District Council 37, Local 376, 79 OCB 20 (BCB 2007)

[Decision No B-20-2007] (IP) (Docket No. BCB-2560-06)

Summary of Decision: Union claimed that DOT violated its duty to bargain by unilaterally changing its standard operating procedures for employees in Highway Repairer and Assistant Highway Repairer titles, allegedly deviating from established procedures and creating new predicates for discipline. The City contended that it had no duty to bargain because it had merely clarified, not changed, existing policy except for *de minimis* nomenclature changes. This Board finds the petition timely but dispositive of no duty to bargain. The Board denies the petition in its entirety. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 376,

Petitioner,

-and-

NEW YORK CITY OFFICE OF LABOR RELATIONS
and the NEW YORK CITY DEPARTMENT OF TRANSPORTATION,

Respondents.

DECISION AND ORDER

On July 24, 2006, District Council 37 ("Union") filed a verified improper practice petition on behalf of its members in the civil service titles of Highway Repairer and Assistant Highway Repairer against the New York City Office of Labor Relations ("City") and the New York City Department of Transportation ("DOT" or "Department"). The Union contends that the DOT 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 allegedly deviating from the established procedures set forth in its "Standard Operating Procedures: Bridge Repair and Preventive Maintenance," and allegedly creating new predicates for discipline. The Union further contends that

the DOT improperly failed to bargain over the practical impact as to the "adverse effects" on the employees subject to the document at issue. The City contends that the duty to bargain is not implicated because it has not changed any procedures other than clarifying existing procedures or making *de minimis* changes of nomenclature, and alleges that it has not created any new predicates for discipline. The City further asserts that these revisions have not had a practical impact on the employees subject to the procedures. The City further argues that the Union's case is time-barred. This Board finds the petition timely but finds the revised document not violative of any duty to bargain, and denies the petition in its entirety.

BACKGROUND

The Trial Examiner found that the totality of the record established the relevant background facts to be as follows.

DOT manages and oversees the repair and maintenance of New York City's streets, sidewalks, street lights, traffic signals, transportation infrastructure, and Staten Island ferry operations. The Division of Bridges is responsible for preventive maintenance and repair of all New York City bridges. The Union represents some 500 DOT employees in the civil service titles of Highway Repairer and Assistant Highway Repairer who perform that bridge work, among other repair and maintenance work.

On March 3, 2004, DOT issued its Standard Operating Procedures for Bridge Repair and Preventive Maintenance ("City's 2004 SOP"). (Answer Exhibit 1.) The City asserts that the document was distributed to all employees of the Division of Bridges who, as they received it, signed their names on sheets designated for each DOT yard, with the dates they received it, the

earliest being March 8, 2004, and the latest, April 15, 2004.[1] The signature sheets are entitled "NYC DOT PREVENTIVE MAINTENANCE SOP DISTRIBUTION" with subtitles of "Signature Sheet" and "Bridge PM & Repair SOP & Compliance Checklist." (Answer Exhibit 2.)

The City's 2004 SOP describes policies, identified by descriptive headings, about reporting to the yard, preparation of equipment and assigned work, calling in assigned work locations and breaks, lunch time, emergency procedures, vehicle operation, reporting back to the yard, end of work shift, work over water, and monitoring field operations. (Answer Ex. 1.)

The Union denies the distribution of the City 2004 SOP to its members or to the Union itself. The Union asserts that the only known documentary memorialization of any DOT standard operating procedure from 2004 is a two-page document with no title and with similar but not identical subheadings, displaying pagination of only "4" and "5." ("Union 2004 SOP"). (Reply Ex. C.) The text of the Union 2004 SOP is outlined in a format different from the City 2004 SOP and contains some but not all of the sentences in the City 2004 SOP. It summarizes others using different phraseology and omits still other sentences.[2]

On March 28, 2006, DOT issued what it called "newly revised" Standard Operating Procedures for Bridge Repair and Preventive Maintenance ("City 2006 SOP"). The City asserts that the revisions consisted solely of *de minimis* "nomenclature changes" and policy "clarification." The Union asserts that the City 2006 SOP differs "greatly" from what it calls "the only previous SOP that the Union is aware of," *i.e.*, the Union 2004 SOP. Comparing the Union 2004 SOP with the City

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[1] Pulaski, 203rd Street, Port Ivory, Harper Street, and Dover Street yards.

[2] Other differences exist between the Union 2004 SOP and both the City 2004 SOP, *e.g.*, end of the work shift and work over water, but these are not subject to the Union's complaint.

2006 SOP, the Union cites differences pertaining to reporting to the yard, preparation of equipment and assigned work, calling in at assigned work locations, lunch time and emergency procedures. The Union also asserts that the City 2006 SOP creates new predicates for discipline but other than calling the City 2006 SOP a deviation from "established procedures," the Union does not elaborate on the asserted deviation.

Both City SOP documents contain nearly identical text. The differences consist of nomenclature changes, omissions, and grammatical corrections. The nomenclature changes consist of the phrase "District supervisor" changed to "Area supervisor" in four places cited by the Union. The omissions consist of removing a reference to the requirement that supervisory personnel complete a "SOP Compliance checklist" as well as removing a requirement that supervisory personnel send home and record as "AWOL" an employee determined unfit for duty.[3] The grammatical correction consists of the addition of the word "who" to render a clause parallel in sentence structure. The City 2006 SOP omits the last heading of the document offered by the City as the City 2004 SOP ("Monitoring of Field Operations SOP Compliance") as well as ¶ B of the heading entitled "Work over Water." In all other respects identified by the Union, the text of the documents offered by the City as City 2004 SOP and City 2006 SOP are identical.

The Union asserts that, by letter dated June 20, 2006, Frank Burns, Assistant Director of Research and Negotiations for the Union, requested of DOT's Assistant Commissioner for Human Resources that a meeting be held to discuss protocol for correcting what he said was failure to date of the Union to have received DOT "memos, SOPs, and Directives." The letter was copied to

[3] Under the City 2006 SOP, a supervisor is to code the timecard of such an employee "appropriately," rather than "AWOL."

several Union leaders including Tom Kattou, President of Local 376, and to DOT's Director of Labor Relations, Gordon Goldberg. In the Reply, the Union also asserts that Kattou telephoned DOT's Goldberg as well as its Director of Policies and Procedures in an attempt to discuss the matter but that his phone call also failed to elicit a response. The City asserts that the Union did not request a meeting or contact DOT regarding the City 2006 SOP.

The Union filed the instant petition, arguing that DOT interfered with, restrained, and coerced the employees at issue and failed to bargain over the alleged changes in violation of the NYCCBL §§ 12-306(a)(1) and (4), and disputing the City's timeliness defense by pointing to the City's contention that the City SOP 2006 at issue was promulgated in March 2006, that is, within the applicable limitations period of this improper practice proceeding.

The Union also alleges that DOT's assignment of Highway Repairers to duties found in a 2005 arbitration award to be out-of-title creates a current practical impact on Union members which the City has failed to negotiate to alleviate, in violation of NYCCBL § 12-307(b).[4] The claims grieved in the referenced arbitration concerned supervisors who required a Highway Repairer and Assistant Highway Repairer to make decisions concerning work methods, assigning work to others and checking their progress, supervising the use of tools and equipment, keeping records and supervising road and sidewalk repairs. The award rejected the City's argument that these functions fell within the scope of judgment and degree of responsibility of the grievants at issue in that contract case. Here, the Union claims, without elaboration, that "[s]ome of the additional duties" which the

[4] The title Supervisor Highway Repairer was at issue in an out-of-title grievance arbitration hearing dated January 21, 2005, whose award, issued May 23, 2005, upheld the grievance. (A-8572-00 and A-10418-04.) (Petition Exhibit B.) Supervisor Highway Repairer is separate and distinct from the titles at issue in the instant case.

Union asserts are required by the City 2006 SOP "have already been recognized as out-of-title work" in the referenced arbitration decision and that a practical impact, under NYCCBL § 12-307(b), has resulted.

For the City's failure to bargain over an alleged impact and over an alleged deviation from procedures which allegedly create new predicates for discipline, the Union contends that DOT interfered with, restrained, and coerced the employees at issue and failed to bargain in violation of the NYCCBL §§ 12-306(a)(1) and (4). The Union seeks an order rescinding the City 2006 SOP ceasing any implementation of the City 2006 SOP, and ordering negotiations "with regard to such terms and conditions of employment of unit employees," a posting of "appropriate" notices at DOT work sites, and other just and proper relief.

POSITION OF THE PARTIES

Union's Position

The Union relies on a seemingly partial document which assertedly is "the only . . . SOP that the Union is aware of" prior to the issuance of the City 2006 SOP. The Union claims that it never received notice of any other SOPs issued by DOT before the City 2006 SOP and never got a response from DOT executives to requests to discuss notification to the Union of DOT memos, SOPs, and directives. The Union contends that by promulgating the City 2006 SOP, DOT unilaterally changed procedures to be followed by Bridge Preventive Maintenance and Repair crews and deviated from established procedures, creating new predicates for discipline without bargaining over the alleged changes. Thus, the Union contends that DOT has interfered with, restrained, and coerced the employees at issue and failed to bargain in violation of NYCCBL §§ 12-306(a)(1) and (4).

Further, the Union claims, albeit without elaboration, that the City 2006 SOP has resulted in additional duties for Union members and that some of those duties have already been recognized, in a 2005 arbitration award, as out-of-title work. The significance of this, the Union argues, is that the continued assignment of unit members to those duties creates a "practical impact" in violation of NYCCBL § 12-307(b) because the City has not negotiated the alleviation of that asserted impact.[5]

The Union disputes the City's timeliness defense by pointing out that the instant petition was filed on July 24, 2006, within the four month limitations period applicable to its claim which arguably arose on March 28, 2006, the date the City 2006 SOP was promulgated.

City's Position

The City argues that, to the extent the Union complains of failure to bargain over the issuance of an SOP, the claim is time-barred, as the SOP was originally promulgated in 2004, beyond the applicable limitations period. The City points to Answer Exhibit 2 as documentary evidence that DOT employees did receive the City 2004 SOP in March and April 2004, well before the statutory time for raising the instant challenge.

In addition to the timeliness challenge, the City contends that the Union has failed to carry its burden of showing that DOT unilaterally changed procedures in the City 2006 SOP or created any

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[5] Section 12-307b of the NYCCBL states that it is the right of the employer:

> to determine the standards of services to be offered by its agencies; determine the standards for employment. . . ; determine the methods, means and personnel by which government operations are to be conducted. . . . Decisions of the . . . 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 . . . are within the scope of collective bargaining.

new predicates for discipline. Grammatical corrections and changes in nomenclature such as "Area supervisor" for "District supervisor" make up City 2006 SOP in no way change the terms and conditions of employment for the employees at issue, nor do the *de minimis* changes such as changing language from "coded as AWOL" to "code the worker's timecard appropriately." Such changes implicate no duty to bargain because employees are not required to do anything procedurally different from before, and the City's decision not to negotiate over such changes do not constitute any failure of any duty.

Finally, the City argues that the Union's practical impact claim fails because the Union has articulated no specific factual allegations from which the Board of Collective Bargaining could find such an impact; thus, no duty to bargain can be found. Moreover, the Union has failed to demonstrate that the duties at issue in the referenced out-of-title arbitration proceeding are duties that the City 2006 SOP may require of members of Local 376. Substantiation of an out-of-title claim in arbitration does not of its own weight establish the establish unreasonably excessive or unduly burdensome workload equating with factual assertions necessary to prove a practical impact and no other evidence has been adduced, Accordingly, no direct or derivative violation of the NYCCBL has been stated here.

DISCUSSION

We address the issue of timeliness first. This Board may not consider any claimed violation of the NYCCBL if that violation occurred more than four months prior to the filing of an improper practice petition. NYCCBL § 12-306(e); § 1-07(d) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"); see *Soc. Serv.*

Employees Union, Local 371, Decision No. B-19-2002 at 6. Here, the petition was filed on July 24, 2006. There is no dispute that the City 2006 SOP was promulgated on March 28, 2006, less than four months prior to the filing. Therefore, we deem the petition timely.

We next turn to the substantive claims. It is an improper practice under NYCCBL §12-306a(4) for a public employer or its agents to refuse to bargain collectively in good faith with certified or designated representatives of its public employees on matters within the scope of collective bargaining which generally consist of certain aspects of wages, hours, and working conditions. *See Correction Officers Benevolent Ass'n*, Decision No. B-26-2002 at 6; *District Council 37, AFSCME, Locals 2507 and 3621,* Decision No. B-35-99 at 12. When a petitioner asserts that a unilateral change has occurred in a term and condition of employment which is determined to be a mandatory subject, then the petitioner must demonstrate the existence of such a change from existing policy. *Patrolmen's Benevolent Ass'n*., Decision No. B-12-2004 at 17. *See also Soc. Serv. Employees Union, Local 371*, Decision No. B-10-2002; *Town of Stony Point (PBA)*, 26 PERB ¶ 4650 (1993). A petitioner seeking bargaining over such an asserted change must demonstrate that the matter sought to be negotiated is, in fact, a mandatory subject. *See Doctors Council, S.E.I.U.,* Decision No. B-21-2001 at 7. If a unilateral change is found to have occurred in a term and condition of employment which is determined to be a mandatory subject, then this Board of Collective Bargaining will find the change to constitute a refusal to bargain in good faith and, therefore, an improper practice. *See District Council 37, AFSCME,* Decision No. B-14-2005 at 13; *Local 1182, Communications Workers of America,* Decision No. B-26-2001 at 4; *Patrolmen's Benevolent Ass'n*, Decision No. B-4-99 at 10.

In one recent case, the Union currently before us argued that when DOT required new hires

to file certain documents verifying compliance with residency requirements, the agency imposed new requirements to qualify for employment and those new requirements constituted a qualitative change in employees' participation in the residency verification procedure. We directed the City to bargain over the change. *District Council 37, AFSCME,* Decision No. B-14-2005 at 13.

Not all terms and conditions of employment are mandatory subjects, however, and we have distinguished between changes in terms and conditions of employment which require bargaining and those which do not. In one recent case, we considered a demand for bargaining over changes in a departmental directive concerning the monitoring of sick leave use. The union in that case urged that the changes were mandatory. The City urged that the changes were mere clarifications of existing policy and disciplinary criteria. We found the changes non-mandatory because although the newly promulgated standards that would be used to monitor sick leave did make it more likely that a member would be exposed to potential discipline, the agency's notice concerning the standards did not actually alter the terms and conditions of employment. *Correction Officers Benevolent Ass'n*, Decision No. B-26-2002.

In this case, the Union contends that DOT changed standard operating procedures which must be followed by employees in the titles of Highway Repairer and Assistant Highway Repairer in the performance of their crew duties in DOT Bridge Preventive Maintenance and Repair. The Union argues that these purported changes caused DOT to deviate from established procedures and created new predicates for discipline without bargaining over the alleged changes, thus, interfering with, restraining, and coercing the employees in violation of NYCCBL §§ 12-306(a)(1) and (4).

The outcome of this case hinges, in part, on our determination as to whether the Union 2004 SOP or the City 2004 SOP is the appropriate document to compare to the City 2006 SOP. For the

following reasons, we find that the appropriate document to compare to the City 2006 SOP is the City 2004 SOP.

First, we find persuasive the City's argument that in March 2004 DOT distributed City 2004 SOP to all employees of the Division of Bridges, including those in the titles at issue here, who, as they received it, signed their names on sheets designated for each DOT yard, with the dates they received it. As evidence of its claim, the City submitted Answer Exhibit 2, consisting of fully executed signature sheets specifically entitled "NYC DOT PREVENTIVE MAINTENANCE SOP DISTRIBUTION" with subtitles of "Signature Sheet" and "Bridge PM & Repair SOP & Compliance Checklist," indicating dispositively that the employees at issue received the City 2004 SOP and that the Union was thus on notice of its distribution at that time. The Union has failed to make specific allegations of fact such that, if credited, would rebut the documentary evidence submitted by the City.

Second, we also find that the Union raises no issue as to material fact warranting a hearing in this case.[6] A petitioner is required to present more than conclusory statements supporting an improper practice claim in order to warrant a hearing to present further evidence. *Soc. Serv. Employees Union*, Decision No. B-10-2002 at 8, citing *Uniform Firefighters Ass'n*, B-19-2003; *see also, Communication Workers of America*, B-03-2005.

In the case before us, Union 2004 SOP has not been authenticated nor produced with documentation establishing its provenance. It displays pagination of only "4" and "5," indicating

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[6] The Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") provide that, "[a]fter issue has been joined, the Board may decide [a] dispute on the papers filed, may direct that oral argument be held before it, may direct a hearing before a trial examiner, or may make such other disposition of the matter as it deems appropriate and proper." OCB Rule § 1-107(8).

that pages of the whole document are missing. The Union's manifold failure to provide a complete document, to establish the provenance of the document it has submitted, and to rebut the City's showing that it disseminated – and unit members signed in acknowledging receipt of – the City 2004 SOP leads us to conclude that no evidentiary hearing is warranted as to which document is appropriately to be compared with the City 2006 SOP. We find that the appropriate document for comparison is the City 2004 SOP.

Between the City 2004 SOP and the City 2006 SOP, we find only *de minimis* changes from one to the other. As we pointed out, the differences consist of three types. Nomenclature differences consist of the phrase "District supervisor" being changed to "Area supervisor" in four places cited by the Union as objectionable. Omissions consist of removing a reference to the requirement that supervisory personnel complete a "SOP Compliance checklist"as well as removing a requirement that supervisory personnel send home and record as "AWOL" an employee determined unfit for duty. Under the City 2006 SOP, a supervisor is to code the timecard of such an employee "appropriately," rather than "AWOL." The City 2006 SOP omits the last heading of the document offered by the City as the City 2004 SOP ("Monitoring of Field Operations SOP Compliance") as well as ¶ B of the heading entitled "Work over Water." The grammatical correction consists of the addition of the word "who" to render a clause parallel in sentence structure. In all other respects cited by the Union, the text of the documents offered by the City 2004 SOP and the City 2006 SOP are identical. Since we have determined that these changes are *de minimis* in nature, we hold that they implicate no duty to bargain and, thus, that the City's failure to bargain in this instance violates no duty under the NYCCBL.

Finally we turn to the Union's claim that the City 2006 SOP imposes duties that are

tantamount to a practical impact under NYCCBL § 12-307(b). The NYCCBL expressly reserves to management the authority to determine the standards of services to be offered by city agencies, and the methods, means and personnel by which governmental operations are to be conducted, including the right unilaterally to "determine the job assignments of its employees." *See District Council 37, AFSCME, Locals 2507 and 362,* Decision No. B-34-1999 at 18. This approach is consistent with PERB's longstanding view that, typically, the assignment of job duties is a managerial function which is non-negotiable. *See Graduate Student Employee's Union*, 33 PERB ¶ 4593 (2000) (reassignment of teaching assistants to assignment of writing tutors nonnegotiable) *aff'd* 33 PERB ¶ 3045 (2000); *Peekskill Faculty Ass'n*, 16 PERB ¶ 4586 (1983) (issue of which employee, specifically, is to be assigned a particular duty is non-negotiable) *rev'd on other grounds*, 16 PERB ¶ 3075(1983).

Moreover, a public employer is not required to bargain over a question concerning a practical impact prior to this Board determining that a practical impact exists. *Soc. Serv. Employees Union, Local 371*, Decision No. B-1-2002 at 8. A petitioner urging the Board to find such an impact must present more than conclusory statements of a practical impact in order to require the employer to bargain or, indeed, in order to warrant a hearing to present further evidence. *Correction Captains Ass'n, Inc.*, Decision B-28-93 at 8. The existence of a practical impact, a factual question, cannot be determined when a union does not provide sufficient facts. *Id.*

In *Social Service Employees Union*, Decision No. B-10-2002, we found that the implementation of an agency handbook for child welfare case workers did not result in a practical impact on the terms and conditions of employment of those employees, contrary to the assertion of the union. *Id.* at 9. Here, the Union merely alleges, without more, that Highway Repairers and

Assistant Highway Repairers have been assigned to perform burdensome duties under the City 2006 SOP. The record is devoid of any probative evidence which would support a claim of practical impact. Therefore, we dismiss the Union's practical impact claim as well.

For the reasons stated above, no duty to bargain is implicated in the facts as presented by the Union and the instant petition is denied in its entirety.

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-2560-06, filed by District Council 37, AFSCME, and Local 376 be, and the same hereby is, dismissed in its entirety.

Dated: May 3, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent. CHARLES G. MOERDLER
MEMBER