District Council 37, Local 3621, 77 OCB 6 (BCB 2006)

[Decision No. B-6-2006(IP)] (Docket No. BCB-2468-05).

Summary of Decision: Union filed a verified improper practice petition alleging that FDNY violated NYCCBL § 12-306(a) by unilaterally changing the policy and procedures for equitable distribution and assignment of overtime without bargaining. The City contended that the petition was moot and, alternatively, that the City had no duty to bargain over the policy because its actions were within its managerial prerogative. The Board deferred the Unions' 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.
(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, LOCAL 3621,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On April 1, 2005, District Council 37, Local 3621 ("Union" or "Local 3621") filed a verified improper practice petition against the City of New York and the Fire Department of the City of New York ("City" or "FDNY"). The Union claims that FDNY violated § 12-306(a)(1), (2), (3), 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 two orders that modified the policy without first bargaining with the Union. The City contends that the petition is moot because FDNY has restored the original order concerning overtime. Alternatively, the City argues that it had no duty to bargain with the Union over the issuance of the subsequent orders because the actions taken by FDNY are within its managerial prerogative. Because the Union's claims are based on alleged unilateral changes to a negotiated subject and will be addressed in arbitration, the Board defers the claims in this improper practice petition to the parties' contractual grievance process.

BACKGROUND

The Union is the certified collective bargaining representative for employees in the titles Supervisor Emergency Medical Specialist Level I ("EMS Lieutenant") and Supervisor Emergency Medical Specialist Level II ("EMS Captain"), employed by FDNY in its Bureau of Emergency Medical Services ("EMS").

EMS operates on a continuing basis, 24 hours per day, seven days per week. EMS Lieutenants perform both administrative and field duties. When performing field duty, EMS Lieutenants spend their tour providing ongoing field supervision of both EMS Command and voluntary hospital units assigned to a response area.

On January 9, 2001, this 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 decisions 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 used "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.
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> * * *
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> 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 of 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 is within the sole discretion of the Department.
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> 3. Pre-Scheduled Overtime Policy
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> 3.2 The Pre-Scheduled Overtime Policy allows members to volunteer for known vacancies (KVO's) and grants exemption from mandated overtime to members

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

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 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.

* * *

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, in June 2004, less than 210 EMS Lieutenants out of a required 228 could potentially work a tour. By July 2004, only 197 were available to work field tours. From August 2004 to February 2005, there were consistently less than 228 EMS Lieutenants available to work.

On December 5, 2004, FDNY suspended EMS CO 2001-032 for EMS Lieutenants only. The City claims that this was necessary to alleviate the EMS Lieutenant staffing shortage and was undertaken pursuant to § 3.3 of EMS CO 2001-032. EMS Lieutenants were then placed into the mandatory overtime pool. An EMS Lieutenant selected to perform mandatory overtime was assigned to eight-hour tours.

On February 16, 2005, FDNY promulgated EMS Command Order 2005-019 ("EMS CO 2005-019"), 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 EMS Lieutenant.

1.2 EMS Lieutenants are considered exempt from mandatory overtime during a specific month 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.

1.3 All other aspects of the Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy remains unchanged.

Thus, under EMS CO 2005-019, the number of pre-scheduled overtime tours that had to be fulfilled before an EMS Lieutenant could be exempt from mandatory overtime for the month was increased from 3 pre-scheduled tours to 5 pre-scheduled tours.

Prior to February 16, 2005, EMS Chief Peruggia contacted Vice-President of Local 3621, Jack Sullivan, to inform him of the implementation of EMS CO 2005-019. Chief Peruggia indicated that the modification was temporary and would be terminated once a new class of EMS Lieutenants graduated from the Academy. On February 17, 2005, the City states that FDNY received a certified Civil Service List for EMS Lieutenants that was issued by the Department of Citywide Administrative Services.

On February 28, 2005, the Union filed a group grievance at Step III on behalf of EMS Lieutenants and Captains and alleged:

> There has been a violation, misapplication, misinterpretation including but not limited to EMS Command Order 2001-032 Section 1.4 in that the Fire Department unilaterally changed the overtime policy forcing supervisors to work a minimum of eight hours overtime. This policy was negotiated as a direct result of the union filing an Improper Practice Petition against the Fire Department.

The remedy sought by the Union is for FDNY to "follow the overtime policy that was negotiated between the union and FDNY. . . ." On May 6, 2005, the City of New York Office of Labor Relations ("OLR") denied the Union's grievance.

On March 31, 2005, FDNY issued EMS Command Order 2005-019A ("EMS CO 2005-019A"), entitled "Temporary Modification of the Pre-Scheduled Overtime Policy

(Revised)," which states that it revoked the modification of EMS CO 2001-032 in EMS CO 2005-019. EMS CO 2005-019A provides:

> 1.1 Effective Sunday, April 3, 2005, the temporary modification to the Pre-Scheduled Overtime Policy for members in the title of EMS Lieutenants has been revoked.
> 1.2 EMS Lieutenants are considered exempt from mandatory overtime during a specific month when they:
> 1.2.1 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.
> 1.3 The Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy remains as written in EMS Command Order 2001-032.
> 2. Related Procedures
> 2.1 EMS Command Order 2001-032, *Equitable Distribution of Overtime/Pre-Scheduled Overtime Policy.*

From December 5, 2004, to April 3, 2005, during the approximately four months that EMS CO 2001-032 was suspended as it applied to EMS Lieutenants, they were not subject to discipline in connection with refusing mandatory overtime.[2]

On April 1, 2005, the Union filed the instant improper practice petition claiming that FDNY violated the NYCCBL by suspending EMS CO 2001-032 and by issuing EMS CO 2005-019 and EMS CO 2005-019A without first bargaining with the Union. According to the Union's Reply, on April 4, 2005, during a labor-management meeting, the Union asked FDNY Chief McFarland whether its members would be subject to working eight-hour overtime tours. He answered in the affirmative.

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[2] FDNY also has a mutual exchange policy EMSC OGP 102-10 (issued on March 1, 1999) that outlines the procedure for schedule exchanges for all members of EMS Command. OGP 102-10 defines "mutual schedule exchange" as "the agreement between two eligible full duty members of the Command to substitute for one another on specified dates and tours." Under this policy, an EMS Lieutenant may not arrange for a mutual exchange with an EMS Captain. This policy remained in place from December 2004 to April 2005 and was not affected by the temporary suspension of EMS CO 2001-032 or the implementation of EMS CO 2005-019.

On April 11, 2005, the Union filed two group grievances at Step III, one on behalf of EMS Captains, the other on behalf of EMS Lieutenants and Captains. The first alleged that:

> there has been a violation, misapplication, misinterpretation including but not limited to Article IV Section 3(d) in that on or about 12/22/04 the Fire Department changed EMS Captains schedules to avoid paying them overtime.

The remedy sought by the Union is for FDNY to "return all Captains back to prior schedule. . . ." The second grievance alleged that:

> there has been a violation, misapplication, misinterpretation including but not limited to EMS Command Order 2001-032 Section 1.4 in that the Fire Department unilaterally changed the overtime policy forcing supervisors to work a minimum of eight hours overtime. This policy was negotiated as a direct result of the union filing an Improper Practice Petition against the Fire Department.

The remedy sought by the Union is for FDNY to "change the minimum back to 6 hours, follow the overtime policy that was negotiated between the union and FDNY. . . ." A Step III hearing was conducted on June 9, 2005, regarding both grievances. On June 21, 2005, OLR denied the grievances.

On October 17, 2005, the Union filed a request for arbitration, which the City did not challenge, of the following grievance: "Whether the employer, the New York City Fire Department, has violated its own written rules and regulations by increasing the number of tours each member is mandated to work overtime and if so, what shall the remedy be?"[3] On October

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[3] In its request for arbitration the Union alleged that FDNY violated Article VII, Section 1(a), of the Hospital Technicians Agreement ("Agreement") and EMS CO 2001-032, and attached the grievance filed on February 28, 2005. Article VII, Section 1(a) provides, in relevant part:

The term "Grievance" shall mean:

a. A dispute concerning the application or interpretation of the terms of this Agreement;

b. A claimed violation, misinterpretation or misapplication of the rules or regulations, written policy or orders of the Employer applicable to the agency which employs the

18, 2005, the Union filed another request for arbitration, which the City did not challenge, of the following grievance: "Whether the employer, the New York City Fire Department, has violated its own written rules and regulations, the collective bargaining agreement and EMS Order 2001-032 by failing to adhere to the policies in forth therein by (i) mandating employees to work a minimum of eight (8) hours (ii) changing schedules to avoid payment of overtime and, if so, what shall the remedy be?"[4] On December 27, 2005, the Union made a request to consolidate these two cases and the City agreed. The arbitration will be held on February 8 and 27, 2006.

The Union requests that the Board order the City to: rescind EMS CO 2005-019 and EMS CO 2005-019A; 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; and post a notice at appropriate facilities.

POSITIONS OF THE PARTIES

Union's Position

The Union claims that FDNY violated NYCCBL § 12-306(a)(1), (2), (3), and (4).[5] First,

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grievant affecting terms and conditions of employment; . . .

[4] In its request for arbitration the Union alleged that FDNY violated Article VII, Section 1(a), of the Agreement and EMS CO 2001-032, and attached the grievance filed on April 11, 1005 on behalf of EMS Captains.

[5] 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;
(2) to dominate or interfere with the formation or administration of any public employee organization;
(3) to discriminate against any employee for the purpose of encouraging or discouraging

the Union alleges that FDNY violated § 12-306(a)(4) when it unilaterally suspended EMS CO 2001-032 and issued EMS CO 2005-019 and EMS CO 2005-019A. The parties had negotiated procedures - promulgated in EMS CO 2001-032 - for the equitable distribution of overtime pursuant to the Board's decision in District Council 37, Local 2507, Decision No. B-3-2001. The changed policy imposes for EMS Lieutenants and Captains 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," not issues related to staffing. Further, the term "temporary" under Section 3.3 does not permit the unilateral implementation of a new policy for approximately four months but is meant to be in effect only until the "emergency" or "significant condition" is over, typically a day or so.

The Union claims that FDNY violated § 12-306(a)(3) when it discriminated against EMS Lieutenants and Captains by subjecting them to a new overtime policy. Although EMS CO 2005-019 refers to "EMS Lieutenants," FDNY has created a new distribution of overtime

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membership in, or participation in the activities of, any public employee organization;
(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. . . .
§ 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.

procedure to EMS Captains as well because they can work overtime only if there is no EMS Lieutenant assigned. Under EMS CO 2001-032, which applied to all EMTs, Paramedics - represented by District Council 37, Local 2507 - and EMS Lieutenants and Captains, members of both Local 2507 and Local 3621 were subject to the same negotiated policies and procedures. But EMS CO 2005-019 imposed a new standard for the distribution of overtime on EMS Lieutenants who suffered disparate treatment.

Furthermore, the Union argues that FDNY's actions have caused a workload impact. For example, under EMS CO 2005-019, EMS Lieutenants would reach the overtime cap established under EMS CO 2001-031 more quickly and be restricted from working overtime for cash. In addition, EMS Lieutenants and Captains lose the benefits and privileges of the mutual exchange policy because they cannot find others to exchange a scheduled tour.

In its Reply, the Union contends that the petition is not moot because the Union's claims focus on FDNY's unilateral changes to the terms of a negotiated policy and procedure. At a labor-management meeting on April 4, 2005, after the filing of this petition, FDNY again made a unilateral change to the overtime policy by mandating a new minimum of eight hours rather than six hours and by changing the scheduling of tours for EMS Captains to avoid the payment of overtime. Thus, FDNY demonstrated a clear likelihood of repeating its disregard of its duty to bargain.

City's Position

The City argues that the petition is moot because the circumstances that serve as the basis for the Union's allegations have been eliminated by FDNY's issuance of EMS CO 2005-019A, which revoked FDNY's suspension of EMS CO 2001-032 and EMS CO 2005-019.

Alternatively, the City argues that on December 5, 2004, FDNY exercised its right temporarily to suspend EMS CO 2001-032, pursuant to § 3.3, to address a significant staffing shortage for EMS Lieutenants. Since their number had declined sharply, FDNY needed more EMS Lieutenants to ensure adequate supervision of EMS operations. When the numbers did not improve, FDNY regarded the staffing shortage a "significant condition" which adversely affected the delivery of pre-hospital care services. During the 2004 holiday season, when EMS experiences a spike in emergency calls, FDNY expected a greater shortage.

The City also contends that it had no duty to bargain over the issuance of EMS CO 2005-019 and EMS CO 2005-019A because FDNY's change in the assignment and allocation of overtime are within its managerial prerogative under NYCCBL § 12-307(b). [6] Moreover, the Union has failed to allege any facts to support its claim that FDNY has interfered with the protected rights of employees, has dominated or interfered with the administration of the Union, or has discriminated against employees under NYCCBL § 12-306(a)(1), (2), and (3).

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. The City requests that the Board defer the case to the parties' grievance process because the Union's claims are already subject to the parties' contractual arbitration process.

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[6] 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 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.

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 Taylor Law (Civil Service Law, Article 14),[7] 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.

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 December 5, 2004, FDNY suspended the order; on February 16, 2005, FDNY promulgated EMS CO 2005-019, which temporarily modified EMS CO 2001-032; and on March 31, 2005, FDNY issued EMS CO 2005-019A, which revokes EMS CO 2005-019.

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 requests for arbitration. As noted above, on October 17, 2005, after filing the instant improper practice petition, the Union filed a request for arbitration on behalf of EMS Lieutenants and Captains - to which is attached its

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[7] § 205.5(d) of the Taylor Law provides in pertinent part:
. . . the Board shall not have the authority to enforce an agreement between a public employer and 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.

grievance filed at Step III on February 28, 2005 - requesting resolution of the issue whether FDNY violated the parties' Agreement and EMS CO 2001-032 when FDNY changed EMS CO 2001-032 by increasing the number of tours each member is mandated to work overtime. In addition, on October 18, 2005, the Union filed a request for arbitration - to which is attached its grievance filed at Step III on April 11, 2005 - requesting resolution of the issue whether FDNY violated the parties' Agreement and EMS CO 2001-032 when it mandated employees to work a minimum of eight hours and changed schedules to avoid payment of overtime. These cases were consolidated and arbitration has been scheduled for February 8 and 27, 2006.

Thus, both the instant improper practice petition and the requests for arbitration turn on the question whether FDNY had the right to modify EMS CO 2001-032 temporarily. The answer to this question may depend, in part, on the meaning of the terms "temporary," "state of emergency," and "significant condition," in § 3.3 of EMS CO 2001-032, a question appropriate for an arbitrator's determination. Under these circumstances, because the Union's claims concern unilateral changes to a negotiated agreement, we defer the improper practice claims to the parties' contractual arbitration process, which has already commenced.

Therefore, the petition is deferred to the arbitration process without prejudice to reopen 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 3621, be, and the same hereby is, deferred until such time as an arbitrator renders a determination and issues an opinion and award upon which this Board may further determine whether an improper practice was committed by the Fire Department of the City of New York.

Dated: January 23, 2006
New York, New York

MARLENE A.GOLD
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