

UFA, 9 OCB2d 19 (BCB 2016)

(IP) (Docket No. BCB-4155-16)

Summary of Decision: Petitioner alleged that the City violated NYCCBL § 12-306(a)(1), (4), and (5) when it unilaterally implemented minimum staffing overtime eligibility criteria for Marine Engineers, Pilots, and Wipers. The City argued that such eligibility criteria are nonmandatory subjects of bargaining; the FDNY has a managerial prerogative to assign overtime; and that its implementation was a *de minimis* change. The Board found that the criteria were mandatory subjects of bargaining; that their implementation was not a *de minimis* change; and that the City violated NYCCBL § 12-306(a)(1), (4), and (5) when it applied these criteria without negotiation during the period when the parties' collective bargaining agreements were in *status quo*. Accordingly, the petition was granted. (*Official decision follows.*)

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

In the Matter of the Improper Practice Petition

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO,

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On February 22, 2016, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO (“Union”) filed a verified improper practice petition against the City of New York (“City”) and the Fire Department of the City of New York (“FDNY”). The Union alleges that the City violated § 12-306(a)(1), (4), and (5) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”) when it unilaterally implemented

minimum staffing overtime eligibility criteria for Marine Engineers, Pilots, and Wipers. The City argues that such eligibility criteria are nonmandatory subjects of bargaining; the FDNY has a managerial prerogative to assign overtime; and that its implementation is a *de minimis* change. The Board finds that the overtime eligibility criteria at issue are mandatory subjects of bargaining; that their implementation is not a *de minimis* change; and that the City violated NYCCBL § 12-306(a)(1), (4), and (5) when it unilaterally applied these criteria during a period when the parties' collective bargaining agreements were in *status quo*. Accordingly, the petition is granted.

BACKGROUND

The Union is the certified collective bargaining representative for all Marine Engineers, Pilots, and Wipers employed at the FDNY¹ and is a party to two collective bargaining agreements covering these titles.² The expired Marine Engineers, Pilots, and Wipers Agreements remained in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d) from their expiration through December 22, 2015, when new agreements were ratified ("2015 Agreements").

Minimum staffing levels for Firefighters are codified in PA/ID 5-74, § 2.³ Minimum Staffing Levels for Marine Engineers and Pilots on three FDNY fireboats are codified in Article V, § 2 of the Marine Engineer and Pilot Agreement. To satisfy these staffing requirements, the

¹ Marine Engineers, Pilots, and Wipers are employed within the FDNY's Marine Division and are responsible for the continuous operation of fire and rescue boats during responses to fires and medical emergencies in and around the waterfront.

² The agreement covering Wipers expired on July 31, 2010 ("2010 Wipers Agreement") and the agreement covering Marine Engineers and Pilots expired on July 27, 2011 ("2011 Marine Engineer and Pilots Agreement").

³ PA/ID stands for Personnel Administrative Information Directive.

FDNY assigns overtime to employees in these titles, known as Minimum Staffing Overtime (“MSOT”). It is undisputed that Wipers are also assigned MSOT.

PA/ID 5-74

PA/ID 5-74, titled “Firefighters Minimum Staffing Guidelines,” was promulgated in 1974 “for the purpose of establishing and regulating a system for equitable distribution of MSOT among firefighters in accordance with the Collective Bargaining Agreement between the UFA and the City, . . . with the intent . . . to equalize MSOT among all eligible Firefighters.”⁴ (Pet., Ex. H) Firefighter MSOT is distributed in accordance with PA/ID 5-74 § 2.1 (“Firefighter MSOT Eligibility Criteria”), which provides in relevant part:

2.1 Firefighters who are ineligible to work MSOT:

2.1.1 Any firefighter who by any combination of regular tours, mutual exchange of tours, [Roster Staffing Overtime (“]RSOT[”)]⁵ or MSOT tours would work more than 24 consecutive scheduled hours.

2.1.2 Any firefighter whose MSOT worked for the 52-week period, as reflected on the latest bi-weekly printout, exceeds the Battalion average of MSOT for the same period by 75 hours of MSOT. Any such firefighter’s status shall be indicated on each printout by a double asterisk (**) on the report.

2.1.3 Any firefighter who is on Accrued or Terminal Leaves, or who has been granted time off (e.g. compensatory time, self-mutual). However, a [firefighter] on vacation may work MSOT. (See Section 2.3.3)

⁴ The Union represents FDNY Firefighters under a separate collective bargaining agreement.

⁵ Roster Staffing Overtime is prescheduled overtime under which Firefighters are given the opportunity to work 96 hours per year of overtime associated with the Roster Staffing Program.

(Pet., Ex. H) Firefighters deemed ineligible for MSOT under PA/ID 5-74's Firefighter MSOT Eligibility Criteria are known as being "redlined."

Buckslip No. OPS-15-11-05

On October 27, 2015, the FDNY's Chief of Operations emailed the Union's Recording Secretary advising that "effective immediately PA/ID 5-74 §§ 2.1.1-2.1.3 (Firefighters Minimum Staffing Policy Guidelines) shall apply to the title of Marine Engineer." (Pet., Ex. I) On November 2, 2015, the FDNY issued Buckslip No. OPS-15-11-05 ("Buckslip"),⁶ which established new interim minimum staffing levels for Marine Engineers on three additional FDNY fireboats and applied PA/ID 5-74's Firefighter MSOT Eligibility Criteria to Marine Engineers ("Buckslip MSOT Eligibility Criteria"). Prior to issuing the Buckslip, the FDNY did not bargain with the Union over the MSOT Eligibility Criteria. The Buckslip provides, in relevant part:

Effective immediately PA/ID 5-74 (Firefighters Minimum Staffing Policy Guidelines) shall apply to the title of Marine Engineer as follows:

Engineers who are ineligible to work MSOT:

1. Any Engineer who, by any combination of regular tours, mutual exchange of tours, or MSOT tours would work more than 24 consecutive scheduled hours.
2. Any Engineer whose MSOT worked for the 52-week period, as reflected on the latest bi-weekly printout, exceeds the Marine Engineer Division average of MSOT for the same period by 75 hours of MSOT.
3. Any Engineer who is on Accrued or Terminal Leaves, or who has been granted time off (e.g. compensatory time, self-mutual). However, a Marine Engineer on Vacation Leave may work MSOT pursuant to the above restrictions.

⁶ A Buckslip is an internal FDNY directive.

(Pet., Ex. H) It is undisputed that after the issuance of the Buckslip, the FDNY also applied PA/ID 5-74's Firefighter MSOT Eligibility Criteria to Pilots and Wipers. The Buckslip further provides that under certain conditions, "[i]f a sufficient number of Engineers are not available to work in accordance with [the Buckslip MSOT Eligibility Criteria], the department will assign Wipers with [a Qualified Member of the Engineering Department certificate] [("QMED")] to replace Engineers." (*Id.*)

According to the City, the Buckslip was issued to maintain consistency with Firefighters in the equitable distribution of overtime; comport with the September 15, 1994 Mayoral Directive No. 94-3, titled "Overtime Reporting and Monitoring" that instructed agencies to ensure that overtime be equitably distributed; and to reduce overtime costs.⁷

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the FDNY violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally applying the PA/ID 5-74's Firefighter MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers.⁸ It contends that the FDNY's action has resulted in the deprivation of overtime opportunities and overtime compensation for Marine Engineers, Wipers, and Pilots.

⁷ Mayoral Directive No. 94-3 establishes guidelines for monitoring and controlling overtime and includes a requirement that "agency Heads . . . review the top overtime earners in their agency, at least quarterly, to ensure that overtime is distributed equitably and to avoid potential abuse." (Ans., Ex. I) The Director of Timekeeping, Payroll, and Compliance Services affirmed that the FDNY's overtime costs for Marine Engineers, Pilots, and Wipers was approximately \$2.2 million in fiscal year 2014 and \$2.6 million in fiscal year 2015.

⁸ NYCCBL § 12-306 states, in pertinent part:

The Union argues that the Bucksliip MSOT Eligibility Criteria are a mandatory subject of bargaining. The Union asserts that this “Board draws a distinction between the assignment of overtime, which is a non-mandatory subject of bargaining, and the distribution of overtime, which is a mandatory subject of bargaining,” and argues that the Bucksliip MSOT Eligibility Criteria governs the distribution of overtime. (Union Br. at 6) The Union also argues that the duty to bargain over the application of the Bucksliip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers is encompassed in the FDNY’s duty to bargain over employee compensation for overtime. As such, the Union argues that the unilateral application of the Bucksliip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers constitutes a refusal to bargain over a mandatory subject of bargaining, in violation of § 12-306(a)(4).

Further, the Union argues that the unilateral implementation of the Bucksliip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers occurred during the period when the

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

(4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees. . . .

(5) to unilaterally make any change to any mandatory subject of collective bargaining . . . during the period of negotiations. . . .

NYCCBL § 12-305 provides, in pertinent part: “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.”

parties' collective bargaining agreements were in the *status quo*, in violation of § 12-306(a)(5). Finally, the Union argues that this unilateral implementation derivatively violated § 12-306(a)(1).

As a remedy, the Union requests that the Board order the FDNY to: (1) cease and desist from applying the Buckslip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers; (2) rescind the Buckslip MSOT Eligibility Criteria; (3) return to the *status quo ante*; (4) make whole all affected employees; and (5) post notices of the NYCCBL violations.

City's Position

The City acknowledges that on November 2, 2015, the FDNY unilaterally applied the Buckslip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers and that prior to November 2, 2015 these criteria were not applied to these titles. However, the City argues that its application of the Buckslip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers constitutes an assignment of overtime that the FDNY has a managerial prerogative to implement, under NYCCBL § 12-307(b), without negotiation.⁹ In the alternative, the City argues that its implementation of the Buckslip MSOT Eligibility Criteria is a *de minimis* change.

⁹ NYCCBL § 12-307(b) states, in relevant part:

It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of service 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;. . . exercise complete control and discretion over its organization. . . . Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining. .

..

Moreover, the City asserts that the FDNY's assignment of overtime, in accordance with the Buckslip MSOT Eligibility Criteria, does not impact the wages of Marine Engineers, Pilots, and Wipers and that no changes to overtime compensation have occurred for employees in these titles. Finally, the City asserts that in the absence of a mandatory subject of bargaining, there is no duty to bargain, no violation of the *status quo*, and no restraint or coercion of members in the exercise of their rights under NYCCBL § 12-305. It therefore requests that the Board dismiss the petition in its entirety.¹⁰

DISCUSSION

NYCCBL § 12-306(a)(4) makes it an improper practice to fail to bargain in good faith “on matters within the scope of collective bargaining, which generally consist of certain aspects of wages, hours and working conditions.” *Local 621, SEIU*, 2 OCB2d 27, at 10 (BCB 2009) (quoting *DEA*, 2 OCB2d 11, at 12 (BCB 2009)) (internal quotation marks omitted). We have long held that a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith. *See ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014); *DC 37*, 79 OCB 20, at 9 (BCB 2007). The party asserting a unilateral change to a mandatory

¹⁰ The hearing officer afforded the parties the opportunity to submit briefs after the pleadings were complete. In place of a brief, the City submitted a sur-reply and the Union objected to the City's submission of new evidence in the sur-reply. The Office of Collective Bargaining Rules (Rules of the City of New York, Title 61, § 1-07(c)) do not provide for the filing of sur-replies without the Board's permission and are limited to circumstances that necessitate a response to new facts or arguments made in a reply. *See UFOA*, 39 OCB 7, at 17, n. 2 (BCB 1987); *DC37*, 37 OCB 46, at 1, n. 1 (BCB 1986). Under the circumstances here, the Board will only accept the City's legal arguments made in its sur-reply in place of a brief. New facts presented by the City in its sur-reply, including assertions of a past practice for the distribution of MSOT and two newspaper articles relating to overtime earners, are not properly before us.

subject of bargaining carries the burden of demonstrating “that (i) the matter sought to be negotiated is. . . a mandatory subject and (ii) the existence of such a change from existing policy.” *ADW/DWA*, 7 OCB2d 26, at 18 (quoting *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011)) (internal quotation marks omitted).

It is well established that when and how much overtime to authorize are not mandatory subjects of bargaining. *See UFA, L. 94*, 3 OCB2d 38 (BCB 2010) (holding that a reduction in an overtime cap is not a mandatory subject of bargaining); *see also IBT, L. 858*, 49 OCB 29, at 13 (BCB 1992) (finding that a decision to reduce the number of overtime hours is not a mandatory subject of bargaining); *UPOA*, 39 OCB 29, at 4 (BCB 1987) (finding that a change in the amount of overtime allowed to perform certain job functions is not a mandatory subject of bargaining). However, this Board has held that the procedures or methods for the distribution of available overtime are mandatory subjects of bargaining under the NYCCBL. *See DC 37*, 67 OCB 3, at 7 (citing *Local 621*, 51 OCB 34 (BCB 1993) (finding the distribution of overtime is a mandatory subject of bargaining)). The rationale for this distinction is that “*procedures* by which overtime is . . . assigned, [do] not interfere with the employer’s managerial prerogative to schedule overtime . . . when it deems such overtime necessary.” *Local 621*, 51 OCB 34, at 13 (emphasis added).

Under the circumstances here, we find that the Bucksliip MSOT Eligibility Criteria are mandatory subjects of bargaining. The Bucksliip MSOT Eligibility Criteria establish a method for the distribution of MSOT to Marine Engineers, Pilots, and Wipers, after the FDNY has determined the need for MSOT. The eligibility criteria at issue do not concern when and how much MSOT the FDNY deems necessary. In fact, the City acknowledges that the Bucksliip’s MSOT eligibility criteria are intended “to maintain consistency in the equitable distribution of overtime amongst [all

Union] members” and to comply with Mayoral Directive [No. 94-3] that overtime be equitably distributed. (Ans. ¶ 53) Consequently, we find that the Buckslip MSOT Eligibility Criteria create a method for the distribution of MSOT and that the FDNY is required to negotiate this method. *See DC 37, 67 OCB 3* (finding that bargaining a method for the distribution of overtime does not interfere with [an] employer’s managerial prerogative to schedule necessary overtime).

Under NYCCBL § 12-306(a)(4), a public employer commits an improper practice by making a unilateral change to a matter within the scope of collective bargaining. *See DC 37, L. 1457, 1 OCB2d 32, at 26* (BCB 2008). Here, it is undisputed that the Buckslip MSOT Eligibility Criteria did not apply to Marine Engineers, Pilots, and Wipers prior to November 2, 2015. Nor is it disputed that effective November 2, 2015, the FDNY applied the Buckslip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers.

We find that the application of the Buckslip MSOT Eligibility Criteria to Marine Engineers, Pilots and Wipers is material, and not *de minimis*. A *de minimis* change is a “change in form only. . . [that does not] alter the substance of the benefit to the employee.” *DC 37, 4 OCB2d 43, at 8-9* (BCB 2011). Here, the changes were not in form only. Rather, they altered the procedures for the distribution of overtime, and impacted employees’ eligibility to work overtime. Further, the City admits that it did not bargain with the Union prior to applying the Buckslip MSOT Eligibility Criteria to Marine Engineers, Pilots, and Wipers. Accordingly, we find that a unilateral change to a mandatory subject of bargaining has occurred, in violation of NYCCBL § 12-306(a)(4).

We also find that the FDNY violated NYCCBL § 12-306(a)(5). NYCCBL § 12-306(a)(5) states it is an improper practice “to unilaterally make any change . . . to any mandatory subject of

collective bargaining . . . during a period of negotiations with a public employee organization . . .”

As set forth above, the implementation of the Buckslip constitutes a unilateral change to a mandatory subject of bargaining. Further, it is undisputed that the Buckslip was issued in the time period between the expiration of the 2011 Marine Engineers and Pilots Agreement and the 2010 Wipers Agreement and the ratification of the 2015 Agreements. Consequently, the FDNY’s implementation of the Buckslip MSOT Eligibility Criteria occurred during the period when the parties’ agreements were in *status quo*, in violation of NYCCBL § 12-306(a)(5).

Accordingly, we find that the City breached its duty to bargain over the Buckslip MSOT Eligibility Criteria, in violation of NYCCBL § 12-306(a)(1), (4), and (5).¹¹

¹¹ When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). *See DC 37*, 8 OCB2d 11, at 23 (BCB 2015); *Local 621, SEIU*, 2 OCB2d 27, at 14 (BCB 2009); *USCA*, 67 OCB 32, at 8 (BCB 2001).

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-4155-16, filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, against the Fire Department of the City of New York and the City of New York, hereby is granted in its entirety; and it is further

ORDERED, that the Fire Department of the City of New York rescind Buckslip No. OPS-15-11-15's Minimum Staffing Eligibility Criteria and reinstate the *status quo* regarding the distribution of Minimum Staffing Overtime for Marine Engineers, Pilots, and Wipers; it is further

ORDERED, that the Fire Department of the City of New York cease and desist from applying Buckslip No. OPS-15-11-15's Minimum Staffing Eligibility Criteria to Marine Engineers, Pilots, and Wipers until such time as the parties bargain over any such changes; and it is further

ORDERED, that the Fire Department of the City of New York make whole any Marine Engineers, Pilots, and Wipers affected by the implementation of Buckslip No. OPS-15-11-15's Minimum Staffing Eligibility Criteria to Marine Engineers, Pilots, and Wipers; and it is further

DIRECTED, that the Fire Department of the City of New York post the attached Notice of this Decision and Order for no less than 30 days at all locations used by the New York City Fire Department for written communications with employees represented by the Union.

Dated: October 6, 2016
New York, New York

SUSAN J. PANEPENTO

CHAIR

ALAN R. VIANI

MEMBER

M. DAVID ZURNDORFER

MEMBER

CAROLE O'BLINES

MEMBER

PETER PEPPER

MEMBER

NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 9 OCB2d XX (BCB 2016), in final determination of the improper practice petition between the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO and the Fire Department of the City of New York and the City of New York.

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-4155-16, filed by the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO, against the Fire Department of the City of New York and the City of New York, and the same hereby is, granted in its entirety; and it is further

ORDERED, that the Fire Department of the City of New York rescind Buckslip No. OPS-15-11-15's Minimum Staffing Eligibility Criteria and reinstate the *status quo* regarding the distribution of Minimum Staffing Overtime for Marine Engineers, Pilots, and Wipers; it is further

ORDERED, that the Fire Department of the City of New York cease and desist from applying Buckslip No. OPS-15-11-15's Minimum Staffing Eligibility Criteria to Marine Engineers, Pilots, and Wipers until such time as the parties bargain over any such changes; and it is further

ORDERED, that the Fire Department of the City of New York make whole any Marine Engineers, Pilots, and Wipers affected by the implementation of Buckslip No. OPS-15-11-15's Minimum Staffing Eligibility Criteria to Marine Engineers, Pilots, and Wipers; and it is further

DIRECTED, that New York City Fire Department post this Notice for no less than 30 days at all locations used by the New York City Fire Department for written communications with employees represented by the Union.

The City of New York

(Department)

Dated:

(Posted By)

(Title)

This Notice must remain conspicuously posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

