UFADBA, 8 OCB2d 37 (BCB 2015)

(IP) (Docket No. BCB-4089-14).

Summary of Decision*:** The Union alleged that the FDNY violated NYCCBL § 12-306(a)(1), (2), (4), and (5) when it modified radio frequencies located inside of fire engines and ladder trucks to permit certain employees to communicate directly with EMS dispatch. The Union claimed that this constituted a unilateral change in the FDNY's procedures and resulted in the transfer of bargaining unit work from its members to EMS dispatchers. The City argued that the FDNY had no obligation to bargain over the change, which was an exercise of its managerial rights under NYCCBL § 12-306(b) to determine the methods, means, and personnel by which its operations are to be conducted. The Board found that the FDNY did not make a unilateral change to a mandatory subject of bargaining. Accordingly, the petition was denied. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

UNIFORMED FIRE ALARM DISPATCHERS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On December 1, 2014, the Uniformed Fire Alarm Dispatchers Benevolent Association ("Union" or "UFADBA") filed a verified improper practice petition against the City of New York ("City") and the New York City Fire Department ("FDNY"). The

Union alleges that the FDNY violated the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") § 12-306(a)(1), (2), (4), and (5) when it modified radio frequencies located inside of fire engines and ladders to permit certain employees to communicate directly with emergency medical services ("EMS") dispatch. The Union claims that this constitutes a unilateral change in the FDNY's procedures and has resulted in the transfer of bargaining unit work from its members to EMS dispatchers. The City argues that the FDNY had no obligation to bargain over the change, which was an exercise of its managerial rights under NYCCBL § 12-306(b) to determine the methods, means, and personnel by which its operations are to be conducted. The Board finds that the FDNY did not make a unilateral change to a mandatory subject of bargaining. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held two days of hearings and found that the totality of the record established the following relevant facts.

UFADBA is the sole and exclusive representative for all FDNY employees in the titles Fire Alarm Dispatcher ("FAD") and Supervising Fire Alarm Dispatcher ("SFAD"). Generally, SFADs supervise FADs, who perform duties related to receiving and transmitting fire and emergency alarms using various systems, including telephone, voice alarm, computer programs and databases, and two way radios; receiving and processing calls regarding administrative issues or complaints from FDNY field units, other FDNY bureaus, City agencies and/or the public; and determining and adjusting the number and type of unit and equipment to be sent to various locations based on condition or

predetermined protocols. The employees work at four different locations determined by borough assignment.

The record demonstrates that when a fire is reported through a call to 9-1-1 it is first routed to an NYPD telephone dispatcher. The NYPD dispatcher gathers information about the fire from the caller and initiates a conference call between the caller and an FDNY FAD. Ultimately, the FAD determines and dispatches appropriate firefighting resources to respond to the incident. Once the responding fire units arrive at the scene, they communicate with the FADs over radios and relay information regarding the fire by using codes that indicate conditions on the scene. Certain codes indicate that notification to EMS dispatch, known as Emergency Medical Dispatch ("EMD"), is required. For example, the code "10-75" indicates that there is an active fire, and it requires that a FAD call EMD immediately and notify them that EMS response is needed.[1]

The record demonstrates that fire personnel responding to the scene of an incident utilize vehicle radios or handheld radios known as handie-talkies ("HTs") in order to communicate directly with EMS and other outside agencies, such as the NYPD, the Department of Buildings, and the Office of Emergency Management. Judith Salgado, the FDNY's Deputy Director of Fire Dispatch Operations, testified that in 2005 "intraoperability frequencies" were added to HTs as a result of lessons that were learned following the September 11, 2001 terrorist attacks.[2] (Tr. at 114-115) The purpose of the intraoperability frequencies is to allow for immediate and direct communication at the

[1] This information is derived from a Department of Investigation ("DOI") report that is discussed in further detail below. It is consistent with the description of the process that was provided by the Union and City witnesses.

[2] Salgado stated that, at that time, there was no ability for the FDNY and the NYPD to communicate with one another directly as the events were unfolding.

scene of a fire or incident between various agencies, regarding anything of a critical nature, without the agencies needing to first contact a dispatcher to make the phone calls.

Juan Gonzalez, the Chief Dispatcher of Fire Dispatch Operations in the Bronx, provided additional detail regarding the FDNY's communication system. Chief Gonzalez testified that the system consists of seven channels: one for each of the five boroughs and two citywide channels, one for use by FDNY dispatch and one for use by EMS dispatch.[3] Each channel represents a different radio frequency. Gonzalez testified that the Firefighters responding to an incident use the radios to give reports to the Incident Commander ("IC") on the scene, who then uses a borough frequency to communicate these reports to a FAD.[4] The FAD will then take this information and broadcast progress reports over a citywide frequency, which is monitored by fire chiefs. According to Gonzalez, if a Firefighter needs to contact EMS or another agency such as the NYPD, the Firefighter should contact a FAD over the radio, and the FAD will then call that agency. However, Gonzalez testified that Battalion Chiefs in the field have always had the capability of contacting EMD directly by radio.[5]

In April 2014, there was an incident involving a fatal fire in Queens where there was a critical delay in the notification of an active fire to EMD. Deputy Director Salgado testified that the fire units that responded to the incident reported the code for an active fire to the FAD, who was responsible for notifying EMD to send a response. An error

[3] The record indicates that the FDNY and EMS each have their own separate borough frequencies.

[4] The IC is the highest-ranking officer at the scene of the fire, who is in charge of controlling the fire. Chief Gonzalez testified that this is usually a Battalion Chief or a Deputy Chief.

[5] As will be detailed below, all the witnesses agree that the IC has always had the ability to contact EMD directly.

occurred, and that notification was not made. EMD was not alerted to send an EMS response team to the scene until the fire unit later identified and reported that there were two injured children. The ambulance arrival was significantly delayed and, subsequently, the children died.[6]

Deputy Director Salgado testified that, as a result of this incident, the FDNY made a revision to its Communications Manual that was intended to remedy some of the problems and delays that occurred during the fatal fire. Specifically, on August 7, 2014, a new section titled "EMS MCI/FIRE – Fireground Communications" was added to Operating Guide Procedure ("OGP") 109-08, titled "Protocol For the Use of the EMS/FIRE Intraoperability Frequency."[7] (Ans., Ex. 4) This section states:

> 4.1. In the event the IC needs EMS resources at the scene of operations, e.g. 10-45 transmitted for a patient with a critical or unstable condition, and EMS is not on-scene or cannot be located, the IC shall ensure EMS response and relay the seriousness of the patient's condition to the responding EMS Unit(s) by one of the following methods.

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[6] In October 2014, DOI issued a report titled "Investigation into Significant Delay in Dispatching an Ambulance to a Queens Fatal Fire in April 2014 and Overall Systemic Flaws of Dispatch System." (City Ex. 1) The investigation found that a FAD's failure to contact EMD upon the notification of an active fire was a direct cause of the delayed arrival of medical assistance to the children. The report made observations regarding what it called the "extremely cumbersome" process for dispatching an ambulance to the scene of an active fire and recommended that changes be made immediately in order to eliminate steps in the process to dispatch an ambulance and to minimize the potential for human error. (*Id*. at 20) The report also noted than an overhaul of the City Emergency Response System is due for completion in August 2016, and it referred to any changes made until the official overhaul as "stop-gap" or "interim," as well as "plainly not sufficient." (*Id*. at 21)

[7] The previous version of OGP 108-09, dated November 16, 2015, was titled "Protocol For the Use of the EMS/FIRE *Interoperability* Frequency." (Ans., Ex. 3) (emphasis added) The terms interoperability and intraoperability appear to have been used interchangeably throughout the FDNY.

> - The IC should contact EMS Medical Branch officer on primary tactical (HT Channel 1) e.g.: "Fire Command to EMS". All EMS officers, lieutenant and above, monitor HT Channel 1.
>
> - If the IC is unable to contact the EMS Medical Branch officer via HT, the IC shall contact the [FAD].
>
> - The UHF radio in either the [Battalion Chief] or [Deputy Chief] vehicle can be used for direct communication with EMS citywide dispatch for relay to EMS units. The UHF channel will be visually identified as "EMS CW 1". All responding EMS units monitor this channel.
> **Note:** Transmissions on this frequency will not be heard by Fire Units.
>
> - DARS radios can be used for direct communication with EMS citywide dispatch for relay to EMS units by switching to EMS Zone, Channel 1 (EMS CW 1).[8]
> **Note:** Transmissions on this frequency will not be heard by Fire Units.

(*Id*.)

Deputy Director Salgado testified that she attended meetings and played a role in the revision of OGP 109-08. She stated that, as part of this revision, the FDNY reprogrammed the radios in the fire engines and ladders to include a frequency that would allow for direct communication with EMD. Salgado stated that the purpose of this change is to allow the fire units to obtain a status check directly from EMD in a situation in which there is a delay in the arrival of an ambulance to a critical patient. According to Salgado, prior to the revision of OGP 109-08, only fire chiefs had direct access to EMD through a radio in their vehicles. After the revision, the ability to directly communicate

[8] Deputy Director Salgado's testimony indicates that a DARS radio is a type of HT that has the ability to hold more frequencies than older models.

with EMD was expanded to the officers responsible for operating the radios in the engines and ladders—typically the fire officer or the chauffeur.[9]

Salgado testified that the procedure for fire units to request EMS was not changed in the revision of OGP 109-08. Rather, she believed that the revision only added a step to the multi-step procedure that should be followed. Specifically, she stated that when EMS response is needed, the fire unit's initial call is to the FAD. If EMS does not arrive, the fire unit should check again with the FAD. Next, the fire unit should use the frequencies on the HTs to find out if EMS is available. After these attempts have been made, if an EMS unit has still not arrived to the scene, the fire units "have the ability to call EMD directly to verify EMS has been assigned or the status." (Tr. at 132)

The Union presented testimony concerning two incidents it alleges show that the FDNY has made a unilateral change in its procedures that has resulted in a transfer of bargaining unit work. Chief Gonzalez testified that, sometime in 2014, he became aware of a situation in which a fire engine company made direct contact with EMD.[10] The incident was brought to his attention by Evelyn Rios, a Lieutenant with EMD, who played a recording of the incident for Gonzalez. Although Gonzalez did not remember the particular details of the call, he recalled that the fire unit contacted EMD over an EMS borough frequency to request information on the status of an EMS unit. Gonzalez stated that he believed that this call should have been made to FDNY dispatch, who could have advised the fire unit of EMS's status. After the incident, Gonzalez spoke with a

[9] Chauffeur is an informal title for a Firefighter trained to operate the fire engine and ladder trucks.

[10] Although Gonzalez could not recall exactly when this incident occurred, the record reflects that it occurred in or around October 2014.

radio mechanic who informed him that engine and ladder radios were in the process of being reprogrammed to include EMS borough frequencies.

Lieutenant Rios also testified about the same incident as Gonzalez. Rios stated that she became aware of the situation when the EMD dispatcher handling the call asked her how to proceed with the request. Rios instructed the dispatcher to assist the caller if they identified themselves; however, she testified that this was the first time she had ever heard of a fire unit contacting EMD over the borough frequency. She acknowledged, however, that Battalion Chiefs have always had the ability to speak to EMD on a citywide frequency to either give or ask for information.[11] She later spoke to another EMD Lieutenant, as well as Chief Gonzalez, and was told that "when [fire unit personnel] come up on the frequency, we were supposed to assist them . . . ." (Tr. at 55) Rios testified that she viewed this as a change in practice. However, Rios acknowledged that there had not been any other change in EMD's procedure for handling requests for assistance.[12]

Lieutenant Rios also discussed this issue with Faye Smyth, an SFAD and the President of UFADBA. Smyth testified that, previously, only ICs had direct contact with EMD, but this was only on the EMS citywide frequency and not the EMS borough

[11] Rios testified that this occurred when there was a multi-casualty incident and EMD had already been contacted.

[12] Lieutenant Rios testified about another incident, post-August 2014, which she described as an "open carrier" incident, or the accidental pressing of the talk button, on the EMS borough frequency, by a Fire Battalion Chief. (Tr. at 56) When an open carrier incident occurs, EMD is unable to communicate with any other units on that frequency. According to Rios, the incident described lasted for approximately 20 minutes and posed safety issues and a major inconvenience. Rios testified that open carrier incidents have also occurred between EMS field personnel and EMS dispatch, although these situations are easier to remedy.

frequencies.[13] Smyth testified that sometime after she spoke with Rios, one of the Union members left a memo from another union, the Uniformed Fire Officers Association ("UFOA"), on her desk. The second page of this memo, which was addressed to "Battalion 1 Officers" and authored by a UFOA Batallion 1 Delegate, contains a section titled "Apparatus Radios/EMS Capability" that states:

> All engine department radios will be or have been already programmed to talk directly to the EMS dispatcher of the area you work in. For us, it's Manhattan South. It's a good tool to use to eliminate the 3rd party information requests via our dispatcher. Two important things to keep in mind though:
>
> 1. You must switch to the Manhattan South EMS frequency which means you will no longer be monitoring Manhattan FD or be able to be reached by them. You must remember to switch back to our Manhattan frequency.
>
> 2. EMS does not use the box numbers that we use. If you call the EMS dispatcher, you must use the box location given, not the box number, to request information.

(Pet., Ex. A)

Smyth testified that she was concerned about the fire units having direct access to EMD because it is a fundamental duty of FADs and SFADs to notify EMD when a response is needed. Smyth also testified that she believed that the fire units having direct access to communication with EMD posed a safety concern, because a fire unit utilizing the EMS frequency would have to switch channels on the radio and FDNY dispatch may not be able to get in touch with them to relay vital information.

[13] Smyth also testified that the EMS citywide frequency is used for larger, multiple casualty incidents.

POSITIONS OF THE PARTIES

Union's Position

The Union alleges that the FDNY violated NYCCBL § 12-306(a) (1), (2), (4), and (5) when it implemented a unilateral change to its procedures and transferred bargaining unit work from its members to EMS dispatchers. Specifically, the Union argues that for several decades prior to August 2014, FADs received radio calls from fire units requesting assistance and called EMD to make the request for such assistance. The Union alleges that, in August 2014, the FDNY implemented a policy, OGP 109-08, that permits fire responders to directly communicate with EMD under circumstances that did not previously exist. The Union asserts that adding the new frequency to the vehicle radios was not a simple expansion of the communication ability that had previously been in place on HTs. Rather, this deviation is substantial because the engine and ladder truck radios now have borough level access—not citywide level access like the HTs. Consequently, the addition of EMS frequencies on fire engines and ladder trucks has expanded the scope of personnel with the ability to contact EMD directly and permits such communication for run-of-the-mill incidents and events other than multi-casualty incidents.

The Union rejects the City's argument that it had the management right to make the change at issue because it involved a choice of equipment. The Union states that the frequencies utilized and the make and model of radios is not a concern. However, the equipment and frequencies are not to be used in a manner that appropriates bargaining unit work. The Union claims that as a result of the change to OGP 109-08, FADs have

now been cut out of the chain of communication and their work has been transferred directly to EMS dispatchers.

The Union cites the FAD Job Description and Notice of Examination, which list "radio calls *from fire units"* as a FAD duty, as proof that the FADs and SFADs have a "reasonable expectation of exclusivity" over this work. (Union Br. at 10) (emphasis supplied by Union) The Union also contends that the IC's ability to contact EMD directly on a citywide frequency does not diminish this reasonable expectation of exclusivity because such communication occurred only during multi-casualty incidents that were, according to the Union, "limited circumstances." (*Id*. at 10) The Union notes that the revised OGP 109-08 does not state that the new in-vehicle frequency for direct fire unit calls to EMD is to be used as a last resort. Thus, the Union concludes that a plethora of calls is to be expected and any claim that the change has only a *de minimus* impact on bargaining unit work is without merit. The Union therefore contends that the reassignment of the work is a mandatory subject of bargaining.

Finally, the Union argues that the FDNY must bargain over the loss of exclusive bargaining unit work regardless of the merits of the FDNY's claim that safety will be enhanced by the change at issue, because safety is not an exception or defense to an unlawful unilateral change in a mandatory subject of bargaining.[14]

[14] The Union also asserts that there are no patently obvious safety benefits to allowing fire units to have direct contact with EMD. Rather, the Union asserts that this direct contact on a borough frequency actually raises a number of safety concerns, such as "a loss of communication between the dispatchers and fire units, the tying up of EMS lines of communication, the difficulty in locating staff, and the likelihood of additional open microphone incidents." (*Id*. at 12)

City's Position

The City argues that the improper practice petition should be dismissed because the Union has failed to demonstrate that the FDNY had a duty to bargain over its decision to modify radio equipment in engine and ladder apparatus in order to enable fire units to communicate with EMD when necessary. The City contends that this decision concerns the selection and use of equipment and falls squarely within its rights under NYCCBL § 12-307(b) to determine the methods, means, and personnel by which governmental operations are to be conducted. The City further argues that there is no support for the Union's assertion that the City failed to bargain over a change to policy or procedure because there is no factual evidence that such a change took place. Deputy Director Salgado testified unequivocally that there has been no change to the policy for requesting the dispatch of EMS resources by FADs. Rather, the only procedural change is the ability to proactively address delays in the arrival of EMS resources, and the City contends that these types of communication are extremely rare.

The City asserts that the Union's allegation that the FDNY had a duty to bargain over the change because it resulted in a reassignment of bargaining unit work must also fail, because NYCCBL § 12-307(b) expressly reserves to management the right to determine what duties should be included in a job specification and which employees should be assigned to perform particular jobs. In particular, the City argues, the employer may "unilaterally add, subtract or modify the duties of a position provided that the modification does not significantly alter the difficulty, complexity or responsibilities of the job." (City Br. at 12) (citing *DC 37, L. 1549*, 69 OCB 37, at 6 (BCB 2002)) The

City contends that, here, the Union "failed to present evidence showing that the change had *any* measurable effect on the duties and functions of bargaining unit members." (*Id*.)

Finally, the City contends that it has not violated NYCCBL § 12-306(a)(5) because, although the parties' collective bargaining agreement currently remains in *status quo*, there is no evidence to suggest that the FDNY's change in its equipment implicated any provision of the agreement or altered any terms and conditions of employment for bargaining unit members in any way.[15]

DISCUSSION

Under NYCCBL § 12-306(a)(4), it is an improper practice for a public employer or its agents "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." Mandatory subjects of bargaining generally include wages, hours, working conditions, and any subject with a significant or material relationship to a condition of employment. *See* NYCCBL § 12-307(a).[16] Where management makes a unilateral

[15] NYCCBL § 12-306(a)(5) provides that it is an improper practice for a public employer or its agents:

> to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.

The City additionally argues that the Union presented no evidence to demonstrate that the FDNY interfered with, restrained or coerced public employees in the exercise of their rights, in violation of NYCCBL § 12-306(a)(1), or dominated or interfered with the Union, in violation of NYCCBL § 12-306(a)(2).

[16] NYCCBL § 12-307(a) provides, in pertinent part:

change in a mandatory subject of bargaining, "it accomplishes the same result as if it had refused to bargain in good faith, and likewise commits an improper practice." *CEU, L. 237, IBT*, 2 OCB 2d 37, at 11 (BCB 2009) (citation omitted). In order to establish that a unilateral change has occurred in violation of the NYCCBL, the Union "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)).

In this instance, although the parties agree that a change has occurred, each party characterizes this change differently. While the Union argues that there has been a change in the FDNY's procedure for fire units requesting EMS services, the City argues that no such change has taken place. Instead, the City argues that the change at issue is merely a modification of equipment that is used in rare instances in which there has been a delay in EMS response.

The record evidence establishes that two changes occurred in August 2014: an expansion in both the personnel with the ability to contact EMD directly and the type of radio frequency that can be used for this purpose. According to the testimony of all witnesses, certain members of the FDNY have always been able to contact EMD directly. Generally, this person has been the IC—the highest-ranking officer of the FDNY on the

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> [P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including, but not limited to, wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including, but not limited to, overtime and time and leave benefits), working conditions
> . . . .

scene of a fire. Most witnesses testified that, prior to the changes at issue, this contact was generally made over a citywide radio frequency that was used during multi-casualty incidents. In or around August 2014, radios in the engine and ladder units were reprogrammed to include an EMD borough frequency. As a result, in addition to the IC, a fire officer or chauffeur now has the ability to contact EMD, on a different frequency than was previously used by the IC to do so.

We do not find any factual support for the Union's assertion that the FDNY has changed the policy or procedure by which EMS services are requested. Although it is undisputed that OGP 109-08 was revised and a new section was added in August 2014, OGP 109-08 addresses the procedures to be followed pertaining to the use of intraoperability frequencies between fire units and EMS.[17] It does not address the initial procedure that fire units must follow when responding to an incident and communicating with FADs. There is nothing in the record to indicate that fire units have been instructed not to call FADs to request EMS response. On the contrary, Deputy Director Salgado affirmatively testified that the firefighters' procedures to request EMS response have not been changed.[18]

Furthermore, we credit Deputy Director Salgado's testimony that section 4.1 of OGP 109-08 was intended to address a situation in which a fire unit has already contacted

[17] OGP 109-08 is entitled "Protocol For the Use of the EMS/FIRE Intraoperability Frequency." (Ans., Ex. 4)

[18] We note that none of the Union witnesses contradicted Salgado's testimony that there has been no change in this procedure. Furthermore, we do not find that the memo written by a UFOA delegate, stating that the engine and ladder unit radios were "a good tool to use to eliminate the 3rd party information requests via our dispatcher," is probative evidence of a new practice or procedure, as there is no record evidence that the memo was authorized by the FDNY. (Pet., Ex. A)

a FAD to initially report conditions or request EMS resources. Consistent with this testimony, section 4.1 begins by stating: "In the event the IC needs EMS resources at the scene of operations, *e.g. 10-45 transmitted for a patient with a critical or unstable condition, and EMS is not on-scene or cannot be located,* the IC shall ensure EMS response and relay the seriousness of the patient's condition to the responding EMS Unit(s) by one of the following methods." (Ans., Ex. 4) (emphasis added). Thus, this section expressly refers to a situation in which a fire unit has already contacted a FAD to report an active fire and is awaiting EMS response, but the response has been delayed. Specifically, section 4.1 addresses actions that can be taken by the IC in order to determine the status of a delayed EMS response, and it refers to direct contact with EMD that is made on a citywide frequency.[19] Moreover, this section does not refer to the EMS borough frequencies in engine and ladder units that are at issue here.[20]

With respect to the change that has occurred, the Board finds that the addition of a radio frequency on engine and ladder units constitutes a decision regarding the equipment available to certain members of the FDNY. This Board has repeatedly stated that "decisions regarding the selection or use of equipment involve the City's discretion over the methods, means and technology of performing its work, and [] to the extent a union's

[19] As section 4.1 of OGP 109-08 pertains to actions that are taken by the IC, and not the fire units, this section does not refer to the changes at issue in this proceeding. Thus, we do not find that the addition of this language gives rise to a violation of the NYCCBL, as suggested by our dissenting colleagues.

[20] City witness Salgado testified that Section 4.1 of OGP 108-09 sets forth a multi-step process culminating in the instruction for fire units to contact EMD directly after contact with the FAD has not resulted in the arrival of EMS personnel. We do not find that the text of section 4.1 clearly articulates this multi-step process. Nevertheless, as stated above, it is clear that the fire officer or chauffeur now has the ability to contact EMD directly in certain situations as a result of the addition of the new frequency in engine and ladder trucks.

demands usurp that discretion, they infringe on the exercise of managerial prerogative and are rendered non-mandatory." *LEEBA*, 3 OCB2d 29, at 43-44 (BCB 2010) (citing *UFA*, 61 OCB 6, at 7 (BCB 1998); *see also USA*, 45 OCB 68, at 21 (BCB 1990); *UFA*, 43 OCB 4, at 145-146 (BCB 1989), *affd*., *Matter of Uniformed Firefighters Assn. v. Off. of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd*., 163 A.D.2d 251 (1st Dept. 1990)). In particular, this Board has explicitly stated that the decision to use certain radio frequencies is not a mandatory subject of bargaining. In *UFA*, 43 OCB 4, at 65, the Board found that the FDNY was not obligated to bargain over demands for "an exclusive City-wide frequency for Fire Marshals" and "new portable radios with the same frequency [as the City-wide frequency sought in the demand] and vehicle radios capable of monitoring mixer-off messages," because these demands were an attempt "to dictate the equipment the City must use in contravention of NYCCBL §12-307b." We reach the same conclusion here and find that a change in the radio frequency and personnel who have access to that frequency is a non-mandatory subject of bargaining. Here, as more fully set forth below, the record indicates that the FDNY made a lawful determination that for back-up purposes it wanted to expand the ability to reach EMD in the event that EMS arrival is delayed. As such, it had the managerial right to make an alteration to its equipment in order to accomplish this objective.

The Union argues that, even if the Board finds that the FDNY had the management right to make the equipment change at issue, it cannot do so here, because the change has resulted in a transfer of exclusive bargaining unit work. Indeed, in past cases regarding claims that bargaining unit work has been transferred, this Board has stated that "management is limited from exercising [its managerial] right if . . . a party

makes a showing that the work belongs exclusively to the bargaining unit." *CWA, L. 1180*, 1 OCB2d 2, at 11 (BCB 2008) (citing *IUOE, L. 15 & 14*, 77 OCB 2, at 12 (BCB 2006) (additional citations omitted).

As discussed above, there is no evidence to indicate that there has been any transfer of bargaining unit work. The Union has not demonstrated that FADs have been cut out of the chain of communication when EMS response is requested or that their role has been diminished. Deputy Director Salgado testified that the addition of radio frequencies with direct access to EMD in engine and ladder units is a part of the existing back-up method that can be used in order to obtain the status of EMS response that has already been requested but is delayed. Before this back-up method is utilized, the FADs have already been contacted to request EMS. Salgado's testimony in this regard is bolstered by the fact that none of the witnesses who testified regarding the October 2014 incident indicated that the FAD had not already been contacted to request EMS response.[21] In fact, Gonzalez's testimony confirmed that the October 2014 call was for a status check on EMS response that had already been requested by FAD. The record thus shows that while the personnel with the ability to communicate with EMD has expanded somewhat, the frequency of those communications and the limited circumstances under which those communications may take place have not.[22] We are therefore unable to find

[21] Furthermore, the Union has not presented any evidence to indicate that fire units have been instructed not to contact the FADs when arriving to the scene of a fire. Thus, we cannot find that the purported changes in procedure that are at issue remove FADs from the process for requesting EMS, as argued by our dissenting colleagues.

[22] To the extent that the Union argued that the FDNY altered the limited conditions under which EMD may be contacted directly, the record does not support that contention. The Union identified only two instances where an engine or ladder unit directly contacted EMD, and one of those contacts was by accident.

a change in procedure or a transfer of bargaining unit work that would give rise to an improper practice.[23]

In conclusion, we do not find that the FDNY has made a unilateral change with respect to a mandatory subject of bargaining in violation of NYCCBL § 12-306(a)(4) or (5). We therefore dismiss the Union's improper practice petition in its entirety.[24]

[23] Because we do not find that the change at issue has resulted in the transfer of bargaining unit work, we need not reach the Union's arguments regarding exclusivity.

[24] Although the Union's petition and brief cited violations of NYCCBL § 12-306(a)(1) and (2), it did not make any substantive arguments regarding these claims. Consequently, we do not find a violation of either provision. Further, the Union's arguments regarding perceived negative safety consequences arising from the change in radio frequencies are not properly before the Board in this matter, as the petition is not a scope of bargaining petition alleging a safety impact.

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-4089-14, filed by the Uniformed Fire Alarm Dispatchers Benevolent Association, against the New York City Fire Department, hereby is dismissed in its entirety.

Dated: December 3, 2015
New York, New York

SUSAN J. PANEPENTO
CHAIR

CAROL A. WITTENBERG
MEMBER

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

Joins in Dissent of Member P. Pepper

CHARLES G. MOERDLER
MEMBER

I Dissent (see attached)

PETER PEPPER
MEMBER

UNIFORMED FIRE ALARM DISPATCHERS

BENEVOLENT ASSOCIATION

Petitioner

-and-

THE CITY OF NEW YORK and THE NEW YORK CITY

FIRE DEPARTMENT

Respondents.

(Docket No. BCB-4089-14)

I dissent. I must disagree with the majority as to whether there was any factual support for the Union's assertion that the FDNY has changed the policy or procedure by which EMS services are requested. Clearly it is undisputed that OGP 109-08 was revised and a new section was added in August 2014, OGP 109-08 which addresses the procedures to be followed pertaining to the use of intraoperability frequencies between fire units and EMS.

As noted by the majority, NYCCBL 12-306 (a)(1) and (4) requires public employers to bargain in good faith over wages, hours, and working conditions, as well as any subject with a significant or material relationship to a condition of employment, with certified or designated representatives of its public employees. In addition, where management makes a unilateral change to a mandatory subject of bargaining, "it accomplishes the same result as if it had refused to bargain in good faith, and likewise commits an improper practice." Although the board has traditionally held that certain procedural revisions which pertain only to supervisory functions are not mandatorily negotiable, this change appears to go well beyond such a revision.

Although it is certainly understood, that if a change occurred, this may not itself establish an improper practice unless that change can be shown to have been to a mandatory subject of collective bargaining. It is also understood that specifically certain fundamental managerial decisions may be excluded from the scope of collective bargaining. Management has the right to determine the methods, means and personnel by which government operations are to be conducted. Importantly, this Board has stated that this right is limited by agreed to contract provisions, if a statutory provision prevents such unilateral exercise, or if a party makes a showing that the work belongs exclusively to the bargaining unit. Here,

it cannot reasonably be disputed that a practice has been implemented starting in August 2014 that permits fire responders to directly communicate with EMS under circumstances that did not exist prior to that time. Specifically, radios on fire trucks now bear the capability of direct communication when such communication on such radios on such vehicles was not available before that time.

The scope of personnel with the ability to contact EMS directly has passed from Incident Commanders and high ranking departmental personnel to firefighters and other officers. The change has been placed into Operational Guide Protocol ("OGP") permitting direct communication by fire units with EMS and not through negotiation. By permitting additional staff to contact EMS there has been a significant change by which work historically performed by Fire Alarm Dispatchers is now being performed by other employees. Specifically, it has, for at least several decades, been Fire Alarm Dispatchers who receive radio calls from fire units requesting medical assistance. By their removal out of this chain of communication their work has been transferred to EMS dispatchers.

As noted by the majority, it is true that the department has the right to determine the "means, methods and personnel" by which the department's operations may be achieved. However this must be modified if the union demonstrates an exclusive performance of particular work, in which case the employer may not remove that work without prior negotiations. The evidence, here, established that many years Fire Alarm Dispatchers and Supervising Fire Alarm Dispatchers have long had the exclusive responsibility for receiving radio calls from the field and transmitting requests for medical assistance from fire personnel. The collective bargaining agreement between the City and UFADBA describes the bargaining unit at Fire Alarm Dispatchers and Supervising Fire Alarm Dispatchers. In this view, the work is exclusive bargaining unit work which may not be transferred from the unit without prior collective bargaining.

What is clear is this practice has now been changed. The issuance of the OGP, the acknowledgment by the DOI and the two incidents, one where there was a request for information by fire personnel to EMS and the open microphone situation demonstrate that there is an actual new procedure for fire units to follow and that the procedure is being followed. It also must be noted that this work is clearly not *de minimis.*

Finally, it must be stated the employer must bargain over any loss of exclusive bargaining unit work regardless of the merits of the employer's claim that safety will be enhanced by its proposal.

As noted by the majority, NYCCBL 12-306 (a)(1) and (4) requires public employers to bargain in good faith over wages, hours, and working conditions, as well as any subject with a significant or material relationship to a condition of employment, with certified or designated representatives of its public employees. In addition, where management makes a unilateral change in a mandatory subject of bargaining, "it accomplishes the same result as if it had refused to bargain in good faith, and likewise commits an improper practice. Although the board has traditionally held that certain procedural revisions which pertain only to supervisory functions are not mandatorily negotiable, this change appears to go well beyond such a revision. It is because of this I dissent and would grant the petition.

New York, New York
November 19, 2015

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