

District Council 37, Local 2507, 77 OCB 18 (BCB 2006)

[Decision No. B-18-2006(IP)] (Docket No. BCB-2509-05), **appeal withdrawn.**

Summary of Decision: Union filed a verified improper practice petition alleging that FDNY violated NYCCBL § 12-306(a) by changing the policy and procedures for equitable distribution and assignment of overtime without bargaining. The City contended that the Union's claims should be deferred to the parties' contractual grievance process and the Board agreed because the claims were based on alleged unilateral changes to a negotiated subject and would be addressed through the grievance process. (***Official decision follows.***)

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 2507,

Petitioner,

-and-

**THE CITY OF NEW YORK AND
THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,**

Respondents.

DECISION AND ORDER

On October 21, 2005, District Council 37, Local 2507 ("Union"), filed a verified improper practice petition against the City of New York and the Fire Department of the City of New York ("City," "FDNY," or "Department"). The Union claims that FDNY 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 suspending a negotiated policy and procedures for equitable distribution of overtime and by subsequently issuing orders that modified the policy without first

bargaining with the Union. The City contends that the Union's claims should be deferred to the parties' contractual grievance process. Alternatively, the City argues that it exercised its managerial prerogative to suspend the policy temporarily and issue the subsequent orders. This Board defers the Union's claims to the parties' contractual grievance process because the claims are based on alleged unilateral changes to a negotiated subject and will be addressed through the grievance process.

BACKGROUND

The Union is the certified collective bargaining representative for employees in the titles Emergency Medical Technician ("EMT") and Paramedic employed at FDNY in its Bureau of Emergency Medical Services ("EMS").

EMS operates on a continuing basis, 24 hours per day, seven days per week. EMTs and Paramedics respond to calls on the 911 system. Paramedics provide advanced life support and EMTs provide basic life support in the delivery of pre-hospital services to patients.

On January 9, 2001, the Board issued *District Council 37, Local 2507*, Decision No. B-3-2001, concerning the Union's claim that FDNY violated the NYCCBL when it unilaterally changed the cap on overtime for EMS employees. This Board held that although the decision as to "when and how much overtime is to be authorized or ordered is outside the scope of the City's obligation to bargain collectively," the system FDNY employs "to distribute available overtime is a mandatory subject of bargaining." *Id.* at 7-8. Subsequently, the City negotiated with the Union over the policy

and procedures for the equitable distribution of overtime, subject to the EMS Overtime Cap.¹ On June 21, 2001, FDNY issued EMS Command Order 2001-032 (“EMS CO 2001-032”), entitled “Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy.” EMS CO 2001-032 applies to EMS Lieutenants, EMS Captains, EMTs, and Paramedics, and provides in relevant part:

The following directive outlines the policy for the equitable distribution of overtime, subject to the EMS Overtime Cap (EMS Command Order # 2001-031) and the pre-scheduling of overtime.

* * *

1.4 Members volunteering for pre-scheduled overtime should expect to work a minimum of six (6) hours of overtime per tour. Members will be paid in cash or compensatory time only for the overtime actually worked. Members who do not work the minimum number of hours will not receive credit for a tour or pre-scheduled overtime, unless the failure to work the minimum number of hours is due to the needs of the Department. The needs of the Department are within the sole discretion of the Department.

* * *

3. Pre-Scheduled Overtime Policy

* * *

3.2 The Pre-Scheduled Overtime Policy allows members to volunteer for known vacancies (KVO’s) and grants exemption from mandated overtime to members participating in the program on a posted month by month basis.

3.2.1 Members are considered exempt from mandatory overtime during a specific month when they:

3.2.1.1 Volunteer, are scheduled for, and/or complete three (3) pre-scheduled overtime tours during the posted month. These members are considered

¹ EMS Command Order 2001-031 (“EMS CO 2001-031”), concerning the overtime cap, provides in pertinent part:

1.2 An overtime cap has been established for employees in the following EMS titles: *EMT, Paramedic, EMS Lieutenant and EMS Captain*. The overtime cap for these specific titles shall be \$ 59,000 (*including base salary*) consistent with the Citywide overtime cap or 35% above their base salary, whichever is greater. The overtime cap excludes compensatory time.

1.3 Members who reach the overtime cap level for their specific title shall be officially restricted from working overtime for cash.

1.4 Members will be limited to a maximum of two (2) tours per week, except in emergency conditions, and subject to the Overtime Cap.

exempt from mandatory overtime for the entire posted month.

- 3.2.1.2 Volunteer, are scheduled for, or complete two (2) overtime tours during the same week. These members are considered exempt from mandatory overtime for the specific week in question.

NOTE: *The number of prescheduled overtime tours required is based on a number of factors, including but not limited to, the EMS Citywide medical leave usage. The Department reserves the right to increase, or decrease, the number of overtime tours required.*

* * *

- 3.3 The Department reserves the right to temporarily suspend this program during a state of emergency, or significant condition which adversely affects the delivery of pre-hospital care services.

According to the City, on September 16, 2005, FDNY promoted 79 EMTs and eight Paramedics to the title of Firefighter, resulting in their removal from the tour schedule. Also according to the City, St. Mary's Hospital closed on September 22, 2005, resulting in a loss of ambulance units that participated in the 911 call system from that location.

On September 17, 2005, FDNY suspended EMS CO 2001-032 for EMTs and Paramedics. According to the City, on the morning of September 17, 2005, Chief John Peruggia was notified that there would be a significant shortage of coverage for ambulance tours for the evening tour of that night and, in light of this information, Chief Peruggia unilaterally suspended EMS CO 2001-032.

According to the City, on that same day, the EMS Resource Coordination Center notified the Union of the suspension of EMS CO 2001-032.

On September 20, 2005, FDNY issued EMS Command Order 2005-123 ("EMS CO 2005-123"), entitled "Temporary Modification of the Pre-Scheduled Overtime Policy," which provides:

- 1.1 Effective immediately, the Pre-Scheduled Overtime Policy has been temporarily modified for members in the title of FDNY EMS-EMT and Paramedic.
- 1.2 FDNY EMS-EMTs and Paramedics are considered exempt from mandatory overtime when they:

- 1.2.1 Volunteer, are scheduled for, and/or complete five (5) pre-scheduled overtime tours during the posted month. These members are considered exempt from mandatory overtime for the entire posted month.
- 1.2.2 Volunteer, are scheduled for, or complete three (3) overtime tours during the same week. These members are considered exempt from mandatory overtime for the specific week in question.
- 1.3 All other aspects of the Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy remains unchanged.
2. Related Procedures
- 2.1 EMS Command Order 2001-032, *Equitable Distribution of Overtime/Pre-scheduled Overtime Policy*.

Thus, under EMS CO 2005-123, the number of pre-scheduled overtime tours that had to be fulfilled before an EMT or Paramedic could be exempt from mandatory overtime for the month was increased from three pre-scheduled tours to five pre-scheduled tours, and, for a specific week, from two pre-scheduled tours to three pre-scheduled tours.

On September 23, 2005, FDNY issued EMS Command Order 2005-128 (“EMS CO 2005-128”), entitled “Suspension of the EMS Overtime Cap,” which provides:

- 1.1 Effective immediately, the Overtime Cap for EMS employees is suspended for the remainder of the 2005 calendar year.
- 1.2 There is no limit on the number of overtime tours that members are allowed to work in a week.
2. Related Procedure
- 2.1 EMS Command Order 2001-031, *EMS Overtime Cap*

Also on September 23, 2005, FDNY stated, in a letter addressed to the President of Local 2507, that the Department was facing a staffing shortage due to a decrease in ambulance tours participating in the 911 call system and an unexpectedly large number of EMS personnel promoted to Firefighter.

On September 26, 2005, the Union filed a Step III grievance alleging that:

there has been a violation, misapplication, misinterpretation including but not limited

to EMS Command Order 2001-032 . . . in that on or about September 17, 2005 the Equitable Distribution/Pre-Scheduled Overtime Policy was suspended due to staffing problems the Fire Department created and also modified the current policy by adding two additional overtime tours per month without negotiating this with the Union.

The City has not yet issued a decision concerning this grievance.

On October 18, 2005, FDNY issued EMS Command Order 2005-133 (“EMS CO 2005-133”), entitled “Modification of the Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy,” which provides:

- 1.1 Effective November 1, 2005, members are considered exempt from mandatory overtime during a specific month when they volunteer, are scheduled for, and/or complete three (3) pre-scheduled overtime tours during the posted month. These members are considered exempt from mandatory overtime for the entire posted month.
2. Related Procedures
- 2.1 EMS Command Order 2001-032, *Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy*.

On October 21, 2005, the Union filed the instant improper practice petition. On January 23, 2006, this Board issued *District Council 37, Local 3621*, Decision No. B-6-2006, involving the same Union but a different local, and concerning the same policy at issue in the instant improper practice petition. In that case, the Union claimed that FDNY violated the NYCCBL when it unilaterally changed EMS CO 2001-032 as it related to EMS Lieutenants and Captains. This Board deferred the Union’s claims to the parties’ contractual grievance process because the claims were based on alleged unilateral changes to a negotiated subject and would be addressed in arbitration.

The Union requests that the Board order the City to: rescind immediately EMS CO 2005-123; restore EMS CO 2001-032; cease and desist from interfering with, restraining or coercing public employees in the exercise of their rights; expunge any disciplinary charges and restore any loss of benefits to employees that may have resulted from the improper policy; and post a notice at

appropriate facilities.

POSITIONS OF THE PARTIES

Union's Position

First, the Union alleges that FDNY violated § 12-306(a)(4) when it unilaterally suspended EMS CO 2001-032 and issued EMS CO 2005-123.² Pursuant to the Board's decision in *District Council 37, Local 2507*, Decision No. B-3-2001, the parties had negotiated procedures, promulgated in EMS CO 2001-032, for the equitable distribution of overtime. The changed policy imposes for EMTs and Paramedics a new standard of mandated overtime, which is a mandatory subject of bargaining.

According to the Union, the City failed to show that there was a material change in circumstances that constituted an "emergency" or "a significant condition which would affect the delivery of pre-hospital services," both of which terms refer to situations such as blackouts, severe snowstorms, or fires, and not to issues related to staffing.

The Union claims that FDNY violated NYCCBL § 12-306(a)(1) because FDNY's conduct

² NYCCBL § 12-306(a) states in pertinent 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 § 12-305 provides in part:

Rights of public employees and certified employee organizations. 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.

in systematically ignoring its duty to bargain is inherently destructive of the unit members' rights under NYCCBL § 12-305. FDNY's actions in changing a negotiated policy whenever it deems it necessary creates a situation in which members view the Union as weak and complicit with the City's unfair treatment rather than an advocate of their rights.

Furthermore, the Union argues that FDNY's actions have caused a workload impact. For example, under EMS CO 2005-128, employees in the titles EMT and Paramedic will reach the overtime cap established under EMS CO 2001-031 more quickly and be restricted from working overtime for cash. In addition, EMTs and Paramedics are subject to discipline if they are unable to meet the requirements of the policy, and the increase in workload has placed the health and safety of EMTs, Paramedics, and the public, at risk. Since the filing of the instant improper practice petition, during the week of December 19, 2005, at least four Union members were disciplined for their inability to work the required overtime due to hardship.

The Union claims that FDNY's actions are particularly egregious because FDNY caused the "staffing shortage" that it claims is the basis for its suspension of EMS CO 2001-032 and issuance of EMS CO 2005-123. FDNY promoted more than 80 members to the rank of Firefighter and had full knowledge and control of the number of people to be promoted and the vacancies that would result. In addition, FDNY had known for more than six months that a decrease in tours would result from the closing of St. Mary's Hospital because the Hospital's imminent bankruptcy and closing were well publicized in the media.

Finally, the Union contends that the Board should not defer the instant petition to the parties' contractual grievance process because the issue whether FDNY violated the NYCCBL by unilaterally changing a mandatory subject of bargaining is properly within the Board's jurisdiction.

Although Local 2507 filed a grievance, and an arbitrator may be called upon to hear it, an arbitrator would have no authority to determine the claimed violation of the NYCCBL. Furthermore, FDNY's request for deferral should not be entertained because the City has demonstrated a complete disregard of its obligation to negotiate with the Union. Although FDNY's unilateral actions regarding EMS CO 2001-032 as they pertained to EMS Lieutenants and Captains were already before the Board in a separate improper practice proceeding, FDNY again, on September 17 and September 20, 2005, unilaterally changed the policy affecting members of Local 2507.

City's Position

The City argues that the Board should defer the instant petition to the parties' contractual grievance process because the facts alleged in this petition are the subject of a Step III grievance filed on September 26, 2005. In addition, the parties' grievance process is the appropriate forum to address claimed violations of a Department procedure negotiated by the parties.

Alternatively, the City argues that FDNY exercised its right to suspend EMS CO 2001-032 temporarily, pursuant to § 3.3, to address a significant staffing shortage and obtain coverage from EMTs and Paramedics for unassigned ambulance tours. The closing of St. Mary's Hospital and the unexpectedly large number of EMS personnel promoted to Firefighter resulted in a considerable shortage of EMTs and Paramedics to cover all field tours and constituted a "significant condition."

The City contends that it had no duty to bargain over the issuance of EMS CO 2005-123, EMS CO 2005-128, and EMS CO 2005-133 because FDNY's changes in the assignment and allocation of overtime are within its managerial prerogative under NYCCBL § 12-307(b).³

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 . . . ; direct its

Moreover, the Union has failed to allege any facts to support its claim that FDNY has interfered with the protected rights of employees.

Furthermore, the City argues that FDNY's issuance of EMS CO 2005-128, which suspended the EMS overtime cap for EMS employees for the remainder of 2005, addresses the Union's concerns stated in the instant petition. Finally, the Union has not alleged sufficient facts to demonstrate that a practical impact on workload exists as a result of actions taken by FDNY.

DISCUSSION

_____NYCCBL § 12-306(a) provides that public employers and certified or designated employee organizations have a duty to bargain in good faith on matters within the scope of collective bargaining. Under NYCCBL § 12-306(a)(4), it is an improper practice for a public employer to refuse to bargain in good faith on mandatory subjects of bargaining. However, in accordance with § 205.5(d) of the N.Y. Civil Service Law Article 14 ("Taylor Law"),⁴ this Board has declined to exercise jurisdiction over improper practices when the basis of the claimed statutory violation is derived from the collective bargaining agreement. *Civil Service Bar Ass'n*, Decision No. B-18-2002 at 5; *District Council 37*, Decision No. B-36-2001 at 5.

employees . . . ; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted. . . ; 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.

⁴ § 205.5(d) of the Taylor Law provides in pertinent part: . . . the [Public Employment Relations Board] shall not have the authority to enforce an agreement between a public employer an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice.

The issue in this case is whether FDNY violated the NYCCBL when it took the following actions regarding the negotiated policy, EMS CO 2001-032: on September 17, 2005, FDNY suspended the order for EMTs and Paramedics; on September 20, 2005, FDNY issued EMS CO 2005-123, which temporarily modified EMS CO 2001-032; and on October 18, 2005, FDNY issued EMS CO 2005-133, which revoked part of EMS CO 2005-123.

We find that the Union's claims concerning alleged unilateral changes to the negotiated EMS CO 2001-032 policy are encompassed by the Union's Step III grievance, filed on September 26, 2005, requesting resolution of the issue whether FDNY violated the parties' Agreement and EMS CO 2001-032 when FDNY suspended the policy and modified it by increasing the number of tours EMTs and Paramedics are mandated to work overtime. The City has not yet issued a decision regarding that grievance.

Thus, both the instant improper practice petition and the Step III grievance turn on the question whether FDNY had the right to modify EMS CO 2001-032 temporarily. The answer to this question appears to depend, in part, on the proper interpretation of provisions in EMS CO 2001-032. Similar to our holding in *District Council 37, Local 3621*, Decision No. B-6-2006, we find that because the Union's claims concern unilateral changes to a negotiated agreement, we defer the improper practice claims to the parties' contractual grievance process, which has already commenced. Under the parties' grievance process, if the Union is not satisfied with the City's Step III grievance determination, the Union may pursue the matter through arbitration.

Therefore, the petition is deferred to the parties' contractual grievance process without prejudice to reopen this case should a determination on the merits of the grievance be foreclosed or should any award be repugnant to rights under the NYCCBL.

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 District Council 37, Local 2507, be, and the same hereby is, deferred to the parties' contractual grievance process without prejudice to reopen this case should a determination on the merits of the grievance be foreclosed or should any award be repugnant to rights under the NYCCBL.

Dated: May 30, 2006
New York, New York

MARLENE A. GOLD
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