DC 37, L. 2507 & 3621 v. City & FDNY, 73 OCB 7 (BCB 2004) [Decision No. B-7-2004 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Improper Practice Petition

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 2507 and LOCAL 3621,

Petitioners,

Decision No. B-7-2004
Docket No. BCB-2191-01

-and-

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

Respondents.

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DECISION AND ORDER

On February 14, 2001, District Council 37, AFSCME ("Union"), on behalf of its Locals 2507 and 3621, filed a verified improper practice petition alleging that the City of New York and the Fire Department of New York ("City," "FDNY," or "Department") violated § 12-306(a)(1), (4), and (5), and § 12-306(c) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally promulgating a reasonable accommodation policy ("RA Policy") without first bargaining with the Union. The City argues that the subject is prohibited, or, alternatively, that the City is not required to bargain over the policy because implementation of this policy is within management's rights. We find that the establishment of the RA Policy and certain aspects of the Union's bargaining demands are not bargainable; however, the procedures implementing the RA Policy constitute a mandatory subject of bargaining. We also find that the City has a duty to disclose certain information

pertaining to the RA Policy, as well as other information specified in this decision. Accordingly, we grant the Union's petition in part and dismiss it in part.

BACKGROUND

In March 1996, Emergency Medical Service ("EMS") personnel and functions were transferred from the Health and Hospitals Corporation ("HHC") to FDNY. The Union represents approximately 3000 employees in the titles Emergency Medical Specialist (Emergency Medical Technician ("EMT") and Paramedic) and Supervising Emergency Medical Services Specialist (Levels I and II) (collectively "EMS employees") currently employed by FDNY.

EMS employees respond to medical emergencies, such as 911 emergency calls. Specifically, EMTs and Paramedics operate FDNY ambulances and transport patients and equipment. Also, many bargaining unit members perform administrative or non-field duties. EMS employees who are sick or injured report to FDNY's Bureau of Health Services ("BHS") where BHS physicians determine whether the employees are capable of "full-duty," "light duty" (temporary assignment to administrative or other tasks), or medical leave (no duty assignment). Once BHS has determined that an employee is not capable of full-duty, the employee is either given a light duty assignment or placed on medical leave. Because of the high incidence of work-related injuries sustained by employees, more disabled employees seek administrative or light duty positions than there are vacancies.

FDNY's Equal Employment Opportunity Policy ("EEO Policy") outlines the policies and procedures for maintaining fair employment practices in compliance with requirements of federal, state and City laws. The EEO Policy, provides, in part:

REASONABLE ACCOMMODATION

FDNY will make reasonable accommodations to qualified employees and applicants with disabilities, unless providing such accommodations would create undue hardship for the agency. Whether an accommodation is reasonable generally depends upon the circumstances of each situation. In order to be protected under the ADA, an employee must be able to perform the essential functions of the job to which s/he was hired.

The Fire Department is faced with the problem of having both civilian administrative employees and employees who perform emergency services (Firefighters, Emergency Medical Technicians, and Paramedics). Some examples of accommodation for civilian administrative personnel, which have been found reasonable, under certain circumstances, include: job restructuring, making facilities physically accessible to and usable by persons with disabilities, modifying work schedules, providing or modifying equipment or devices and providing auxiliary aides and services.

In September 1999, the Union learned that the City was drafting an RA Policy which, the City claims, was to amend the existing EEO Policy to bring it into compliance with the Americans with Disabilities Act ("ADA"), the New York State Human Rights Law, and the New York City Human Rights Law. On September 21, 1999, the Union made a written request to bargain over the RA Policy before it was finalized. The Union's letter stated that the RA Policy, if promulgated, would affect terms and conditions of employment that are mandatory subjects of bargaining and would also have a direct impact on the Line of Duty Injury ("LODI") agreement the Union negotiated for EMS employees and on a Modified Duty policy previously issued by EMS. The City refused to bargain with the Union on this subject. The City mailed a draft proposal of the final RA Policy to the Union, and on November 20, 2000, the City issued the policy as Operating Guide Procedure 110-04 ("OGP 110-04" or "RA Policy").

OGP 110-04 provides, in part:

1. PURPOSE

1.1 To set forth a policy governing the submission, consideration and determination of requests by Fire Department employees for a reasonable accommodation for

a disability within the meaning of the Americans with Disabilities Act ("ADA"), 42 USC § 12101 et seq., New York State Human Rights Law, Article 15 of the New York State Executive Law, and the New York City Human Rights Law, § 8-101 et seq., of the Administrative Code of the City of New York.

2. POLICY

2.1 It is the policy of the Fire Department to provide reasonable accommodations to employees with disabilities in order to enable them to enjoy equal employment opportunities, consistent with applicable law and regulations.

2.2 A Fire Department employee who requests a reasonable accommodation must be and remain otherwise qualified for the position in question, including, where applicable, possessing and maintaining all necessary licenses or certifications. A Fire Department employee granted a reasonable accommodation must be able to perform the essential functions of the position with the reasonable accommodation.

2.3 The Fire Department will only grant requests for a reasonable accommodation that are specifically designed or required to enable a qualified individual to perform the essential functions of the position in question, or to enable the employee to enjoy the benefits and privileges of employment enjoyed by other similarly-situated employees without disabilities. The Fire Department is not required to and will not provide as a reasonable accommodation personal items that are needed both on the job and off the job, such as wheelchairs, hearing aids or prosthetic limbs.

2.4 A Fire Department employee is eligible for a reasonable accommodation upon a determination by the Fire Department that:

2.4.1 The employee is an individual with a "disability" as that term is defined in Section 3.1 of this policy; and

2.4.2 The employee is "otherwise qualified" for the position, as that term is defined in section 3.3 of this policy; and

2.4.3 The accommodation requested is reasonable and will not impose an undue hardship on the Fire Department. This would encompass any accommodation that would be unduly costly or disruptive or presents significant difficulties or a direct threat to public safety by preventing or hampering the provision of critical Fire Department services or operations. The Fire Department's mission is to provide essential firefighting and fire prevention services and emergency medical services to the people of New York City, and it must at all times be able to maintain staff capable of performing or otherwise necessary to the provision of such essential public safety services. Reasonable accommodation requests will also be evaluated in light of any applicable collective bargaining agreement provisions.

2.5 Any reasonable accommodation that is granted is subject to periodic review.

2.6 This policy is intended to fulfill the Department's obligation under applicable law and regulations, and shall be interpreted and applied consistent with, and in light of changes in, such law and regulations. This policy is not intended and shall not be interpreted or applied to grant Fire Department employees either fewer or greater rights and privileges than required by applicable law and regulations.

The LODI agreement, negotiated by HHC, the City, and the Union prior to the EMS employees' transfer to the Department, provides extended paid medical leave and/or LODI assignments for work-related illness or injury. An injured employee must apply for these benefits by completing a LODI request form and a worker's compensation package. Once found eligible, an employee must comply with LODI Operating Guide Procedure 125-2 (OGP 125-2) and an August 30, 1994, negotiated supplemental agreement which was incorporated in the 1995-2000 collective bargaining agreement. LODI (OGP 125-2) provides, in relevant part:

> A. Employees in the following titles; EMT, Paramedic, Lieutenant and Captain, may be eligible for up to 18 months of non-chargeable time (paid medical leave) for work related injuries incurred while performing in the line of duty during the employee's work hours, providing that such injuries are not due to the negligence of the employee, and the appropriate medical documentation to substantiate the claim is submitted in a timely manner. These benefits are granted at the discretion of management, and are subject to review and approval. There may also be additional requirements for benefits, such as undergoing medical examinations, as required by the Office of Health and Safety. Employees must take all necessary precautions to avoid accidents and observe safety rules and regulations.

After receiving 18 months of LODI benefits, an employee who is unable to return to work may be assigned to light duty or face dismissal pursuant to N.Y. Civil Service Law ("CSL") §§ 71 and 73.[1]

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[1] CSL § 71 provides, in part:
Reinstatement after separation for disability

(continued...)

The Modified Duty Operating Guide Procedure (OGP 104-7) was issued by the Department for all its employees in 1991 before the EMS transfer to FDNY. The Modified Duty policy establishes a procedure for temporarily assigning employees – from between one month to one year – in a modified duty capacity. Modified Duty (OGP 104-7) provides, in part:

> Members who are physically unable to perform full duty, for a limited period of time, will be permitted to return to a productive work assignment, upon approval of application

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[1](...continued)
Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him for the performance of the duties of his position (footnote omitted). Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission . . . for a medical examination to be conducted by a medical officer selected for that purpose . . . . If, . . . such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist . . . , the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years.

CSL § 73 provides, in part:
Separation for ordinary disability; reinstatement
When an employee has been continuously absent from and unable to perform the duties of his position for one year or more by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workmen's compensation law, his employment status may be terminated and his position may be filled by a permanent appointment (footnote omitted). Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission . . . for a medical examination to be conducted by a medical officer selected for that purpose . . . . If, . . . such medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field . . . . If no appropriate vacancy shall exist . . . the name of such person shall be placed on a preferred list for his former position in his former department or agency, and he shall be eligible for reinstatement . . . from such preferred list for a period of four years.

> to the modified duty assignment program. The number of modified duty assignments are limited and application to the program does not guarantee a placement. Any modified duty assignment granted under the provisions, outlined herein, shall be for a minimum of one (1) month but shall not exceed one (1) year . Members who are approved for modified duty assignments will be assigned to available authorized positions.

After the RA Policy was issued, the Department forwarded notices to permanently disabled personnel who were subject to termination under CSL §§ 71 and 73 to advise them of their right to request a reasonable accommodation in the form of reassignment to another position. Those permanently disabled employees who applied for an RA were offered appropriate assignments. The RA Policy outlines the duties of the EEO office in handling employees' applications and questions regarding applications for RA, and contains a section with the heading, "Procedures," which describes the process whereby an employee may apply for a reasonable accommodation and management's review process. The "Procedures" section contains the following sub-sections: "Filing," "Intake," "Documentation," "Determination," "Notification," "Appeal," "Final Determination," "Confidentiality," and "Termination of Disability" or "Need for Accommodation."

On December 7, 2000, the Union made a second request to bargain over the RA Policy. The City responded, in a December 13, 2000, letter, that the policy involved nonmandatory subjects of bargaining but scheduled a January 2001 meeting to discuss the topic.

On December 13, 2000, the Union sent a letter requesting information from the City in order to prepare for the meeting and to ensure enforcement of the CBA. The letter contains a series of similar requests concerning RA assignments, Modified Duty assignments, and transfers under § 6.1.9 of the Rules of the Department of Citywide Administrative Services ("DCAS

Rules") (Rules of the City of New York, Title 61, Appendix A).[2] For each program, the requests included the following:

A. the person(s) responsible for distributing and receiving applications for a modified duty assignment, RA or a transfer;
B. the person(s) responsible for providing a modified duty assignment, RA or a transfer to EMS employees;
C. the criteria used to determine if an employee is qualified for a modified duty assignment, RA, or a transfer;
D. a copy of the current policy and procedure (including forms) used by the Department when employees apply for a modified duty assignment, RA or a transfer;
E. The number, identity and location of positions available for employees requesting modified duty, RA or a transfer.

In addition, the Union requested information on: (1) the number of employees who have requested and been granted or denied Modified Duty assignments, RA, or transfers under DCAS Rule § 6.1.9 since July 1, 1996; (2) the number of employees working in Modified Duty assignments, or have been granted transfers since July 1, 1996; and (3) the number and location of Modified Duty, Light Duty, LODI Limited Duty, and RA assignments that are currently occupied and are budgeted for Fiscal Year 2000. The request did not seek the employees' names or other personal information.[3]

At the January 26, 2001, meeting, the Union, in addition to those items previously sought,

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[2] DCAS Rule § 6.1.9 provides:
Transfer and Change of Title. Notwithstanding the provisions of paragraph 6.1.1 of this section or any other provision of law, any permanent employee in the competitive class who meets all of the requirements for a competitive examination, and is otherwise qualified as determined by the commissioner of citywide administrative services, shall be eligible for participation in a non-competitive examination in a different position classification provided, however, that such employee is holding a position in a similar grade.

[3] The City denied a previous request dated June 14, 2000, on the grounds that the Union sought confidential information.

requested to bargain over: (1) the definitions and procedures of the RA Policy; (2) the impact of the new RA Policy on existing assignment procedures such as Modified Duty and LODI; and (3) the contractual obligation to reassign physically disabled employees pursuant to Article IX, § 9, of the Citywide Agreement.

Article IX, § 9, states:

> Any employee who is required to take a medical examination to determine if the employee is physically capable of performing the employee's full duties, and who is found not to be capable, shall, as far as practicable, be assigned to in-title and related duties in the same title during the period of the employee's disability. If a suitable position is not available, the Employer shall offer the employee any available opportunity to transfer to another title for which the employee may qualify by the change of title procedure followed by the New York City Department of Citywide Administrative Services pursuant to Rule 6.1.1 of the Personnel Rules and Regulations of the City of New York or by noncompetitive examination offered pursuant to Rule 6.1.9 of the Personnel Rules and Regulations of the City of New York.
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> If such an employee has ten (10) years or more of retirement system membership service and is considered permanently unable to perform all duties of the employee's title and no suitable in-title position is available, the employee shall be referred to the New York City Employee's Retirement System and recommended for ordinary disability retirement.

The Union also sought to bargain over (4) the Department's failure to provide employees with leaves of absence as a form of reasonable accommodation; (5) the Department's use of CSL §§ 71 and 73 to terminate disabled EMS employees; and (6) the way the RA Policy would affect the rules and regulations under DCAS Rule § 6.1.9. The City's negotiator stated that the City did not consider the meeting a bargaining session, that the RA Policy was not a mandatory subject of bargaining, and that the City was not prepared to respond to the Union's request for information. The parties then agreed to discuss the RA Policy without waiving their rights regarding the subject's negotiability. However, the City was not prepared to address the meaning and

operation of the RA Policy's procedures or the Union's request for information.

The Union filed the instant improper practice petition on February 14, 2001. The parties have been involved in ongoing settlement discussions from the time the petition was filed. In January 21, 2003, the Union requested the Board to hold the case in abeyance pending settlement discussions. On September 9, 2003, after settlement discussions failed, the Union requested the Board to make a determination. On November 17, 2003, the parties again requested that the case be held in abeyance to give the parties a final opportunity to arrive at a mutually agreeable settlement. On February 27, 2004, after negotiations failed, the parties requested the Board to issue a decision.

The Union requests that the Board find that: (1) the Department unilaterally promulgated the RA Policy, a mandatory subject of bargaining, in violation of the NYCCBL; (2) the Department's refusal to bargain over the procedures of the RA policy violates the NYCCBL; (3) the Department's failure to provide the Union information requested constitutes a refusal to bargain in good faith; and (4) the Department must post a notice that it will not unilaterally alter terms and conditions of employment without first bargaining in good faith with the Union.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that the City's refusal to engage in collective bargaining over the definitions and procedures of the RA Policy before its promulgation constitutes a violation of

§ 12-306(a)(1), (4) and (5) of the NYCCBL.[4] As a direct consequence of this refusal to bargain, the Union asserts, many applicants for RA have been ignored and some employees found qualified for RA have been placed on medical leave without pay rather than assigned an accommodation.

The RA Policy procedures that directly relate to employees' terms and conditions of employment and are therefore mandatory subjects of bargaining include, but are not limited to: (1) procedures governing the filing of applications for RA; (2) procedures followed in reviewing and determining whether such applications are denied or approved; (3) procedures to appeal the denial of an RA; (4) procedures and criteria used to select amongst competing applicants for RA when there are more applicants than available RA assignments; (5) employees' pay and benefit status pending receipt of an RA assignment; (6) procedures governing what kind of RA is

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[4] Section 12-306(a) of the NYCCBL 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;
(5) to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization. . . .

§ 12-305 provides, in 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 or all of such activities. . . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

Because the Union makes no arguments in support of its claim that the Department violated § 12-306(a)(5), the Board does not address this claim.

assigned; and (7) the use of seniority by FDNY to select amongst competing eligible qualified applicants for RA.

Furthermore, the Union asserts that the RA Policy contains definitions which are directly related to the scope and availability of reasonable accommodations and thereby directly relate to employees' terms and conditions of employment. Such definitions include: "Disability," "Essential Functions," "Reasonable Accommodation," "Undue Hardship," and "Confidentiality."

The Union claims that although the Department has an obligation to comply with federal, state, and City statutes governing reasonable accommodations for employees with disabilities, these statutes do not prohibit the Respondents from bargaining on discretionary matters not mandated by the statutes, such as more generous benefits for disabled employees.

According to the Union, the City also has a duty to bargain over the RA Policy's integration with and impact on existing procedures such as Modified Duty (OGP 104-7) and LODI (OGP 125-2). Specifically, the Union seeks to bargain over the kinds of assignments that disabled employees who may no longer be eligible for Modified Duty or LODI benefits will receive and the procedures these employees will follow. Further, the Union seeks to bargain over the impact of the RA Policy on Article IX, § 9, under which the Department has a contractual obligation to reassign physically disabled employees, and on DCAS Rule § 6.1.9 transfers.

The Union also seeks to bargain over the Department's failure to provide employees with leaves of absence as a reasonable accommodation and to end the Department's use of CSL §§ 71 and 73 terminations.

Additionally, the Union seeks to bargain over procedures relating to RA qualified

employee assignments to administrative positions. According to the Union, the Department places employees who are able to perform full-duty field work to administrative assignments while the Department places employees who can perform administrative duties but not field duties on medical leave. The Union wants RA qualified employees to displace administrative employees who are capable of being reassigned to field duty. This action would avoid placing an employee on medical leave, which entails a loss in pay and benefits, and also potentially prevent a CSL §§ 71 and 73 termination.

Finally, the Union contends that pursuant to the NYCCBL § 12-306(c),[5] the City has a duty to disclose information pertaining to mandatory subjects of bargaining to enable full and proper negotiations.

City's Position

The City argues that the RA Policy is in accordance with the ADA, the New York State Human Rights Law, and the New York City Human Rights Law. The subject matter of the policy is a prohibited subject of bargaining because it is a matter fixed by law. The RA Policy does not establish a procedure but rather informs employees of their statutory rights under the law, designates Department personnel responsible for handling employees' requests for reasonable accommodation, advises employees to whom the requests should be submitted, and provides the appropriate forms employees must use.

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[5] § 12-306(c) provides, in pertinent part:
Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

(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 . . . .

According to the City, while none of the relevant statutes explicitly forbids collective bargaining, they implicitly vest discretion in the City to promulgate and enforce the RA Policy, and thus bargaining over this subject would violate public policy.

The City argues that the decision whether to assign employees pursuant to the RA Policy, Article IX, § 9, of the Citywide Agreement, LODI, or the Modified Duty policy falls within the employer's management rights. The Board has construed § 12-307(b) of the NYCCBL to guarantee the City the unilateral right to assign and direct employees and to determine what duties will be performed during work time.[6] Management's right to assign employees is not modified or waived by the Citywide Agreement, LODI or any other agreement. Every aspect of the RA policy and procedure relates to management rights. The policy establishes the criteria and procedures to determine continuing eligibility. To the extent that the Union wishes to negotiate benefits in addition to LODI, and bargain over Article IX, § 9, the Union must make the appropriate demand.

Additionally, bargaining over Modified Duty is barred because the Board has already determined that issues regarding this policy fall under management's right to assign employees.

Alternatively, the City argues that the petition fails to allege facts sufficient to support a claim of an improper practice under § 12-306(a)(1) or (4) because the Union has failed to allege

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[6] NYCCBL § 12-307(b) provides, in part:
It is the right of the city, or any other public employer, acting through its agencies . . . , to direct its employees . . . ; relieve its employees from duty because of lack of work or for other legitimate reasons; . . . [and] determine the methods, means and personnel by which government operations are to be conducted . . . . Decisions of the city or any other public employer 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 . . . are within the scope of collective bargaining.

any facts demonstrating that Respondents interfered with the Union's § 12-305 rights and failed to allege any facts to support the claim that the City refused to bargain over a mandatory subject of bargaining.

DISCUSSION

FAILURE TO BARGAIN CLAIMS

Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *Correction Officers Benevolent Ass'n,* Decision No. B-26-2002 at 7. 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." The petitioner must demonstrate that the matter to be negotiated is a mandatory subject of bargaining. *See Doctors Council, SEIU,* Decision No. B-21-2001 at 7.

A public employer may not insulate its actions from compliance with applicable requirements of the NYCCBL merely by demonstrating that its actions were in accordance with statutory law. *Correction Officers Benevolent Ass'n,* Decision No. B-39-88 at 17. Although this Board does not have authority to administer statutes other than the NYCCBL, the Board has a direct responsibility under the NYCCBL to determine whether the City has acted unilaterally with respect to matters over which it must bargain with the Union. *Patrolmen's Benevolent Ass'n,* Decision No. B-41-87 at 6. The requirement of good faith bargaining extends to matters covered by statutory law when they relate to terms and conditions of employment. *Patrolmen's*

Benevolent Ass'n, Decision No. B-41-87 at 7.

In *Uniformed Firefighters Ass'n of Greater New York*, Decision No B-11-89 at 11, *aff'd*, *Uniformed Firefighters Ass'n v. Office of Collective Bargaining*, No.12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251, 558 N.Y.S.2d 72 (1st Dep't 1990), the Board stated that when a mandatory subject of bargaining relates to a statutory obligation, the matter is bargainable unless: it would require a contravention of law; the subject has been preempted by statute; or, it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion. *See also Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 40; *Social Services Employees Union*, Decision No B-11-68 at 3.

In *Matter of City of Watertown v. State of New York Public Employment Relations Board,* 95 N.Y.2d 73 (2000), the Court held that the municipality's initial determination of disability status was part of management's statutory rights and, thus, was not negotiable, but the procedures for challenging such determinations affected terms and conditions of employment. The statute in dispute, General Municipal Law § 207(c), did not "remove the review procedures from the scope of collective bargaining [because] bargaining is mandatory if the procedures qualify as a 'term and condition' of employment." The Court stated that "[a]bsent 'clear evidence' that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining." *Id.* at 79.

In *Doctors Council,* Decision No. B-31-2002, the union claimed that HHC violated the NYCCBL when it revoked its Code of Ethics and unilaterally implemented the New York City Conflicts of Interest Law (Chapter 68 of the New York City Charter). Relying upon *Watertown,* the Board held that the question whether Chapter 68 applied to HHC employees is beyond the

jurisdiction of the Board but acknowledged that the Union may make demands to bargain over procedures implementing the requirements of Chapter 68 to the extent that such negotiations are not inconsistent with the statute. *Id.* at 11.

RA Policy

In the instant matter, we find that management has the right to establish an RA Policy, in compliance with applicable law, without bargaining. *See Doctors Council,* Decision No. B-31-2002. Moreover, just as *Watertown* held that initial determinations of disability were not negotiable, here management has the right to determine eligibility for RA and select amongst competing applicants for RA or available assignments. Any demands the Union has made to bargain over criteria – including the definition of the terms "Disability," "Essential Functions," "Reasonable Accommodation," and "Undue Hardship" – some of which the Union improperly characterizes as "procedures", are not bargainable because they must be in compliance with federal, state or City disabilities laws or are within management's rights.

The Board understands that there are several policies that provide benefits for employees incapable of full-duty work, including LODI, Modified Duty, and RA. We further understand that, at least for Modified Duty and RA, disabled employees may seek benefits under both policies. Management has the right to select the applicants for such benefits, and to make the appropriate assignments. The RA Policy does not change the essential nature of this process.

However, as in *Watertown,* while management has the right to determine who qualifies for RA, the procedures implementing the policy constitute a mandatory subject of bargaining. Indeed, the RA Policy contains many procedures, such as filing and appeal requirements, some of which are outlined in the "Procedures" section of the policy. Nothing in the record supports the

City's contention that bargaining over these procedures contravenes the law, is pre-empted by statute, or offends public policy. Thus, we find that the procedures implementing the RA Policy constitute a mandatory subject of bargaining.

In addition to its bargaining requests concerning the RA Policy, and the effect the RA Policy may have on Article IX, § 9, the Union seeks to bargain over how the RA Policy will affect LODI (OGP 125-2), Modified Duty (OGP 104-7), CSL §§ 71 and 73, and DCAS Rule § 6.1.9.[7] The Union posits that these programs will be adversely affected by the RA Policy. Employees who have suffered a disability have a variety of rights and duties, which are embodied in department policies and contractual provisions or agreements such as LODI, Modified Policy, CSL §§ 71 and 73, and DCAS Rule § 6.1.9. The RA Policy does not preclude employees from making a request from among the available options, and nothing in the record indicates that the benefits provided by these options will be changed. As to each of these matters, we make the following determinations.

LODI (OGP 125-2)

LODI is a negotiated agreement between the parties which provides extended paid medical leave and/or LODI assignments for work related illness or injury. We find that the City does not have a duty to bargain over how the RA Policy will affect LODI because if the LODI

[7] Concurrently with the benefits provided by the RA Policy and Modified Duty (OGP 104-7), Article IX, § 9, of the Citywide Agreement states that any employee found physically incapable of full-duty work will be accommodated, as far as practicable, in an in-title or out-of-title assignment during the employee's disability. To the extent the Union asserts that the RA Policy would result in violations of Article IX, § 9, those violations are properly the subject of the parties' grievance and arbitration procedure. *Social Service Employees Union,* Decision No. B-38-2000. If the Union seeks greater rights and benefits for its members than provided for by Article IX, § 9, or the Union suggests the need to modify this provision, the Union has an opportunity to make the proper demand to bargain over these issues during negotiations.

agreement is violated, the matter can be pursued under the parties' grievance procedure. *Social Service Employees Union,* Decision No. B-38-2000. Additionally, if the Union is not satisfied with the existing LODI policy, the Union should make a demand to bargain over such benefits.

Modified Duty (OGP 104-7)

Modified Duty is a policy issued by FDNY which allows employees who are physically unable to perform full-duty work to be temporarily placed in a modified duty assignment. In *District Council 37,* Decision No. B-34-99, which involved the same parties and the same Modified Duty policy as in the instant matter, the Union claimed that the City unilaterally abrogated the policy by eliminating and ceasing to establish light duty and modified duty assignments for EMS employees, and that these changes deprived its members of the opportunity to fill light duty and modified duty positions when unable to perform full-duty. The Board concluded that the assignment of employees unable to perform full-duty is a determination regarding necessary levels of staffing, and the City has the right to alter such established staffing practices. *Id.* at 18; *see Town of Carmel,* 31 PERB ¶ 3006, 3009 (1998), *aff'd sub nom. Town of Carmel Police Benevolent Ass'n v. Public Employment Relations Bd.,* 267 A.D.2d 858, 32 PERB ¶ 7028 (3d Dept. 1999).

Here, FDNY has no duty to bargain over how the RA Policy will affect Modified Duty (OGP 104-7) because management has the right to determine assignments. If the Union believes that FDNY has failed to comply with the existing terms of the Modified Duty policy, it may seek redress under the grievance and arbitration provision of the collective bargaining agreement.

DCAS Rule § 6.1.9 Transfers

DCAS Rule § 6.1.9 allows for the transfer and change of title of permanent employees

through non-competitive examination. The promulgation of the DCAS Rules is authorized by Civil Service Law § 20(2) and those Rules have the force and effect of law. *See* 55 RCNY Appendix A § 2.2. We find that FDNY has no duty to bargain over this matter because the Board has no jurisdiction over the administration or interpretation of statutes other than the NYCCBL. *Doctors Council,* Decision No. B-31-2002. We note, however, to the extent that the Union asserts that these rights are incorporated in the Citywide Agreement under Article IX, § 9, the Union may raise the violation of the contractual provision through the parties' grievance procedure.

CSL §§ 71 and 73

CSL §§ 71 and 73 are statutory provisions which allow for the reinstatement or termination of employees who have been on leave of absence for at least one year due to a disability. FDNY has no duty to bargain over how the RA policy will affect CSL §§ 71 and 73 because the authority of this Board does not extend to the interpretation or administration of any statute other than the NYCCBL. *Doctors Council,* Decision No. B-31-2002. If the Union is challenging the City's statutory right to terminate employees or seeking to redress an alleged violation of CSL §§ 71 and 73, this Board is not the proper forum to address these matters. *Correction Officers Benevolent Ass'n,* Decision No. B-39-88 at 17.

FAILURE TO DISCLOSE INFORMATION CLAIMS

The Union's December 13, 2000, letter to the City sought numerous items of information, some of which we find fall within the City's obligation to disclose information under NYCCBL § 12-306(c)(4). These requests fall into two categories: requests for information relating to the RA Policy and requests for information regarding other policies which the Union alleges will be

affected by the RA Policy. Pursuant to NYCCBL § 12-306(c)(4), a public employer has a duty to furnish necessary information in order to have "full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." This duty extends to information which is relevant to and reasonably necessary for purposes of collective negotiations or contract administration. *Correction Officers Benevolent Ass'n,* Decision No. B-9-99; *Civil Service Technical Guild,* Decision No. B-41-80.

In the instant matter, as to the information requests regarding the RA Policy, because we have found that the procedures for implementing the RA Policy constitute a mandatory subject of bargaining, the City has a duty to disclose information pertaining to those procedures. With reference to the Union's December 13, 2000, request (*see supra* at 8), for the period covering November 2000, the date the policy was issued, until the present, the Union is entitled to: (A) information identifying the personnel responsible for distributing and receiving applications for RA per year; (B) information identifying the persons responsible for providing reasonable accommodations per year; (D) a copy of the current policy and procedure, and the forms used to apply for an RA per year; and (E) the average number, approximate type, and location of positions available for RA during the year from November 2000. FDNY has no duty to disclose (C) the criteria used to determine if an employee is qualified for an RA, because criteria used to determine eligibility for RA are not bargainable and fall within management rights. We also deny the Union's request for (1) information on the number of employees who have sought and been granted or denied RA since July 1, 1996; and (3) the number and location of RA assignments that are currently occupied and budgeted for Fiscal Year 2000. The Union has failed to establish how these requests relate to its ability to negotiate concerning procedures

implementing the RA Policy, any other mandatory subject of bargaining, or the enforcement of the CBA.

As to the Union's information requests regarding policies other than the RA Policy, we find that the City has a duty to disclose information concerning Modified Duty (OGP 104-7) as to (A), (B), (D) and (E), as specified above and for the same timeframe, because Modified Duty is an existing written policy which is grievable under the contract and this information is reasonably necessary for contract administration. The City also has a duty to disclose information regarding FDNY's use of DCAS Rule § 6.1.9 as to (A), (B), (D) and (E), as specified above, for the same timeframe, and limited to the extent such information relates to FDNY, because Article IX, § 9, of the Citywide Agreement references transfers provided for under DCAS Rule § 6.1.9, and such information is reasonably necessary for contract administration. Finally, as to the only request regarding LODI, the Union is entitled to (3) the average number of LODI assignments occupied and budgeted for each year beginning with fiscal year 2000 until the present, because LODI is the subject of a bilateral agreement over which the parties have bargained, and such information is reasonably necessary for contract administration. As to the Union's other information requests regarding Modified Duty, and transfers under DCAS Rule § 6.1.9, the City has no duty to disclose (C), (1), (2) and (3) because we have found that these policies are not bargainable and the Union has not shown how those requests are relevant to and reasonably necessary for purposes of collective negotiations or contract administration.

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-2191-01, filed by District Council 37, AFSCME, AFL-CIO, and its affiliated Locals 2507 and 3621, be, and the same hereby is, denied as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over the establishment of the Reasonable Accommodation Policy; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over procedures implementing the Reasonable Accommodation Policy; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, denied as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over how the Reasonable Accommodation Policy will affect the application of Article IX, § 9, LODI (OGP 125-2), Modified Duty (OGP 104-7), CSL §§ 71 and 73, and DCAS Rule § 6.1.9; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted as to the Union's request for information pertinent to the procedures implementing the Reasonable Accommodation Policy, covering the period November 2000 to the present, as to: (A) the person(s) responsible for distributing and receiving applications for a reasonable accommodation per year; (B) the person(s) responsible for providing a reasonable accommodation per year; (D) a copy of the current policy and procedure (including forms) used by the Department when employees apply for a reasonable accommodation per year; and (E) the average number, type

and location of positions available for employees requesting a reasonable accommodation during the year; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, denied as to the Union's request concerning the Reasonable Accommodation Policy for information regarding: (C) criteria used to determine eligibility for reasonable accommodation; (1) the number of employees who have been requested and been granted or denied reasonable accommodation; and (3) the number and location of reasonable accommodation assignments occupied and budgeted for; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted, as to the Union's information requests, (A), (B), (D) and (E), covering the period November 2000 to the present, regarding Modified Duty assignments and DCAS Rule § 6.1.9 transfers; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, denied, as to the Union's information requests regarding Modified Duty and DCAS Rule § 6.1.9 as to (C), (1), (2) and (3); and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted, as to the Union's information request regarding: (3) the average number of LODI assignments occupied and budgeted for each year beginning with fiscal year 2000 until the present; and the City is

DIRECTED, under NYCCBL § 12-306(c)(4), to supply the information specified above; and it is further

ORDERED, that the petition is dismissed in all other respects; and it is further

ORDERED, that the City post a copy of the attached NOTICE, and that the NOTICE must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Dated: March 19, 2004
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

RICHARD A. WILSKER
MEMBER

M. DAVID ZURNDORFER
MEMBER

BRUCE H. SIMON
MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE

BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued a decision in BCB-2191-01, an improper practice petition between District Council 37, **AFSCME, AFL-CIO,** Local 2507 and Local 3621, and the City of New York and the Fire Department of the City of New York.

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-2191-01, filed by District Council 37, and its affiliated Locals 2507 and 3621, be, and the same hereby is, denied as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over the establishment of the Reasonable Accommodation Policy; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over procedures implementing the Reasonable Accommodation Policy; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, denied as to the City's failure to bargain, in violation of NYCCBL § 12-306(a)(1) and (4), over how the Reasonable Accommodation Policy will affect the application of Article IX, § 9, LODI (OGP 125-2), Modified Duty (OGP 104-7), CSL §§ 71 and 73, and DCAS Rule § 6.1.9; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted as to the Union's request for information pertinent to the procedures implementing the Reasonable Accommodation Policy, covering the period November 2000 to the present, as to: (A) the person(s) responsible for distributing and receiving applications for a reasonable accommodation per year; (B) the person(s) responsible for providing a reasonable accommodation per year; (D) a copy of the current policy and procedure

(including forms) used by the Department when employees apply for a reasonable accommodation per year; and (E) the average number, type and location of positions available for employees requesting a reasonable accommodation during the year; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, denied as to the Union's request concerning the Reasonable Accommodation Policy for information regarding: (C) criteria used to determine eligibility for reasonable accommodation; (1) the number of employees who have been requested and been granted or denied reasonable accommodation; and (3) the number and location of reasonable accommodation assignments occupied and budgeted for; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted, as to the Union's information requests, (A), (B), (D) and (E), covering the period November 2000 to the present, regarding Modified Duty assignments and DCAS Rule § 6.1.9 transfers; and it is further

ORDERED, that the improper practice petition be, and the same hereby is, denied, as to the Union's information requests regarding Modified Duty and DCAS Rule § 6.1.9 as to (C), (1), (2) and (3); and it is further

ORDERED, that the improper practice petition be, and the same hereby is, granted, as to the Union's information request regarding: (3) the average number of LODI assignments occupied and budgeted for each year beginning with fiscal year 2000 until the present; and the City is

DIRECTED, under NYCCBL § 12-306(c)(4), to supply the information specified above; and it is further

ORDERED, that the petition is dismissed in all other respects.

The Fire Department of the City of New York
(Department)

Dated: _____ (Posted By) (Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.