Uniformed Firefighters Ass'n, 43 OCB 70 (BCB 1989) [Decision No. B-70-89 (I)], aff'd, Uniformed Firefighters Ass'n v. Office of Collective Bargaining, No. 1065/90 (Sup. Ct. N.Y. Co. Nov. 26, 1990).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.

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DECISION NO. B-70-89
DOCKET NO. BCB-1117A-88
(I-193-88)

DECISION AND ORDER

During negotiations for a new collective bargaining agreement between the City of New York and the Uniformed Firefighters Association, the City announced its intent to delete a previous contractual requirement that engine companies (with stated exceptions) be staffed by no fewer than five persons at the start of each tour. In the City's view, minimum manning was not a mandatory subject of bargaining. The Union, on the contrary, demanded that the City restore minimum manning in the seventy-four engine companies that, by agreement in a time of fiscal crisis, had been less amply staffed than others.

This Board, by Decision No. B-4-89, sustained the City's contention that minimum staffing is not in itself a mandatory subject of bargaining. At the same time the Board made clear

that the UFA was not foreclosed from seeking to show the City's intended personnel plan would adversely affect employees' safety and workload.[1]

Having found sufficient grounds to warrant inquiring further into the consequences of the City's proposed actions, the Board ordered that a fact-finding hearing be conducted to consider "whether the reduction of minimum manning levels in firefighting companies from five-man to four-man crews, creates a practical impact on the safety and workload of firefighters." [2] If that

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[1] The New York City Collective Bargaining Law spells out the municipal employer's management rights (and their limits) as follows, in Section 12-306b:

> It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

[2] We remark that though the hearing notice quoted above referred to "firefighting companies" generically, the context makes clear (and the parties fully agree) that the present controversy relates solely to the staffing of engine companies. Ladder companies, staffed as they are by at least five firefighters, are not involved in this proceeding.

impact were shown to exist, the Board indicated that "the City will be directed to negotiate over its alleviation."

A qualified hearing officer was duly designated to conduct this further proceeding and to report to the Board. Six days of formal hearings, a massive record of testimony, scores of exhibits, voluminous briefs, and the hearing officer's report amply confirm the seriousness, capability, and thoroughness that characterized both parties' participation in these proceedings and thus provided the basis for the conclusions now to be stated.

DISCUSSION

We indicate at the outset the parameters of our consideration of the present controversy.

First, our decisions have abundantly established that the City's managerial prerogative extends to the subject of staffing levels and to the tactical utilization of available employees. These are matters beyond the scope of mandatory collective bargaining.

At the same time, however, this Board has repeatedly held that managerial action (or inaction) may be challenged before this Board on the ground that it allegedly has had a "practical impact" on affected employees' safety or workload. If the Board agrees that a practical impact of this nature has been a consequence of the City's unilateral judgment, the Board may then direct the City to negotiate, with a view toward alleviating the deleterious results (existing or threatened) of its managerial

act.

Our decisions have emphasized the proposition that a "practical impact" is far more than simply a change in the way things are done. A practical impact exists only when the Board finds that a given exercise of management prerogative has such extraordinary and substantial adverse effect upon the working conditions of employees as to impose, for example, "an unduly burdensome or unreasonably excessive workload" [3] or to constitute a patent threat to employee safety. [4]

If City action normally outside the boundaries of mandatory collective bargaining is nevertheless challenged because allegedly it does create a "practical impact" of this nature, the challenger bears a heavy burden of persuasion. Our Decision No. B-4-89 ordered that the present proceeding be undertaken precisely to ascertain whether reducing minimum staffing levels in some though by no means all engine companies should be deemed, in the light of what has been said above, to affect safety and workload so markedly as to warrant this Board's ordering negotiation between the City and the UFA.

The record of the hearing that followed the Board's order embodies extensive testimony buttressed by exhaustive researches reflected in the parties' eighty-four exhibits. Careful review

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[3] Decision No. B-9-68.

[4] Decision No. B-5-75.

of that record has left us unpersuaded that the City's plan to assign four rather than five firefighters to certain engine companies, considered together with its roster manning program, adaptive response policy, and the revision of engine company tactics, will have the objectionable effects the UFA has feared.

We do not suggest that the matter is undebatable. Highly qualified witnesses vigorously stated their belief that existing firefighting practices are preferable to those the City has designed for deploying its forces. Throughout, however, the materials before us reflect conflicting judgments concerning tactical matters as to which opinions may reasonably differ and as to which the City has responsibility for making decisive choices.

A considerable portion of the recorded testimony reflects opinions sharpened by the witnesses' direct experience. Drawing on that experience, witnesses summoned by the UFA tellingly recounted past firefighting episodes whose outcomes, for good or ill, were dramatically affected by the presence or absence of a five-firefighter engine company (rather than, as may occur if the City's plans remain unaltered, a four-firefighter company). We have been moved by the witnesses' sincerity and by their commendable public service.

Yet we sustain the City's view that plans for responding to more than 340,000 emergency incidents yearly need not be shaped by the "worst case scenario." At some point the City must have room to exercise a flexible judgment about how best it can

utilize its firefighters. [5] Departure from a single pattern shaped by past usage does not in and of itself suggest that firefighters' wellbeing has been adversely affected.

In the future as has been true in the past, firefighters' work will expose them to dangers and stresses. We are unpersuaded however, that the staffing patterns the City has in view -- differentiating among engine companies according to their location, coupled with a new adaptive response procedure [6] designed to assure the presence of a numerically adequate complement of firefighters at the scene of a fire -- are ill considered or otherwise disregard the interests of those whom the UFA represents. The City's speedy provision of a "second-due engine company" as a matter of routine may reasonably be viewed as a manpower supplement. It is plausibly deemed to offset whatever loss in effectiveness may occur when the initial response is by a four-firefighter engine company, rather than by a five-firefighter company as will be commonplace. Therefore, without concluding that the City's planning is indisputably

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[5] In recent years engine companies annually have coped with more than 70,000 non-structural fires (which, however, frequently are put out by extinguishers or booster lines and do not require the use of a hose) and with more than 30,000 potentially hazardous fires of a structure or its contents (though of these only about one in five required the use of even a single hose line and fewer than one in twelve required the use of two hoses).

[6] The adaptive response procedure, part of a "prioritized" manning program ("roster manning"), provides for the automatic dispatch of additional units when the initial response to a fire includes engines operating with fewer than five firefighters.

correct in every detail, we do conclude that the present proceeding has not demonstrated a "practical impact" on employee safety and workload within the meaning of the statute.

The Board takes note of a communication addressed to its hearing officer, well after the close of the hearing in this case, and of the Union's objections to this belated submission. We have decided to accept this submission because it represents a modification of the City's roster manning proposal which apparently gives greater assurance that personnel shortages will not interfere with achieving the manning level the City had projected.

In essence, the City has now guaranteed every firefighter in its employ (except during the first six months of probationary status or during final leave) ninety-six hours of overtime opportunities annually for which the authorized budgetary headcount will be reduced to 8896. The scheduling of overtime for each active firefighter will focus on periods of predictably low availability, thus assuring the presence of additional manpower precisely when personnel gaps might otherwise have aroused fresh concern about the workload or safety of firefighters on the "backstep."

The City's revised proposal confirms and reinforces this Board's conclusion that the roster manning program and its constituent elements, including adaptive response and revised engine company tactics, are not demonstrably likely to magnify the dangers or the work burdens inherent in firefighting and,

accordingly, may be made operative managerially rather than as a product of negotiation. The City's overtime guarantee, though unilaterally given, and the finite reduction in headcount are regarded by this Board as elements of the record our judgment reflects. We wish to emphasize that our decision is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future.

DETERMINATION AND ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

DETERMINED, that the City's plans to reduce minimum manning in some engine companies from five-man to four-man crews, which we have considered together with its plans concerning roster manning, adaptive response, and engine company tactics, have not been shown to have a practical impact on employee safety or workload within the meaning of the statute, and are therefore not matters as to which the City is obligated to engage in collective bargaining; and it is hereby

ORDERED, that the petition of the Uniformed Firefighters Association of Greater New York that the City be directed to bargain concerning those plans be, and the same hereby is,

dismissed.

Dated: New York, N.Y.
December 18, 1989

MALCOLM D. MacDONALD
Chairman

DANIEL G. COLLINS
Member

DEAN L. SILVERBERG
Member

CAROLYN GENTILE
Member

EDWARD F. GRAY
Member