Uniformed Firefighters Association, 77 OCB 39 (BCB 2006)

[Decision No. B-39-2006] (IP)(Docket No. BCB-2531-06).

Summary of Decision**:* Petitioner alleged that the City and FDNY violated NYCCBL § 12-306(a)(4) when it changed an existing order to mandate that units must respond to CFR-D calls, respond to certain types of alarms during a reduced response period, and attend training assignments during meal periods. The City argued that two of the three objections to the revisions are untimely, the topics are a management right not subject to bargaining, there has been no change to working conditions that would trigger a duty to bargain, and the petition fails to set forth a change in working conditions over which there is an impact. The Board found that the petition was filed in a timely manner, but that the Union had not shown that the City had violated NYCCBL § 12-306(a)(4), so it dismissed the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Scope of Bargaining and
Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

The petition in this matter, filed by Uniformed Firefighters Association ("Union") on January 19, 2006, alleges that the City of New York ("City") and the Fire Department of the City of New York ("FDNY") violated § 12-306(a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), when it changed an existing

order to mandate that units must respond to CFR-D calls, respond to certain types of alarms during a reduced response period, and attend training assignments during meal periods. The City argues that two of the three objections to the revisions are untimely, the topics are a management right not subject to bargaining, there has been no change to working conditions that would trigger a duty to bargain, and the petition fails to set forth a change in working conditions over which there is an impact. The Board finds that the petition was filed in a timely manner, but that the Union has not shown that the City had violated NYCCBL § 12-306(a)(4), and dismisses the petition.

BACKGROUND

The parties' collective bargaining agreement ("Agreement"), Article XXVII, titled "Meal Periods" provides:

> In order to improve the efficiency, productivity, health and morale of Firefighters, existing practices regarding meal periods shall be modified as follows:
>
> > Each unit shall be scheduled to receive one half-hour meal period in each tour as described in AUC-Response to fires and other emergencies by a unit during its meal period shall be governed by the provisions of that circular.

In accordance with the Agreement, FDNY's circular regarding meal periods is PA/ID 2-79, which was originally issued on March 19, 1984. The relevant provisions of the PA/ID 2-79 issued on that date were:

3. UNIT RESPONSE DURING MEAL PERIODS

3.1 Units shall respond to all alarms received when there is a 3rd or greater alarm in their borough until announcement from Central Office to return to meal leave procedures.

3.2 Units shall also respond during meal periods:

> A. To all verbal alarms;
>
> B. To all structural alarms;
>
> C. To all mechanical street boxes, except those designated as DRB;
>
> D. If a 10-75 or greater signal is received for an alarm to which they are assigned to respond;
>
> E. To relocations as directed;
>
> F. As directed by the dispatcher. Directions by the dispatcher shall not be discussed directly with the Division of Fire Communications. Matters involving misinterpretation of these guidelines shall be handled through channels or through the grievance procedure.
>
> G. If the Citywide Command Chief or Borough Commander has suspended meal periods due to fire traffic, lack of units or other emergency conditions. Such suspension may be citywide or on a borough basis.

In 1994, FDNY instituted a program named "CFR-D," under which a fire company responds to certain requests for emergency medical assistance. Since the introduction of the CFR-D program, firefighters have responded to requests for medical assistance during their meal periods. Additionally, since 1994, FDNY has had operating procedures under which, in certain circumstances known as a "reduced response," a single fire company would respond to a class E or class J alarm. It has also been FDNY's practice for firefighters to respond to and go to training assignments during meal periods since before September 2005.

On September 15, 2005, Salvatore J. Cassano, FDNY Chief of Operations, sent a memorandum regarding FDNY's meal period response to all borough commands and the Special Operations Command. The memorandum stated:

> Pending revision of PA/ID 2-79 section 3.2, during Meal Periods units shall also respond to ***all CFR-D alarms***; in addition, during *Reduced Response to Class "E" and "J"* alarms as per ABC 5-94, if the assigned unit is on its meal period, the

nearest available company, either ***engine or ladder*** company, will be assigned in its place.

All units shall be notified of this policy.

(Emphasis in original.) The memorandum was copied to the Chief of Department and Staff Chiefs.

On September 29, 2005, FDNY's Director of Labor Relations sent the Union's President a letter, which attached a copy of revisions that the City proposed to make to PA/ID 2-79, for the Union's review and comment. The letter notified the Union that FDNY expected to publish the document on October 13, 2005. The revisions to § 3.2 of PA/ID 2-79 read, as follows:

3.2 Units shall also respond during meal periods:

A. To all verbal alarms;

B. To all structural alarms;

C. All CFR-D responses

D. To all mechanical street boxes, except those designated as DRB;

E. If a 10-75 or greater signal is received for an alarm to which they are assigned to respond;

F. To relocations as directed;

G. During *Reduced Response to Class E and Class J Alarms,* if the assigned unit is on its Meal Period, the nearest available company, either engine or ladder, will be assigned in its place;

H. Training assignments;

I. To relocations as directed;

J. As directed by the dispatcher. Directions by the dispatcher shall not be discussed directly with the Division of Fire Communications. Matters involving misinterpretation of these guidelines shall be handled through, channels or through the grievance procedure.

> K. If the Citywide Command Chief or Borough Commander has suspended meal periods due to fire traffic, lack of units or other emergency conditions. Such suspension may be citywide or on a borough basis.

(emphasis added.)

The Union's attorney responded to the September 29 letter on October 5, 2005. The Union's letter stated that "By amending the order to include the first responder medical runs, firefighters meal periods will be negatively impacted. Since this is a procedure which should be the subject of negotiations between the parties, the UFA requests that the new procedure be held in abeyance until it is discussed, at the very least, at the next labor management meeting."

The Union asserts that the change was subsequently implemented in spite of its opposition and in spite of its request to defer the change until the parties held a meeting. The Union also asserts that at a labor/management meeting on January 5, 2006, FDNY stated that it would not change the revised meal period order and refused to negotiate over the subject. The City denies the Union's allegations.

Statistics

The City submitted an affidavit from Chief Cassano to support its assertions that the revised PA/ID merely reflected the existing FDNY policy and that issuance of the PA/ID did not constitute a change. Chief Cassano stated that he has been employed by FDNY since 1969, serving in various titles. Chief Cassano averred that the CFR-D program was instituted in 1994, and since the introduction of this program, firefighters have responded to CFR-D calls during their meal periods. He asserted that since 1994, FDNY has had operating procedures under which, in certain circumstances, a single fire company would respond to either a class E or J alarm. Finally, Chief Cassano claimed that it had been FDNY's practice since before September 2005 for firefighters to

respond to a training assignment even if it was made during their meal period.

After the pleadings were complete, both parties responded to a request by the Trial Examiner to provide statistics regarding the number of CFR-D calls to which firefighters responded during a meal period for the years prior to 2006.

The City provided data for the number of CFR-D responses during a meal period for five engine companies for the periods June through August 2004 and June through August 2005. Engine Unit Code 003 in Manhattan had 24 CFR-D responses during meal periods in Summer 2004 and 28 in Summer 2005. Engine Unit Code 096 in the Bronx had 22 CFR-D responses during meal periods in Summer 2004 and 26 in Summer 2005. Engine Unit Code 155 in Staten Island had 15 CFR-D responses during meal periods in Summer 2004 and 19 in Summer 2005. Engine Unit Code 273 in Queens had 19 CFR-D responses during meal periods in Summer 2004 and 15 in Summer 2005. Engine Unit Code 290 in Brooklyn had 27 CFR-D responses during meal periods in Summer 2004 and 26 in Summer 2006.

The Union did not produce statistics that show the number of CFR-D responses during a meal period. However, the Union argues that its own research, based upon Department records, indicates that there were 25,929 total CFR-D runs in 2004 and 26,731 total runs in 2005, "an increase of .0958 over the preceding year," and the Union contends that the number of runs are increasing in 2006. (Union letter 5/16/2006.)

In addition to the above estimate, the Union also supplied data regarding the total number of Segment 1 calls from 2001 through 2005. According to the Union, Segment 1 calls are a type of CFR-D run which include cardiac arrest and choking incidents, and which account for a small percentage of CFR-D runs. The statistics had been provided to the Union by the City in relation to

a proposed change in operational guidelines for dispatching CFR-D units to Segment 1 calls. The data shows total numbers for Segment 1 runs only and does not specifically address Segment 1 or CFR-D responses during a meal period. In 2001, there were a total of 18,118 Segment 1 incidents. Of those incidents, 14,043 engines were assigned to respond to them. In 2002, there were 18,295 total Segment 1 incidents and 14,024 engines assigned to respond. In 2003, there were 19,752 total Segment 1 incidents and 16,072 engines assigned to respond. The actual Segment 1 responses of those units assigned to respond was only slightly lower than the number of total assignments for 2001 through 2003.

Between February 2, 2004, and September 30, 2004, there were a total of 12,235 Segment 1 incidents, 11,501 fire unit assignments to those incidents, and of those assignments, FDNY completed a response 9,068 times. In 2005, there were 16,807 total Segment 1 incidents, 15,726 fire unit assignments to those incidents, and, of those assignments, 14,643 FDNY completed a response 14,642 times.

As a remedy, the Union asks that the Board find that FDNY has committed an improper practice for its refusal to bargain with the Union and has violated NYCCBL §§ 12-307(b) and 12-306(a)(4); direct Respondents to bargain with the Union over the workload impact of changing the order limiting the meal periods of firefighters who must respond to CFR-D and other additional runs and; direct that conspicuous notices be placed throughout the FDNY which state that Respondents have violated the NYCCBL.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the petition was timely filed because it was not officially notified of the changes to the PA/ID until September 29, 2005, and the petition was filed on January 19, 2006, which is within four months of when the Union was notified of the changes. The September 15, 2005, memorandum was not sent to anyone at the Union, so the memorandum cannot serve as official or constructive notice to the Union of a change in the PA/ID. Additionally, before the revised PA/ID was issued, FDNY had no existing policy and practice for fire companies responding to CFR-D alarms during meal periods. Although firefighters have responded to CFR-D alarms and attended training sessions during their meal period in the past, the official order setting forth the policy regarding these responses was not changed until the revised PA/ID was issued in October 2005. The publication of the order changing the official policy was ample justification for the filing of the instant petition because of the policy's negative impact on firefighters' meal period.

The Union argues that the City failed to bargain over a mandatory subject and cannot shield itself from bargaining by declaring that it has the management right to make such a change. The City has made a unilateral change in terms and conditions of employment that constitutes a refusal to bargain. According to the New York State Public Employment Relations Board ("PERB"), the duty to bargain in good faith includes an obligation to continue past practices that involve mandatory subjects of negotiation, even in the absence of a provision to that effect in the contract. The Union contends that PERB and this Board have held that issues regarding meal periods are a mandatory subject of bargaining. Here, the policy under the revised PA/ID directly impacts on the length of time of the meal period and constitutes a unilateral reduction in the meal period and, thus, the

changes are a mandatory subject of bargaining.

The Union argues alternatively that by changing PA/ID 2-79 and adding runs during a meal period, the City has refused to bargain with the Union over the resulting workload impact, as defined under NYCCBL § 12-307(b), and in violation of § 12-306(a)(4).[1] Firefighters' meal periods have existed without amendment for more than 20 years, and the revised PA/ID constitutes a significant change, as the new policy increases the number of runs to which a firefighter is required to respond

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[1] NYCCBL § 12-307(b) provides:

> 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. 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.

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.

during his or her meal. Therefore, this change in policy has a direct impact on workload and constitutes a change in working conditions, which triggers the duty to bargain.

The change in policy is substantive and not *de minimis*. The Union argues that there has been a very recent spike in the number of CFR-D responses, which has led to a significant increase in the firefighters' workload during meal periods, and which culminated in the revision of the PA/ID. It is evident that CFR-D responses have increased so much that FDNY amended its protocols, which is the gravamen of the instant petition. The Union contends that the Segment 1 calls cited in the statistics make up a small percentage of CFR-D runs, and a review of the most recent numbers indicates a steady increase in CFR-D assignments for Segment 1 runs. Thus, although statistics regarding CFR-D runs during meal periods are not available, it is logical to conclude that increased runs would impact missed meals. Furthermore, although the City argues that the change regarding responses to class E and J alarms is a benefit to firefighters, the topic is still a mandatory subject of bargaining.

The City is incorrect in labeling a unilateral change a "clarification" of existing practice. The Union asks why a new order would be required if a practice has been established.[2]

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[2] On February 6, 2006, the *New York Post* published an article about firefighters responding to medical emergencies during a meal period, and the article quoted a portion of a joint statement by the Union President and the UFOA President. The joint statement read, "Historically, firefighters and fire officers have voluntarily allowed the FDNY to take liberties and infringe on their 30-minute meal period when emergencies occur." The City claimed that this statement is evidence that the Union knew that the policy regarding CFR-D responses during meals was not a new policy, and that the policy was known to the Union before the PA/ID was revised. The Union asserts that the statements contained in the *New York Post* article are far too vague to be considered awareness of any change regarding CFR-D responses during meals prior to the revision of the PA/ID.

City's Position

The City contends that the petition is untimely as to two of the three revisions to PA/ID 2-79. On September 15, 2005, a memorandum was distributed to all units in FDNY regarding CFR-D responses and class E and J alarms. Because of the memorandum, the Union knew or should have known that the alleged changes occurred on September 15, 2005, and the petition was not filed until January 19, 2006, which was outside of the four-month statute of limitations, so the petition is untimely regarding those matters.

The City also contends that FDNY's assignment of a fire company to respond to emergencies and training assignments during the company's meal period is a management right and not subject to mandatory bargaining since the duties assigned are an aspect of the essential duties and functions of the employee's position. Absent a showing that FDNY's actions alter the essential character of an employee's position, the Union cannot establish a failure to bargain on the City's part, and here, the Union has set forth no facts to support a conclusion that the essential character of the position has changed.

Furthermore, the Union has not shown that there has been a change to firefighters' working conditions that would trigger a duty to bargain because the revision of PA/ID 2-79 merely reflected the existing policy and practice of the FDNY and, as such, did not constitute a change over which the City should be required to bargain. Here, firefighters have responded to CFR-D calls and responded to class E and J alarms during their meal periods since at least 1994, and have responded to training assignments during their meal periods since before September 2005.

Additionally, the language in the revised PA/ID which pertains to class E and J alarms is a *de minimis* change over which the City should not be required to bargain and is, indeed, a benefit to

firefighters in that they no longer have to interrupt their meal period to respond to that type of alarm.

The City contends that the Union has failed to set forth a change in working conditions over which there is an impact since there has been no change. The language merely clarifies existing policy and practice or is a *de minimis* change over which the City has no duty to bargain. Also, although the Union alleges that there has been a sharp increase in these responses, those allegations are not supported by the facts. Finally, the Union has not alleged a single fact from which the Board could find that the Department has created an unreasonably excessive or unduly burdensome workload for firefighters and, thus, the petition should be dismissed in its entirety.

DISCUSSION

Although this Board finds that the petition was filed in a timely manner, we also find that the Union has failed to allege facts sufficient to show that the City made a unilateral change in a term or condition of employment or that the policy announced in the revised PA/ID creates a practical impact over which the parties are required to bargain.

We first address the timeliness issue. Under NYCCBL § 12-306(e), claims of violations of the NYCCBL must be made within four months of the accrual of the claim.[3] *See also* § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1). Here, the petition was filed in a timely manner. The revised PA/ID is at the center of this

[3] NYCCBL § 12-306(e) provides in relevant part:
A petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

dispute. The Union was notified of the changes to the PA/ID on September 29, 2005, the PA/ID was issued on October 13, 2005, and the instant improper practice petition was filed on January 19, 2006. This filing was within four months of the accrual of the claim, which was when the revised circular was issued. Although the City argues that the Union's claim accrued on September 15, 2005, the date of the distribution of Chief Cassano's memorandum, it has asserted no facts showing that the memorandum was distributed to the Union or that the Union had notice of the memorandum, or that the members of the Union were adversely affected as of that date. Therefore, the claim has been timely filed.

The Union correctly asserts, in the first place, that meal periods are a mandatory subject of bargaining. A meal period is time off from working, a term or condition of employment that is mandatorily bargainable. *Addison Central School District*, 13 PERB ¶ 3060 (1980). The duration of a meal period is a mandatory subject of bargaining. *Hammondsport Central School District* 18 PERB ¶ 4647 (1985). Recognizing these principles, this Board has held, in *International Brotherhood of Teamsters, Local 858*, Decision No. B-38-92, that the imposition of a lunch period on employees who had previously been able to omit their lunch period and leave work early was a mandatory subject of bargaining. *See also Patrolmen's Benevolent Ass'n*, Decision No. B- 24-97 at 65-66 (demand for compensation for work ordered during a meal period is mandatorily bargainable). However, this case does not involve the establishment of, or compensation for, a meal period. In this matter, bargaining has reached fruition, thus satisfying the employer's obligation to bargain over this topic. We have previously held that:

> the employer violates (the law) if during the contract term [the employer] refuses to bargain, or takes unilateral action with respect to the particular subject, unless it can be said from an evaluation of the prior negotiations that the matter was fully

> discussed or consciously explored and the union consciously yielded or clearly and unmistakably waived its interest in the matter.

United Probation Officers Ass'n, Decision No. B-38-89 at 19; *see District Council 37, AFSCME*, Decision No. B-23-2002 at 13-14, *aff'd*, *District Council 37 v. City of New York,* No. 112450/03 (Sup. Ct. N.Y. Co. Mar. 15, 2004, *aff'd* 22 A.D.3d 279 (1st Dep't 2005).

The parties here negotiated a provision of their Agreement which addresses the subject of meal periods, Article XXVII, mandating that each unit shall be scheduled to receive one half-hour meal period in each tour and that the response to fires and other emergencies by a unit during its meal period shall be covered by the provisions of a FDNY circular. It is apparent from the language of the contract that the parties consciously explored the matter of meal issues, setting a meal period of one-half hour but leaving other issues, including disruption of that meal period to respond to "fires and other emergencies," to be governed by a circular promulgated by the FDNY. The language also explicitly shows that the parties contemplated that units would have to respond to emergencies during a meal period. Accordingly, although meal periods are a mandatory subject of bargaining, here, the parties have bargained the issue, and the City has fulfilled its obligation through that bargaining.

Although training assignments are not mentioned in Article XXVII of the Agreement, under NYCCBL § 12-307(b), FDNY has 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. *Uniformed Firefighters Ass'n*, Decision No. B-2-2004 at 6; *New York State Nurses Ass'n*, Decision No. B-23-2003 at 11. Here, the Agreement only specifies that meal periods shall last one-half hour. Beyond

the mandate that firefighters receive that half hour meal period, there appears to be no other limitation on management's right to assign firefighters in this circumstance. Thus, management exercised its right to assign firefighters to respond to emergencies and to attend training assignments during meal periods, and is not required to bargain over the subject.

The focus of the Union's allegations, however, is upon the increased workload impact of responding to the calls and training assignments during firefighters' meal periods. When an 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 over the alleviation of that impact may arise. *Sergeants Benevolent Ass'n*, Decision No. B-56-88.

In order for this Board to determine whether a practical impact on workload exists, the petitioner must show that the managerial decision created an unreasonably excessive or unduly burdensome workload as a regular condition of employment. *Uniformed Firefighters* Ass'n, Decision No. 2-2004 at 6-7; District *Council 37, Local 1549*, Decision No. B-37-2002 at 9; *Sergeants Benevolent Ass'n*, Decision No. B-56-88 at 17. A petitioner does not demonstrate a practical impact by conclusory allegations of 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 just an assertion of an 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.

In the instant matter, even if a change in workload stemmed from the revised PA/ID, the Union has not alleged facts that would show that the FDNY's policy regarding CFR-D calls, class E and J alarms, and training assignments during meals has resulted in an unreasonably excessive or unduly burdensome workload as a regular condition of employment for firefighters. *Probation and Parole Officers Ass'n*, Decision No. B-2-76 at 15. The Union provided its own estimates for the total number of EMS runs in 2004 and 2005, and provided detailed statistics for Segment 1 calls, which the Union claims accounts for a small percentage of CFR-D runs. Although the Union argues that the increase in total CFR-D runs at any time would significantly impact on firefighters'

workload during meal periods, the Union asserts an increase of only .0958 in CFR-D runs between 2004 and 2005, which does not create a substantial impact on firefighters' workload. Furthermore, the Union provides no support for its claim of a significant increase in responses to class E and J alarms and training assignments during meal periods as a result of the policy, let alone an increase which would have a substantive impact upon firefighter's workload. On the record before us, the Union has not demonstrated that a practical impact exists. 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 docketed as BCB-2531-06, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York,
December 4, 2006

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

ERNEST HART
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER

I dissent. BRUCE H. SIMON
MEMBER

Uniformed Firefighter Association, Decision No. B-39-2006
(IP)(Docket No. BCB-2531-06)

DISSENTING OPINION OF MEMBERS MOERDLER AND SIMON

This proceeding raises yet again a fundamental misconstruction of the laws that govern collective bargaining in the City of New York. Collective bargaining was conceived as an alternative to the arrogant abuse of power by the employer under the guise of raw management prerogatives and, as a counterweight, public employees were barred from exercising their fundamental right to withhold their services. With notable exceptions, the public employer is mandated to collectively bargain the terms and conditions of employment, rather than exercising sheer *ipse dixit,* while employees are similarly enjoined to bargain collectively and constrained from striking to enforce their will. That delicate balance – one which has generally worked well for so many years – is again sought to be tipped in favor of management by the fabrication of a management rights prerogative that is not authorized by law. We reject that approach and, accordingly dissent.

The majority correctly concludes that meal periods are a mandatory subject of bargaining, including the right to and duration of the meal period. E.g., *Hammondsport Central School District* 18 PERB ¶4647 (1985), *Addison Central School District,* 13 PERB ¶ 3060 (1980). *See also* Patrolmen's Benevolent Ass'n Decision B-24-97 at 65-66. At issue here is whether the Fire Department may adversely impact Firefighter's meal periods without so much as a semblance of bargaining. Citing NYCCBL § 12-307 (b), [1] the majority holds that management has as an absolute "management right"

[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;

thereunder to abrogate or adversely impact the meal period it contracted to give Firefighter's by intruding on the meal periods without having to "bargain over the subject."

The City maintains, and the majority agrees, that it may exercise the managerial prerogative to engage in unilateral implementation of basic changes in working conditions – changes that would otherwise be the mandatory subject of good faith bargaining – based on claims that such changes are permitted in the lawful exercise of an untrammeled "management prerogative" under NYCCBL §12-307b. 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.

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

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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, *Public Sector Labor and Employment Law* 487 (2 Ed. 1998) ("*Lefkowitz")*. Mini-PERB provisos or procedures that fall short of that standard are subject to challenge. See *Lefkowitz*, supra at 798; cf., *Shanker v. Helsby*, 515 F. Supp. 871,877 (SDNY 1981). Manifestly, this Board should decline to follow or apply provisos or procedures that are invalid.

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 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, as later noted, 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 we believe is not in and of itself a valid or binding statutory enactment.[3]

From a historical perspective, it appears that the notion that employer decisions affecting "conditions of employment" could be excluded from bargaining because of the nature of the managerial action involved arose during World War II. The War Labor

[3] Importantly, no appellate judicial tribunal has to date ruled otherwise. It merits note that the argument has been advanced that, because NYCCBL §12-307b has been cited and relied upon over many years, it somehow has effectively become "the law" through some specie 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. "Lore" does not become self-enacting "law" by the mere passage of time coupled with erroneous misperception. Likewise, the notion that the New York City 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 NYCCBL §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, perhaps, to some deference, but not slavish adherence.

Board ("WLB"), which was appointed to oversee labor relations and enforce labor's wartime no-strike pledge, apparently explicated the management prerogatives concept. In the context of deciding arbitrability of certain issues, the WLB rendered its determination in *Montgomery Ward*, 10 WLR 415 (1943). There the WLB excluded from bargaining certain managerial decisions, finding that "changes in the general business practice, the opening or closing of new units, the choice of personnel, the choice of merchandise to be sold, or other business questions of a like nature not having to do directly and primarily with the day-to-day life of the employees and their relations with their supervisors … [should be] excluded from arbitration."

In 1964, the U.S. Supreme Court in *Fibreboard Paper Products v. NLRB,* 379 U.S. 203 (1964) held that subcontracting of unit work is a mandatory subject of bargaining. Justice Potter Stewart's concurring opinion in *Fibreboard* echoed *Montgomery Ward* by identifying a zone of managerial prerogatives that could legally be excluded from collective bargaining, i.e., those that "lie at the core of entrepreneurial control" or, stated otherwise, those employer concerns that are "fundamental to the basic direction of a corporate enterprise." *Id.* at ---. Thus, Justice Stewart concluded that "decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decisions may be necessary to terminate employment."

In 1979, the U.S. Supreme Court, in *Ford Motor v. NLRB*, 441 U.S. 488 (1979), returned to the issue in defining mandatory subjects of bargaining as being those matters that are "plainly germane to the working environment" and that are not "among those managerial decisions which lie at the core of entrepreneurial control."

PERB has historically followed the foregoing analysis in determining the scope of collective bargaining under the Taylor Law, fixing upon the zone of governmental interests that are excluded from collective bargaining in a manner consistent with *Fibreboard* and *Ford Motor*. See, e.g., *New Rochelle*, 4 PERB ¶ 3704 (1971); *City School District of City of New York*, 4 PERB ¶ 3060 (1961). PERB has also adopted a multi-level framework to analyze the nature and substance of managerial interests in instances where the public employer has secured a managements rights clause from the union. However, the managements rights clause is not automatically accorded sweeping effect. A clause that does not explicitly identify the conduct at issue does not, in PERB's view, permit unilateral management action. See, e.g., *New York State (Department of Correctional Services),* 27 PERB ¶ 3055, 3124-25 (1944), *confirmed* 220 AD 2d 19 (3rd Dept. 1996).

Given the tension between the right of employees to bargain over their working conditions and terms of employment and government's public interest obligations, PERB has effectively adopted a balancing test to weigh these oft-times conflicting interests.[4] . See, *County of Rensselear,* 13 PERB ¶ 3077 (1985). That examination is directed at the relationship between the disputed subject and those managerial interests that are either necessary for the employer to carry out its mission or are explicitly within a management rights clause. Thus, PERB has declared the decision to provide service to the public or to discontinue a particular service as one fundamental to

[4] Intellectual honesty compels the conclusion that the balance between the public interest espoused by government and employees' interests is by no stretch of the imagination equal. Government makes and enforces the laws, appoints its arbiters and interpreters and has at its command an array of weapons that no private sector employer, much less the employees, can hope to match. Perhaps that is as it should be when one recognizes the public interest to be advanced and protected. However, the disparity must be acknowledged.

government's mission and thus within the ambit of the managerial prerogative. See, *New Rochelle, supra.* On the other hand, a decision to subcontract out bargaining unit work to non-unit employees has not been viewed as in furtherance of that mission and, accordingly, has been held to be a mandatory subject of bargaining, if the work previously has been performed exclusively by unit employees. *Somers Central School District*, 9 PERB ¶3014 (1976). Similarly, PERB has ruled that adoption of a dress code for non-uniformed employees does not constitute an act in furtherance of the employer's mission or, concomitantly, a management prerogative. *County of Putnam*, 18 PERB ¶4565 (1985). See also, *City of Buffalo.* 15 PERB ¶ 3027 (1982). To quote the decision in *Nassau County Police Benevolent Association,* 27 PERB ¶3054 (1994):

> We cannot say that whatever managerial prerogatives may be associated, for example, with the testing methodology, testing triggers (e.g., definition of reasonable suspicion), choice of laboratory, collection procedures, chain of custody, sample screening, conditions for retesting, reporting and recording of test results, due process protections, and disciplinary consequences, so outweigh the employees' collective and individual interests in these areas as to make them negotiable only at the County's option. We therefore, find these procedures and consequences to be mandatorily negotiable. *Id.* at 3119

It merits emphasis that in the context of the issues here tendered, PERB's decisions are of particular importance. That occurs because there is no "substantial equivalency" in state statute to NYCCBL §12-307b and the only cognizable predicate for a claim that the NYCCBL §12-307b management rights concept survives rests upon the existence and scope of "substantial equivalency" under decisional law. Hence, the scope of that decisional predicate becomes particularly relevant and it seems clear that PERB has not articulated any test for the existence or cognizability of management rights of the sweep of NYCCBL §12-307b.

It remains only to note that this Board has, on occasion at least, recognized the need for meaningful criteria other than the all-encompassing (and, we think, invalid) sweep of §12-307b (see, fn. 3, *supra).* Thus, in *District Council 37, AFSCME, AFL-CIO (New York City Housing Authority),* B-1-90 (1990), this Board adopted the *Fibreboard* and *Ford Motor* criteria and applied both a balancing test and a two-tier analysis in determining the applicability under the circumstances of the claimed managerial prerogative:

> When we encounter a conflict between the employer's prerogative to control the basic direction of its enterprise and the right of employees to bargain on subjects that affect their terms and conditions of their employment, *we must strike a balance between the vital interests of government to manage its affairs on the one hand, and the public policy underlying the bargaining obligation of the NYCCBL and the Taylor Law on the other*.[5]
>
> ….
>
> Thus, before we will find that the Authority's [challenged action] constitutes a mandatory subject of bargaining, *we must first determine that the policy is plainly germane to the working environment*. *If we find it germane, we then also must find that it is not among those managerial decisions which lie at the core of entrepreneurial control. B-1-90* at pp. 8,12. (Emphasis added).[6]

What emerges from the foregoing analysis is, we submit, (1) a cogent and workable framework for analysis of the application or pertinence of the circumscribed managerial prerogative exception and (2) a functional balancing test for its application

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[5] Citing*, inter alia, Fibreboard* and *Board of Education of the City School District of the City of New York v. United Federation of Teachers, Local 2, AFT, AFL-CIO*, 19 PERB ¶3015 (1986) at 3033, rev'd 542 N.Y.S.2d 53 (A.D. 3 Dept. 1989), appeal filed; *State of New York v. Civil Service Employee Association, Inc., Local 1000, AFSCME, AFL-CIO* 18 PERB ¶3064 (1985); *County of Rensselaer v. Rensselaer County Unit of the Rensselaer County Local 842, CSEA, Local 1000, AFSCME, AFL-CIO* 13 PERB ¶3080 (1980).

[6] In the interests of completeness, it must be noted that the Board also cited to "the employer's express statutory prerogative, under §12-307b, *B-1-90* at 8. Other than to cite and quote the proviso it did not, however, seek to bring its ruling within the ambit of any of that ordinances all-encompassing provisos, preferring, quite properly, to engage in the reasoned analysis noted above (i.e., application of the two-tier analysis and the balancing test).

in a given case. The threshold inquiry, we submit, is whether the challenged action or policy is "plainly germane to the working environment" and, only if the answer is in the affirmative, then a finding must be made that the challenged action or policy is "among those managerial decisions which lie at the core of entrepreneurial control." In the process of making those determinations, the Board must be mindful of the fact that it must balance the conflicting interests in accommodating one set of requirements (the duty to bargain) with the oft-times conflicting obligations attendant to Government's need to further its mission of soundly advancing the public interest.[7]

The majority starts down the road of balancing the interests and critically weighing the facts, by suggesting that the parties may have "explored" the meal issue (by a clause that created the right to one-half hour meal period), but then left open to what extent and in what manner disruption might preclude exercise of that right. (see majority opinion at 14). However, instead of pursuing that analysis and reaching a conclusion based on a complete or supportive factual record, the majority promptly veers off, stating, in conclusional fashion, that the issue was bargained (albeit without any cited support in the record[8]) and concludes that management rights are paramount,

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[7] Simplistic reliance upon the overly broad provisos of §12-307b does not advance that reasoned analytical process, even if §12-307b were valid.

[8] The cited contractual language is, at best ambiguous, susceptible of different interpretation, e.g., that the parties left open for future discussion and future implementation (through , further bargaining)the circumstances under which the meal time requirement could be abnegated or disrupted and then implemented. That conclusion is as sound and simultaneously as speculative as the one the majority offers. For, no amplifying insight is provided either in the majority opinion or the record. Indeed, it merits note that in the majority's recitation of the City's position, there is no claim stated as having been made by the City (e.g., in its pleadings), that the issue had been fully bargained. It was not. The void simply cannot be filled by resort to an unauthorized prerogative. Neither is the majority's discussion respecting impact of any relevance. For, under the majority's view it is relevant here only because the majority's analysis is entirely dependant on its (erroneous) finding of a properly exercised management prerogative (" When an employer exercises a management right…. " adverse impact may create a duty to bargain.(Majority Op. at 15)).

were properly invoked and only an increased workload impact can produce a contrary conclusion. The analysis is flawed and the result is, in our view, erroneous.

Applying the relevant criteria set forth above, we conclude that the challenged action is not "*plainly* germane*"* to the working environment and is certainly not "among those managerial decisions which lie at the core of entrepreneurial control." Applying the balancing test, and noting that the proposed action seems to be out of touch with current societal and practical realities, we conclude that whatever the merits of the underlying arguments of the parties may be, the matter could and should have been bargained. Reasonable men and women can reach rational results without *ipse dixit.* The abolition of bargaining simply because management would prefer to avoid discourse does not appear necessary to advance any sound Governmental mission. We accordingly conclude that that the balance tips decidedly against valid assertion of any management prerogative. Instead, we would hold that NYCCBL § §12-306a4(1) and (4) were violated and again express the view that NYCCBL §12-307b is an invalid exercise of power that was not granted by the State to the City of New York and is a nullity.

December 8, 2006

Charles G. Moerdler

Bruce Simon