level of achievement necessary for promotion. The only change is in the steps an Officer must follow to complete the requirements for promotion: an Officer must now apply for credit from a college or university for the identical PONSI-evaluated FDNY course, which was previously acceptable without outside accreditation. This requirement is a unilateral procedural change related to employer-provided training. As such, requiring college or university accreditation for PONSI-evaluated FDNY courses is a mandatory subject of bargaining.

Therefore, we find that the City has violated § 12-306(a)(4) by failing to bargain over the subject prior to implementation. When a public employer violates §12-306(a)(4), it derivatively violates §12-306(a)(1) of the NYCCBL, which states that it is an improper practice for a public employer to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter. *Uniformed Fire Officers Association, Local 854*, Decision No. 17-2001 at 7.

Accordingly, we dismiss so much of the petition regarding the change in deadline for completion of requirements for promotion. However, we grant the petition regarding the procedure by which an Officer obtains credit for PONSI-evaluated FDNY courses. We also dismiss the Union's claims that a *per se* impact arose from the City's actions because those allegations are speculative and conclusory. *Patrolmen's Benevolent Ass'n*, Decision No. B-39-93.

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 Fire Officers Association, Local 854, IAFF, alleging violations of § 12-306(a)(1) and (4), is denied with regard to the change in deadline for completion of requirements for promotion; and it is further

ORDERED, that the improper practice petition filed by the Uniformed Fire Officers Association, Local 854, IAFF, alleging violations of § 12-306(a)(1) and (4), is granted with regard to the unilateral change in accreditation procedures for PONSI-evaluated FDNY courses; and it is further

ORDERED, that the City shall bargain with the Union over accreditation procedures for PONSI-evaluated FDNY courses and refrain from making any further changes in said procedures without bargaining; and it is further

ORDERED, that the Union's remaining claims are dismissed.

Dated: February 26, 2003
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

GABRIELLE SEMEL
MEMBER

Concurs in a separate opinion.

CHARLES G. MOERDLER
MEMBER

OFFICE OF COLLECTIVE BARGAINING
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I concur in the result. However, to the extent, if any, that the reasoning turns upon so-called "managerial rights" or "prerogatives" under Section 12-307(b) of the NYCCBL, I decline to join in that reasoning for the reason, among others, that no such "rights" or "prerogatives" are authorized as a matter of State law.

Dated: New York, New York
February 26, 2003

CHARLES G. MOERDLER
MEMBER