UFA v. City & FDNY, 73 OCB 2 (BCB 2004) [Decision No. B-2-2004 (IP)]

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

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION,

Petitioner,

Decision No. B-2-2004
Docket No. BCB-2314-02

-and-

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

Respondents.
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DECISION AND ORDER

On December 11, 2002, the Uniformed Firefighters Association ("Union") filed a verified improper practice and scope of bargaining petition against the City of New York and the Fire Department of the City of New York ("City" or "Department"). The petition alleged that the Department's plan to reduce the number of Fire Marshals would result in a practical impact.[1] The Union alleges a workload impact on the Fire Marshals remaining following the reduction. The City contends that the reassignment of a number of Fire Marshals is a proper exercise of its management rights. Since we find that the Union has failed to provide sufficient facts to support its workload impact claim, we dismiss the petition.[2]

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[1] The Union has withdrawn its improper practice claim that the City refused to bargain over the reduction in Fire Marshals.

[2] Because the reduction and reassignment of Fire Marshals occurred after the petition was filed, the parties were allowed to submit supplemental papers to show whether a workload impact exists.

BACKGROUND

The Union represents the Fire Marshals ("FMs") employed in the Department. Within the Department, the Bureau of Fire Investigations ("BFI") is responsible for investigating the causes, circumstances, and origins of fires. At the time the petition was filed, the BFI had a base in each borough except Staten Island, which was covered by the Brooklyn base. Each base contained six squads, each squad consisting of one Supervising Fire Marshal ("SFM") and between three and six FMs. A FM's duties include: examining evidence at fire scenes, performing mobile and fixed surveillance to apprehend suspects and locate witnesses, applying for and executing search and arrest warrants, giving testimony as expert and lay witnesses at legal proceedings, providing guidance to recently trained fire marshals, and preparing reports.

At the time the petition was filed, the City states that the Department employed 148 FMs and 32 SFMs, and the Union asserts that there were 144 FMs and 36 SFMs. Sometime in 2002, the Department announced that due to budgetary constraints, it would reduce the number to 110 FMs and 23 SFMs effective February 1, 2003. The Department planned to reassign 38 FMs to firehouses to perform firefighting duties, and the reduction in SFMs would be attained through attrition. The Department also planned to close the Bronx base, which would then be covered by the Queens base. The Manhattan base, which previously was open 24 hours, seven days a week, was to be closed at night, and Manhattan would then be covered by the Brooklyn and Queens bases at night. After the Department announced its plans, several FMs volunteered to be transferred to firefighting units and the rest were to be selected for reassignment based on seniority.

On December 4, 2002, the Union sent a letter to the Office of Labor Relations requesting impact bargaining regarding the proposed reductions. Nothing in the record indicates that the parties met to discuss this issue.

In February 2003, the Department reduced the number of FMs and SFMs as announced. In conjunction with the reduction, BFI stopped responding to 1st and 2nd alarms, unless deemed to be suspicious, and also stopped responding to car fires, pursuant to a modified response protocol. This is approximately a 27% reduction of all cases investigated by BFI during 2002 and coincides with the 25% reduction of FMs in February 2003. On April 1, 2003, the Union and City representatives met to discuss the impact of the reductions.

On September 16, 2003, the Department further reduced the number of FMs to 80 and SFMs to 20. The Bronx and Queens bases are currently closed. The Brooklyn base remains open seven days a week, 24 hours a day. The Manhattan base is dedicated to investigating fires about which automobile fraud or insurance fraud is suspected.

Petitioner requests that the Board direct the City to bargain with the Union to alleviate the negative workload impact on the remaining FMs as a result of the reduction in numbers.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the Department's decision to reduce the number of FMs is within the scope of mandatory collective bargaining pursuant to NYCCBL § 12-307(b), which gives public employee unions the right to bargain over the practical impact that the City's decisions

have on employees' terms and conditions of employment.[3]

The Union asserts that the number of FMs have been steadily cut since 1995 even though there has been no material change in circumstances to warrant the reduction of FMs. The recent reduction in numbers will result in an adverse workload impact on the remaining FMs.

Currently, there is only one base in operation, with all FMs operating out of Brooklyn and responsible for all fire investigations within the City. The Union claims that based on Department records, between January and August 2003, 1,252 City fires were not investigated compared with 141 in the same period the previous year. FMs face more stress and tension than before because they are now responsible for a multitude of cases. Although the Department claims that certain categories of fires will no longer be investigated – such as car fires, "all-hands" fires, and 2nd alarm fires – this reduction will not alleviate the workload impact on the remaining FMs because it does not take into consideration the stress and tension the FMs now face. Furthermore, FMs who must respond to other boroughs are delayed by distance and caseload. As a result, their "investigations . . . [are] tainted by outside investigators or others because of their late arrival, negatively impacting investigations." Moreover, citizens and

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[3] NYCCBL § 12-307(b) provides in relevant 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; determine the content of job classifications . . . ; and exercise complete control and discretion over its organization . . . . Decisions of the city or any other public employer 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 scope of collective bargaining.

firefighters will be injured and perpetrators will escape detection and punishment.

The Union states that although it cannot provide specific instances to demonstrate workload impact, the totality of the circumstances indicates that FMs are working harder to perform their responsibilities.

City's Position

The Department's plan to reduce the number of FMs and reassign them to perform firefighting duties, to limit the types of fires that will be investigated, and to change the hours of operation of the bases is a proper exercise of its managerial rights under § 12-307(b) of the NYCCBL.

The Petition must be dismissed because Petitioner cannot establish that the Department's reduction of FMs created an impact of any kind over which the City must bargain. In particular, Petitioner has failed to demonstrate a practical impact on the workload of the remaining FMs. As of February 1, 2003, BFI stopped responding to 1st and 2nd alarms unless they are deemed suspicious. This amounts to a reduction of approximately 950-1100 cases per year investigated by BFI. Additionally, the field units in Brooklyn are not responding to car fires, which amount to approximately 900-1000 cases per year. There has also been a steady decline in the total number of cases that were incendiary (as opposed to accidental) from 2000 to the present. While the number of FMs has decreased, the number of cases that are investigated has also decreased because of changes in the types of cases that BFI investigates, and because there has been a decline in the incidence of fires in the last three years. Thus, Petitioner presented no evidence to demonstrate that a workload impact exists.

DISCUSSION

The issue in this case is whether the reduction of FMs through reassignment has caused a practical impact on the workload of the remaining FMs. Under the NYCCBL § 12-307(a), public employers and public employee organizations have the duty to bargain in good faith over wages, hours, and working conditions.[4] It is an improper practice under NYCCBL § 12-306(a)(4) 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." However, pursuant to NYCCBL § 12-307(b), a public employer has discretion to act unilaterally in certain areas outside the scope of mandatory bargaining, such as the right to assign or reassign its employees, to determine what duties employees will perform during working hours, and to allocate duties among its employees, unless the parties themselves limited that right in their collective bargaining agreement. *New York State Nurses Ass'n*, Decision No. B-23-2003 at 11; *Local 621, S.E.I.U.*, Decision No. B-34-93 at 9. When, however, the employer exercises a management right in a manner that has an adverse effect on terms and conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact. *Sergeants Benevolent Ass'n*, Decision No. B-56-88.

In order for this Board to determine whether a practical impact on workload exists, the

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[4] NYCCBL § 12-307(a) states in pertinent part:
Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . .

petitioner must show that the managerial decision created an unreasonably excessive or unduly burdensome workload as a regular condition of employment. *District Council 37, Local 1549*, Decision No. B-37-2002 at 9; *Uniformed Firefighters Ass'n*, Decision No. B-25-91 at 29; *Sergeants Benevolent Ass'n*, Decision No. B-56-88 at 17. A petitioner does not demonstrate a practical impact by merely alleging more difficult duties or higher level work. *District Council 37, Local 1549*, Decision No. B-37-2002 at 9-10. An assertion that, for example, employees are required to work more time than scheduled must include specific details, not bare surmise of increased workload. *New York State Nurses Ass'n,* Decision No. B-23-2003 at 13; *see Sergeants Benevolent Ass'n*, Decision No. B-56-88 at 17.

In *Probation and Parole Officers Ass'n*, Decision No. B-2-76, the union alleged that the public employer's decision to lay off employees had a practical impact on the workload of the remaining Probation Officers. The union argued that those officers remaining had difficulty filing required papers in court within a specified time limit and that the increase in caseload created a backlog of cases and forced these employees to spend less time on each case. *Id*. at 7-9. The Board concluded that although the union had demonstrated some increase in caseload, the union had not shown that the increase constituted an unreasonably excessive or unduly burdensome workload, in part because the employees were not forced to work overtime or penalized for being unable to finish their work. *Id*. at 15. The Board also noted that the increase in workload was "accompanied by the relaxation of other requirements," such as a reduced work week. *Id*. at 16.

More recently, in *Assistant Deputy Wardens/Deputy Wardens Ass'n*, Decision No. B-16-2002, the union argued that management's revision of certain directives concerning inmates

discharged on bail increased the workload of Assistant Deputy Wardens by requiring them to spend more time reviewing the procedure whereby inmates are discharged. The Board found no practical impact on workload because the union failed to plead specific facts to show, for example, that the increase in time spent reviewing inmate discharges forced these employees to work overtime or that they were unable to meet assigned deadlines. *Id.* at 8.

Here, the Union has not alleged sufficient facts to support its claim that the reduction of FMs has resulted in an unreasonably excessive or unduly burdensome workload as a regular condition of employment for the remaining FMs. The Union states that although the totality of circumstances indicates that FMs are working harder to perform their responsibilities, it cannot "point to one specific instance" in support of this claim. The Union does not deny that FMs are investigating fewer categories of fires, and provides no evidence to show that there is in fact an increase in caseload. Nothing in the record indicates that FMs are now required to work overtime or that they will be penalized for the increase in travel time to reach fires. Furthermore, the Union provides no support for its claim that FMs now experience more stress and tension from the increase in workload. On the record before us, the Union has failed to demonstrate an increase in the workload of FMs and, therefore, we are unable to find that a practical impact exists. While we recognize that the Union raises the question whether decreased FM staffing adversely affects public safety, this issue is not within the Board's purview under the NYCCBL and may be pursued in an appropriate forum. Accordingly, the petition is dismissed.

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, BCB-2314-02, filed by the Uniformed Firefighters Association, be, and the same hereby is, dismissed.

Dated: January 29, 2004
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

I dissent. CHARLES G. MOERDLER
MEMBER

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

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DECISION AND ORDER

I dissent.

The premise upon which the Majority decision is exclusively based is the so-called Management Rights Clause, NYCCBL Section 12-307(b). As noted in comments in other matters, it is my view that proviso is unauthorized by law and invalid.

It may be that in circumstances such as this some inherent or residual power exists on the part of management to retain or deploy personnel or conduct certain activities under specific circumstances. However, that concept has not been explored or even considered by the Board, nor any presentation made in support thereof, nor is it a basis for the majority decision.

While the “management prerogative” (sometimes termed “managerial prerogative” or “management rights”) has a solid, but circumscribed, foundation in law,

it may not be predicated upon NYCCBL §12-307b, much less its sweeping and virtually all-encompassing provisos.[1]

The so-called "management rights" or "management prerogatives" proviso of NYCCBL §12-307b in order to have any validity or force as a statutory creature must "be substantially equivalent to the state law [the Taylor Law, N.Y. Civ. Serv. Law § 212(1)] as it relates to matters within the scope of mandatory negotiations," else it is invalid (at least as a creature of statutory enactment).[2] That occurs because the Taylor Law mandates that mini-PERB provisos and procedures (such as the New York City Charter provisions here at issue) be "substantially equivalent" to those specified under paramount State law. N.Y. Civ. Serv. Law § 212(1). Significantly, there is no provision of law, in the Taylor Law or elsewhere in applicable state law, that provides a substantial equivalent to NYCCBL §12-307b. Add to that the mandate of state law that "… it is the public policy of the state and the purpose of this act [the Taylor Law] to promote harmonious and cooperative relationships between government and its employees …." and the conclusion becomes obvious: there is simply no authority

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[1] *Section 12-307b provides, in pertinent part, as follows:*

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; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work.

[2] *The phrase "substantially equivalent" has been defined by perb as "that which is equal in essential and material parts" to some state law counterpart. See, Lefkowitz, P*ublic Sector Labor and Employment Law *487 (2 ed. 1998) ("L*efkowitz"). *mini-PERB provisos or procedures that fall short of that standard are subject to challenge. see L*efkowitz*, supra at 798; cf., S*hanker v. Helsby*, 515F. Supp. 871,877 (SDNY 1981). Manifestly, this board should decline to follow or apply provisos or procedures that are invalid.*

under state law for the sweeping, one-sided provisions of NYCCBL §12-307b. That is not to say that management (like labor) does not, at common law or otherwise, have certain inherent rights, responsibilities and fundamental prerogatives and duties. They are ascertainable and applicable on a case-by-case basis and under a more circumscribed, accepted and balanced standard than the sweeping language of NYCCBL §12-307b. However, the availability of the management prerogative exception to mandatory collective bargaining is not validly prescribed by NYCCBL §12-307b, which in my view is not in and of itself a valid or binding statutory enactment.[3]

Since there exists no valid basis in law, considered or explicated by the Board for the determination that the conduct charged "is a proper exercise of [the Agency's] managerial rights," that determination cannot withstand scrutiny and must fall as a matter of law.

Dated: January 29, 2004
New York, New York

CHARLES G. MOERDLER
MEMBER

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[3] *Importantly, no appellate judicial tribunal has to date expressly sustained the provision against a challenge such as here is stated. It merits note that the argument has been advanced that, because NYCCBBL §12-307b has been cited and relied upon over many years, it somehow has effectively become "the law" by some form of estoppel. Respectfully, that view lacks merit. the law is clear, it mandates substantial equivalency to paramount state law. N.Y. Civ.Serv.Law § 212(1). Erroneous construction, though adhered to for decades, does not create estoppel. Likewise, the notion that the NewYorkCity Collective Bargaining law would not have been enacted but for acquiescence in that erroneous construction does not give rise to a statutory obligation. true, these considerations, apart from NYCBBL §12-307b itself, bear upon what has been this board's view of the scope of the "management prerogative" and, to that extent, are entitled to considerable deference.*