L.983, L.1062, DC37, L.371, SSEU v. City, OLR, 45 OCB 6 (BCB 1990) [Decision No. B-6-90]

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

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 983 and 1062,

-and-

DECISION NO. B-6-90

LOCAL 371, SOCIAL SERVICE EMPLOYEES
UNION, AFSCME, AFL-CIO, DOCKET NO. BCB-1234-89

Petitioners,

-against-

THE CITY OF NEW YORK and THE OFFICE OF
MUNICIPAL LABOR RELATIONS,

Respondents.
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INTERIM DECISION AND ORDER

On December 5, 1989, District Council 37, AFSCME, AFL-CIO ("Petitioner" or "DC 37"),[1] filed a scope of bargaining petition against the City of New York and its Office of Municipal Labor Relations ("Respondent" or "City"), seeking an order:

> 1) declaring that the Respondents' planned layoff of bargaining unit employees, Motor Vehicle Operators ("MVOs") in the Child Welfare Administration of the Human Resources Administration ("HRA"), and retention of private employees from an outside contractor (Vera Institute of Justice, Inc.) to perform the same duties as the MVOs is a mandatory subject of bargaining under §12-307 of the NYCCBL in that such action affects the terms and

[1] DC 37 filed the petition on behalf of itself, its Local 983, Motor Vehicle Operator & Traffic Enforcement Agents, and its Local 1062, Supervisors of Automotive Plant and Equipment.

conditions of employment of present incumbent MVOs and MV Supervisors, or,

2) in the alternative, if such changes are not mandatorily bargainable, that Respondent is required nonetheless to bargain over the impact of such changes, and;

3) requiring that HRA not layoff any such bargaining unit members or require MV Supervisors to supervise private employees until the Board rules on the bargainability of this change and, if the change is found to be bargainable, until the parties conclude the bargaining process which would include a resolution before an impasse panel.

In a letter submitted with the petition, DC 37's General Counsel requested that the processing of this matter be expedited since MVOs will lose their jobs and all benefits as a result of this contract, and they and other affected unit employees (e.g., MV Supervisors) will suffer irreparable harm.

On December 7, 1989, Malcolm D. MacDonald, the Chairman of the Board of Collective Bargaining ("Board"), directed that the Union's request to expedite processing of this matter be granted, and accordingly, and in the exercise of his discretion under Section 13.6 of the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"),[2] shortened the City's time to answer the petition from ten to seven days and the Union's time to reply from ten to five days. The City, after receiving a one day extension of time, filed its answer to the petition on December 13, 1989. The Union filed a reply on December 18, 1989.

On January 29, 1990, DC 37 filed an amended scope of bargaining petition, adding Local 371, Social Service Employees Union, AFSCME, AFL-CIO ("Local 371") as a petitioner to this proceeding. The amended petition, in

[2] Section 13.6 of the OCB Rules, in pertinent part, provides that the Director or a Deputy Director acting in his absence, for good cause shown, may extend or shorten any time limit prescribed or allowed in these rules.

addition to restating each allegation of the earlier scope of bargaining petition, claims that Respondent's decision to contract out the work of MVOs also has an impact on Caseworkers[3] employed by the Child Welfare Administration of the HRA.

After receiving an extension of time, the City filed an answer to the amended petition on February 15, 1990. DC 37 filed a reply on February 22, 1990.

Background

The Child Welfare Administration ("CWA"), in the performance of child protective services and foster care functions, utilizes transportation services to:

> enable the rapid removal from their homes of children who have been abused and/or neglected or children whose safety and well being are in serious jeopardy; obtain medical examinations and/or emergency treatment for such children; perform foster care placements; transport children to and from CWA offices and programs (including Nurseries/Team lounges as well as to and from Family Courts); enable rapid investigation of serious abuse and/or neglect allegations; and to transport staff home following the performance of after hours placements.[4]

In 1984, the City began using the competitive bid process to "contract out" for these transportation services and awarded several contracts to "Big Apple Car Services" and "Always Auto Leasing."[5] On or about December 2, 1988,

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[3] DC 37 is the certified bargaining representative of Caseworkers who belong to Local 371.

[4] See, HRA's contract funding proposal submitted to the City's Board of Estimate, at Addendum V, Section 1.

[5] The City alleges that prior to 1984, CWA's transportation needs were met using a variety of services including yellow cabs, (continued...)

the City discontinued its contracts with Big Apple Car Services, which provided approximately 60% of CWA's transportation needs, due to "irregularities." The City states that in order to maintain CWA's transportation program it hired City employee MVOs, for the most part on a per diem basis; the remaining 40% of services were provided by Always Auto Leasing, whose contracts were due to expire on July, 31, 1989.

On June 29, 1989, the HRA was calendared to submit to the Board of Estimate for approval a funding proposal awarding a sole source contract for all of CWA's transportation services to the Vera Institute of Justice, Inc. ("Vera"). In the section of the proposal entitled "Explanation of the Need for the Contract," the HRA states:

> Failure to contract out for transportation services would result in the need to establish a large scale, in-house transportation system involving the use of agency vehicles and drivers and to purchase some services on a "cash and carry" basis. These methods of transporting children and staff would be difficult to administer, less efficient and more costly.

The initial request was "laid over" by the Board of Estimate until July 20, 1989. Upon learning of HRA's proposal, DC 37's Political Action and Legislative Department prepared a Legisla-

tive Memo entitled "We Oppose" dated July 19, 1989, and filed it with the Board of Estimate. The funding proposal continued to be laid over, remaining on the Board of Estimate's calendar until September 28, 1989 without any action taken. Petitioner states that when the proposal no longer appeared on

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[5](...continued)
private car services and gypsy cabs.

the calendar, it believed the "issue of contracting out the MVO jobs was dead."

On or about November 15, 1989, through an alternative competitive bidding process, HRA awarded Vera an agency-wide contract for all of the transportation services at issue. An internal memorandum dated November 27, 1989, from HRA's Office of Labor Relations to its Office of Administrative Services regarding implementation of the contract, states:

> This is to inform you that CWA has established a transportation services contract with [Vera]. The contract, which is scheduled to begin on December 4, 1989, will be implemented in two six month phases. During the first six months, the number of service hours to be provided by [Vera] will be limited as follows:
>
> Month 1 (December) - 1,000 hours
> Month 2 (January) - 3,000 hours
> Month 3 (February) - 5,000 hours
> Month 4 (March) - 7,000 hours
> Month 5 (April) - 9,000 hours
> Month 6 (May) - 10,000 hours
>
> By the seventh month (June, 1990), services will be provided by [Vera] to all covered CWA locations.
>
> Based on an analysis of the number of service hours used per month, we do not anticipate that we will need to terminate any per diem MVOs during the first two months of the contract (December and January). However, in February we anticipate a need for only 78 MVOs. At that point, it is likely that we will have to terminate excess per diem MVOs (unless the attrition rate is high). Our analysis indicates that we will retain 55 per diem MVOs in March, 33 in April and 22 in May.
>
> Although we plan to terminate all contracted temp drivers prior to termination of per diem MVOs, we may, at any point during the first phase of the [Vera] contract, require the services of temp drivers to fill in for absentees.
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> We plan to refer terminated per diem MVOs to [Vera] for possible employment. [Vera] has indicated that it would be interested in hiring acceptable applicants.

The Petitioner states that it did not learn until late November, "when the MVOs were told by management that their jobs would be eliminated," that the City had competitively bid the contract. On December 4, 1989 the Petitioner formally demanded that HRA bargain with DC 37 over changes in the terms and conditions of employment of affected MVOs and MV Supervisors prior to implementation of the Vera contract.[6] DC 37 filed a scope of bargaining petition concerning these matters the following day, which it amended on January 29, 1990.

[6] In a separate letter dated December 4, 1989, DC 37 demanded that HRA supply the Petitioner with "a copy of the contract and bid specifications so that [it] may determine the impact on [its] members."

RELEVANT STATUTORY PROVISION

Section 12-307 of the NYCCBL, in relevant part, provides:

Scope of collective bargaining; management rights.

a. Subject to the provisions of subdivision b of this section and subdivision c of Section 12-304 of this chapter, public 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 ....

* * *

b. 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.

Positions of the Parties

DC 37's Position

The Petitioner does not dispute that Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL") gives the City the right to "determine the methods, means and personnel by which government operations are to be conducted" or to "relieve its employees from duty because of lack of work or for other legitimate reasons." However, DC 37 contends that Respondent's decision to contract out bargaining unit work is a mandatory subject of bargaining to the extent that "such action affects the terms and conditions of employment" of MVOs, MV Supervisors and Caseworkers.

Assuming, arguendo, that the Board does not find that implementation of the Vera contract is a matter within the scope of mandatory collective bargaining (i.e., that the City acted pursuant to its rights under Section 12-307b of the NYCCBL), Petitioner seeks a Board determination that the City's exercise of managerial prerogative triggers a per se practical impact on MVOs who will be laid off; a per se safety impact on MV Supervisors and Caseworkers; and a practical impact on workload of MV Supervisors.

As to MVOs affected by implementation of the Vera contract, the Petitioner submits that it is "well established that practical impact is implicit in any layoff,"[7] and that those employees are entitled to bargain with management not as to the decision to layoff, but as to the per se practical impact which it must cause. Petitioner contends further that where

[7] Petitioner cites Decision No. B-5-80.

layoffs are certain to occur, a fact which the City's own documents make undeniable, the employer is required to bargain immediately.[8]

The Petitioner rejects as irrelevant the City's argument that per diem employees have no expectation of continued employment and, in any event, submits that many "significant events have occurred since the MVOs were hired which altered their expectation that their jobs would be temporary."[9] Furthermore, Petitioner disputes the City's claim that only per diem MVOs assigned to CWA will be terminated, submitting documentation to indicate "that some, and perhaps all, of the MVOs were appointed as 'provisional' and not per diem employees."[10]

The nature of their appointments notwithstanding, DC 37 submits that the City has a per se duty to bargain over the practical impact of the layoffs and that such negotiations could encompass such matters as notice, order and recall of laid off MVOs, as well as the impact on employees left behind.[11]

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[8] Petitioner cites Decision No. B-35-82.

[9] For example, Petitioner submits that over one year has passed since most of the MVOs were hired by CWA, which exceeds the maximum period of time a temporary appointment is authorized under Section 64 of the Civil Service Law.

[10] Petitioner submitted an HRA Office of Personnel Services form entitled "Introduction of New Assigned Employee." DC 37 alleges that this document constitutes the "appointment papers" of a provisional MVO hired on February 2, 1989 who was assigned to HRA/CWA.

[11] Petitioner cites Decision Nos. B-18-75; B-3-75.

With respect to the alleged safety impact on the MV Supervisors and Caseworkers, the Petitioner submits that Vera drivers "are ex-convicts[12] who have not been trained as drivers ... and who have not undergone screening by the Department of Personnel which would ensure that there is nothing in their backgrounds which would pose a threat to the safety of [MV] Supervisors" and those they transport. Petitioner contends that since December 4, 1989, there have already been several incidents involving Vera drivers "which illustrate serious safety problems which affect the MV Supervisors, Caseworkers and children under CWA's care."

Two of those incidents, Petitioner submits, involved alleged traffic violations for which the Vera drivers were stopped by police and that in one instance, the Caseworker being transported was forced to seek alternative means to reach his destination. Petitioner alleges further that Police Officers, in examining the papers for the Vera vehicles involved, found that both cars lacked the appropriate licenses and insurance. DC 37 contends "that so long as some, if not all, of the vehicles leased by Vera are improperly licensed and insured, anyone coming in contact with them is at great risk."

In further support of its contention that the safety of MV Supervisors are at risk, DC 37 submitted the Affidavit of Daniel Rosenblum ("Rosenblum Affidavit"), an MV Supervisor at CWA. Mr. Rosenblum states, at ¶11:

> My duties as an MV Supervisor include supervising MVOs who transport children and caseworkers to and from various locations within the City of New York .... I dispatch drivers to locations where transportation is needed. I am responsible for determining the safety of the vehicles which will be used to transport any CWA

[12] In the contract proposal submitted to the Board of Estimate, HRA described Vera as a not-for-profit corporation which recruits "hard to employ" populations.

> clients or employees. I am also responsible for determining if the driver of such vehicle is impaired or unable for any other reason to perform his/her duties. As a supervisor, I am responsible for evaluating MVOs under my supervision. If I determine that a driver is unsafe or not performing his/her job, it is my responsibility to recommend that appropriate action, including dismissal, be taken to correct the problem.

Additionally, Petitioner submits the Affidavit of Ketly Henry ("Henry Affidavit"), a Caseworker assigned to CWA who on January 5, 1990, was assigned a Vera driver to transport her, a fellow Caseworker and two children from Spring Valley to the Queens Family Court. Ms. Henry alleges that the Vera driver got lost en route to both the foster home and the court, drove recklessly, refused to follow directions, was verbally abusive towards Henry and demanded that she exit the car on the shoulder of a highway, slammed the car door on Henry's leg when she refused to exit the vehicle, and reached their final destination in Queens three hours later than scheduled. Henry, who is pregnant, states that she became nauseated, required medical treatment for her injuries and has not been able to return to her duties as a Caseworker since the episode.

On the basis of this incident, Petitioner contends that Vera drivers evidently do not possess the training, skill, and qualifications[13] to ensure the safety of those they transport and, thus, pose an immediate and demonstrable threat to the safety of Caseworkers and the children they are entrusted to protect. Thus, Petitioner asserts, "given the serious risks at hand and the potential for great harm," Respondents should be ordered to

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[13] Petitioner denies that the ex-convicts employed by Vera represent persons of "good moral character" as contemplated by Article V, Section 5 of the Vera contract. (Infra, at 16-17.)

bargain immediately over the impact of its decision on bargaining unit employees.

Additionally, Petitioner alleges that implementation of the Vera contract has a practical impact on the workload of MV Supervisors within the meaning of Section 12-307b of the NYCCBL. As illustrative of the alleged impact, DC 37 submits the Rosenblum Affidavit, which states, at ¶20:

> Since CWA started phasing in the Vera contract on December 4, 1989, I am now required to assume the additional duties of ordering Vera dispatching personnel to send drivers in vehicles to pick up children and/or employees of CWA. If a driver fails to show up at a job within the allotted time, I am responsible for writing them up for possible action by the agency. At the moment, Vera personnel work from 8:00 am to 12:00 midnight. I also continue to be responsible for supervising the work of MVOs.

In further support of its claim, Petitioner contends that the City, through collective bargaining,[14] waived its right to act unilaterally concerning changes in supervisory responsibilities of MV Supervisors. Therefore, DC 37

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[14] Article V, Section 2 of the 1984-87 Collective Bargaining Agreement ("Agreement") between the parties provides:

> The Union recognizes the Employer's right under the [NYCCBL] to establish and/or revise standards for supervisory responsibility in achieving and maintaining performance levels of supervised employees for employees in supervisory positions listed in Article I, Section 1 of this Agreement. Notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees are within the scope of collective bargaining. The Employer will give the Union prior notice of the establishment and/or revision of standards for supervisory responsibility hereunder.

asserts, any changes resulting from implementation of the Vera contract on the workload of MV Supervisors give rise to bargainable issues.[15]

Finally, Petitioner seeks a Board order directing the City to refrain from implementation of the Vera contract to the extent it affects terms and conditions of employment of any bargaining unit members until a decision has issued in this matter. Additionally, Petitioner seeks that in the event the Board orders bargaining, that such implementation be enjoined until completion of the bargaining process.

City's Position

Respondent contends that its decision to eliminate per diem MVOs assigned to CWA and subcontract the work to Vera "falls squarely within its managerial rights under Section 12-307b of the NYCCBL." The City contends that this Board and the Public Employee Relations Board ("PERB") have consistently found demands involving manning,[16] layoffs,[17] and subcontracting[18] beyond the scope of mandatory collective bargaining. Moreover, the City submits, in Decision No. B-5-80, "the Board required a showing that the work belonged exclusively to the bargaining unit before it would limit management's exercise of its statutory rights." Because the transportation services at

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[15] Petitioner cites Decision No. B-7-69.

[16] The City cites Decision Nos. B-4-89; B-23-85; B-6-79; B-5-75; Buffalo, 13 PERB ¶3084; Fairview; 12 PERB ¶3118; Newburgh, 10 PERB ¶3001.

[17] The City cites B-2-76; B-25-75; B-18-75; B-3-75; B-4-71; Indian River, 20 PERB ¶3047 (1987).

[18] The City cites Decision No. B-1-74; Indian River, 20 PERB ¶3047.

issue here were never the exclusive work of per diem MVOs, the City argues, Petitioner cannot establish that this matter is a mandatory subject of bargaining.[19]

In response to the alleged practical impact on MVO's, the City cites Pearl River Union, 11 PERB ¶4530 (1978), for the proposition that a union demand concerning the reduction in work force and impact of that decision is nonmandatory if "[s]uch a provision would interfere with the right of a public employer to adjust its workforce in accordance with its felt needs."[20]

With respect to the alleged safety impact on MV Supervisors and Caseworkers, the City contends that Petitioner has failed to demonstrate any facts, other than one isolated incident, to warrant a determination of practical impact. When a practical impact on safety has been alleged, the City asserts, "the union must present 'specific facts' in their argument showing how the proposed change has been, or will be a threat to the safety of its members." Respondent submits that the Board's decisions have "emphasized the proposition that 'practical impact' is far more than simply a change in the way things are done."[21]

The City asserts that the Petitioner offers nothing but pure conjecture and speculation - while the safeguards detailed in the Vera contract specifications provide "the safest feasible policy." In support of

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[19] The City also cites Indian River, 20 PERB ¶3047 (1987) (Employer's unilateral decision not subject to prior negotiations absent showing that work belonged exclusively to the bargaining unit.)

[20] Id. at 4569

[21] The City cites Decision No. B-70-89.

its position, the City points out that the Vera contract, in relevant part, provides:

> C. ANCILLARY SERVICES
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> Due to the sensitive circumstances surrounding the need to transport children and Agency staff, the Contractor shall establish and maintain special recruiting, training, supervision and monitoring of its drivers and other personnel (hereinafter called "ancillary services"). Such ancillary services shall include but not be limited to initial driver screening and medical examinations and training including: driver sensitivity training; defensive driver training; a Red Cross approved course in First Aid and drug and alcohol testing. The Contractor shall establish and staff a system of supervision that will enable it to monitor the performance of all drivers, dispatchers and mechanics employed by it in connection with the performance of this Agreement.
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> * * *
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> ARTICLE V - VEHICLES, DRIVERS AND DISPATCH BASE STATIONS
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> * * *
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> 2. Vehicles shall be properly inspected and maintained at all times to ensure the safety and welfare of children and staff....
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> * * *
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> 4. All Vehicles to be used ... must comply with regulations of the New York State Department of Motor Vehicles.... The Contractor and all vehicles to be used for the performance of work under this Agreement must be licensed with the New York City Taxi and Limousine Commission....
>
> 5. In order to protect the safety and welfare of children and Agency staff, the Contract shall employ only persons of good health and moral character as drivers. As part of its screening and hiring process, the Contractor shall provide all prospective drivers with thorough medical examinations, including drug and alcohol testing. The Contractor shall thereafter, certify to the Agency, that all drivers employer under this Agreement are in good health, have tested negatively for drug and alcohol abuse and, to the best information and belief of the Contractor, are persons of good moral character. Screening shall also include inquiry into the State Central Registry of Child Abuse and Maltreatment ("State Central Registry"). The Contractor shall compile required clearance forms and submit to CWA for transmittal to the New York

> State Department of Social Services. CWA will inform the Contractor of the results of clearances.
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> * * *
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> 7. The Contractor shall review New York State Department of Motor Vehicle driver abstract records and shall certify to the Agency that all drivers are competent, reliable and properly qualified by experience and driving record to satisfactorily perform their duties under this Agreement.... It is further agreed that in its sole discretion, the Agency may, at any time during the term of the Agreement, demand the removal of any driver from work under this Agreement.
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> 8. The Contractor shall agree not to hire or retain any person who refuses to grant authorization for fingerprinting as provided by law and in this Agreement or criminal conviction record review; who has not completely and truthfully reported information concerning his/her criminal convictions; who has a criminal conviction record, subject to Article 23-A of the New York State Correction Law; or has been, or is currently the subject of an indicated child abuse and maltreatment report on file with the State Central Registry....
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> 9. The Contractor shall provide two weeks of orientation and "hands on", behind the wheel training to all drivers....
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> * * *

The City contends that, pursuant to the contract, all Vera vehicles are properly registered with the Taxi and Limousine Commission ("TLC") and insured. As for the two traffic incidents referred to by MV Supervisor Rosenblum, the City submits that since "these allegations fail to specify a driver name, number or vehicle number, they cannot even arguably constitute a basis for a prima facie finding of practical impact." Furthermore, the City asserts, "any known instances in which tickets were issued rejecting [a Vera vehicle's papers] were later resolved in favor of Vera."[22]

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[22] In support of its contention, Respondent submits photocopies of licenses and/or applications for TLC licenses, NYS motor vehicle registrations, and insurance cards for eight Vera (continued...)

With respect to the incident involving Ms. Henry, the City contends that it "could similarly have occurred under the pre-Vera arrangement and ... is virtually unpreventable." Respondent submits that the Vera driver involved was fired later that day pursuant to the City's discretion under the Vera contract, which demonstrates that the "safest feasible policy" is already in place. "The contractual safeguards included in the Vera contract," the City urges, "clearly outweigh the [Petitioner's] attempted exploitation of one isolated incident."

Similarly, Respondent claims that DC 37 has failed to allege any facts which demonstrate that the Vera contract has had any practical impact on MV Supervisors, other than a "few brief allegations" of a single witness (Mr. Rosenblum). In fact, the City denies that the Vera contract requires any additional duties be performed by MV Supervisors. Quoting from the Rosenblum Affidavit, the City points out that there is no difference between dispatching either a Vera driver or a City MVO to a job; and that the MV Supervisor must perform the same function with respect to possible disciplinary actions, whether it be a Vera driver or a City MVO.

Finally, the City contends that the instant petition should be dismissed because it is untimely. Respondent describes DC 37's petition "as a demand to negotiate the 'unilateral action' taken by HRA on or about June 29, 1989" and that, therefore, the instant petition should be construed as a refusal to bargain charge[23] rather than a scope petition. In support of its argument,

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[22](...continued)
vehicles.

[23] Section 12-306a of the NYCCBL provides:
(continued...)

Respondent contends that DC 37 seeks to procure a bargaining order, a remedy issued in an improper practice forum, "under the guise of a scope of bargaining petition" only because it failed to pursue this matter within the statutory four-month period to file an improper practice petition.[24] The City maintains that because Petitioner was aware of HRA's intentions to subcontract the transportation services at issue by at least July 19, 1989, as is evidenced by its legislative memo entitled "We Oppose", and more than four months elapsed before the instant petition was filed on December 5, 1989, the petition should be dismissed in its entirety.

Discussion

Initially, we address the City's argument that the claims contained in the instant petition were not timely made, pursuant to the OCB Rule 7.4 relating to the filing of improper practice charges. Petitioner contends, and we agree, that Respondents mischaracterize the nature of the instant proceeding. The NYCCBL provides two mechanisms for the resolution of bargainability disputes; one proceeding upon "request" pursuant to Section 12-

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[23](...continued)
Improper public employer practices. It shall be an improper practice for a public employer or its agents:

* * *

(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.

[24] Section 7.4 of the OCB Rules requires that a petition alleging an improper practice in violation of Section 12-306 of the NYCCBL be filed within four (4) months.

309,[25] and another proceeding as part of an improper practice finding pursuant to Section 12-306. It is well-settled that Section 12-309 of the NYCCBL was included in the statute

> in order to make possible the resolution of such questions by means of a type of declaratory judgment process which is deemed preferable to forcing a party to resort to an improper practice proceeding in which he must charge the other side with a refusal to bargain.[26]

Thus, determinations of bargainability may be made independent of allegations of improper practice.

Petitioner here does not allege a refusal to bargain; nor does it contend that Respondent has committed an improper practice. Rather, DC 37 asks us to determine whether certain matters fall within the scope of mandatory collective bargaining or, in the alternative, whether the exercise of managerial prerogative has had a resultant practical impact within the meaning of the Section 12-307b of the NYCCBL. Accordingly, we reject the City's contention that Petitioner sought to circumvent the procedural requirements of Section 7.4 of the OCB Rules and will consider the substantive issues that follow within the context of a scope of bargaining proceeding.

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[25] Section 12-309a of the NYCCBL, in relevant part, provides:

> The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty ... on the request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining.

See Decision No. B-24-75.

[26] Decision No. B-21-87. See also, Decision Nos. B-38-82; B-5-75.

Petitioner alleges that the management's rights clause notwithstanding, the City's decision to subcontract bargaining unit work affects terms and conditions of employment of MVOs and, thus, is a matter within the scope of mandatory collective bargaining.[27] The City claims that its decision to subcontract its transportation services and eliminate the assignment of these duties to per diem MVOs who have no expectancy of continuing employment, is an exercise of management prerogative and therefore is outside the scope of mandatory collective bargaining.

As a preliminary matter, we note that Article I, Section 1 of the Agreement between the parties, entitled "Union Recognition and Unit Designation" provides:

> The Employer recognizes the Union as the sole and exclusive collective bargaining representative for the bargaining unit set forth below, consisting of employees of the Employer, wherever employed, whether full-time, part-time, per annum, hourly or per diem....

Accordingly, Petitioner has standing to bargain, pursuant to Section 12-306a of the NYCCBL, on behalf of all such categories of employees as are listed in the quoted language of Article I, Section 1. Moreover, while it is true that per diem employees are not covered by the job security provisions of the Civil Service Law,[28] they are certainly governed by the general provisions of the NYCCBL, which on its face makes no distinction between the scope of bargaining

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[27] We note that Petitioner alleges also that the City's decision is mandatorily bargainable as to MV Supervisors and Caseworkers, but that it fails to allege any facts or persuasive argument which support such a contention. Rather, all of its assertions are in support of and, thus, will be addressed within the context of a finding of practical impact, infra.

[28] Civil Service Law Section 75, et seq.

for per diem and permanent employees.[29] In considering a similar issue, the Board of Certification, in Decision No. 1-77, found that "there can be no question that [temporary] employees who work long and continuous periods of time have rights that must be recognized under the NYCCBL." Therefore, we find here that the civil service status of affected MVOs is not relevant for the purposes of determining whether the City has a duty under the NYCCBL to negotiate with Petitioner concerning its decision to subcontract work previously assigned to these members of the bargaining unit.[30]

The issue of whether subcontracting services by substituting private employees for public employees implicates terms and conditions of employment of replaced public employees is one of first impression for this Board. Previously, we have determined the bargainability of related issues such as demands for contractual job security provisions;[31] the reassignment of duties from one bargaining unit to another without layoffs, i.e., "civilianization" cases;[32] and layoffs in conjunction with a curtailment of services, i.e.,

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[29] Cf., Decision No. B-18-75 (We made no distinction between competitive and non-competitive employees with respect to determining the negotiability of a demand for layoff procedures); Decision No. B-25-80 (We concluded that per diem grand jury stenographers were municipal employees as defined by Section 12-303e of the NYCCBL); Decision No. B-1-80 (We found that while non-permanent CETA employees were not eligible to invoke the protections of the contractual grievance procedure as worded, the NYCCBL or state law does not bar the extention of such rights to this category of public employee).

[30] We also note that there is some dispute as to whether all of the MVOs who will be affected by the City's decision are, in fact, per diem employees.

[31] E.g., Decision No. B-1-74.

[32] E.g., Decision No. B-35-82 and the cases cited therein.
(continued...)

"fiscal crisis" cases.[33] Our most definitive statement on the subject was set forth in Decision No. B-1-74 where, in the course of negotiations for a Citywide contract, DC 37 filed a scope of bargaining petition seeking to submit the following demand to an impasse panel:

> DEMAND #44: THE CITY SHALL NEGOTIATE WITH THE UNION AS TO THE PRACTICAL IMPACT OF CONTRACTING OUT WORK NORMALLY PERFORMED BY EMPLOYEES COVERED BY THE CONTRACT.

We stated that "[a]lthough the right to subcontract would clearly be within the City's reserved management rights, as set out in [§12-307b] of the NYCCBL, it is equally clear that the practical impact of a decision to subcontract on the terms and conditions of employment of affected employees must be bargained over."[34] In the analysis that followed this statement, we noted that our interpretation of the management rights clause was consistent with earlier decisions of PERB on subcontracting.[35] We also noted, however, that in the private sector, under certain circumstances "the subcontracting of

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[32](...continued)
But see, Decision No. B-12-77 (In dictum, we stated that a demand for the inclusion of a provision in a collective bargaining agreement defining a grievance as an alleged wrongful assignment of unit-work to non-unit employees would be a mandatory subject of bargaining.)

[33] E.g., Decision No. B-2-76 and the cases cited therein.

[34] We ultimately held that Demand #44 was not appropriate for submission to the impasse panel because to do so "would prevent the City's taking the initiative to relieve any impact in the most expeditious manner and ... would oust the Board of its duty and obligation to interpret and enforce the NYCCBL and give the arbitrator the authority to determine the meaning of the term practical impact, whether an impact occurred, and the ensuing obligations of the parties."

[35] E.g., Union Free School District, 6 PERB ¶4520 (1973).

work previously performed by bargaining unit members is a mandatory subject of bargaining."[36]

Subsequent to issuance of Decision No. B-1-74, PERB again dealt with the question of whether an employer could assign unit work to non-union employees. In Somers, 9 PERB ¶3014 (1976), PERB stated that prior to this case it had not addressed the question of whether subcontracting for economic reasons was a mandatory subject of bargaining.[37] In that decision, taking notice of the Supreme Court's decision in Fibreboard, PERB found that "in a situation where the employer might, out of a desire to cut costs, cause one group of employees to be replaced by another group that would perform the same services," subcontracting for this purpose does not exempt a public employer from its obligation to bargain.[38]

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[36] In Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 57 LRRM 2611 (1964), the Supreme Court held that "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment is a statutory subject of collective bargaining under §8(d)" of the NLRA.

[37] E.g., Matter of Half Hollow Hills, 6 PERB ¶3082 (1973) (unlawful when done for purposes of frustrating the organization of employees); Rensselaer, 8 PERB ¶3064 (1975) (no refusal to bargain absent a demand to negotiate); Oswego, 5 PERB ¶3023 (1972) (unlawful if no intention to curtail or limit services).

[38] See also, Wappingers, 19 PERB ¶3037 (1986); Tonawanda, 17 PERB ¶3091 (1984); Saratoga Springs, 12 PERB ¶7008 (1979) (Where, on appeal, the Appellate Division, 3d Dept., held "[t]here is a substantial difference between the abolition of civil service positions to effectuate a reduction in the work force and the abolition of positions for the purpose of subcontracting for the same services without the reduction of the work force even though both may result in an economic benefit to the taxpayer.")

Although private sector precedents are not binding upon this Board and decisions of PERB are often distinguishable on the basis of the statutory management rights provision of the NYCCBL, "they may be properly referred to for such enlightenment as they may render in our interpretation of the scope of bargaining under the NYCCBL."[39] Accordingly, we note that PERB continues to limit the scope of mandatory bargaining in subcontracting cases to circumstances where "the work in question has been performed exclusively by the unit claiming the right of retention."[40] For example, in Ellenville, the employer had since 1972, transported handicapped children using exclusively private carriers with the exceptions of 1977 and 1978, when unit employees were utilized in addition to private carriers. Under those circumstances, PERB found the employer's unilateral decision to subcontract its entire operation again in 1979 not subject to a duty to bargain.[41] Because there had been no established practice for utilizing only unit employees for the work at issue, PERB held that the employer was under no duty to negotiate with the union prior to its decision.

In the instant matter, it cannot be argued that the work performed exclusively by the private contractors (i.e., Big Apple Car Services and

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[39] Decision No. B-21-75. See also, Decision No. B-18-75.

[40] Indian River, 20 PERB ¶3047 (1987). See also, New York City Transit Authority, 20 PERB ¶3025 (1987) (insufficient evidence to show that work in question was performed exclusively by transit police); Ostelic Valley, 19 PERB ¶3072 (1986) (no evidence to show that duty was performed exclusively by the Library Media Specialist); Ellenville, 13 PERB ¶4532 (1980).

[41] See also, Indian River, 20 PERB ¶3047 (1987) (record revealed that work was performed by both unit and non-unit bus drivers).

Always Auto Leasing) for at least four years (1984-88) and in part for the following two, was not the same work as was performed by the MVOs employed by the City. Clearly, we cannot conclude that the MVOs affected by the City's decision to contract out its entire transportation operation again in 1990, albeit for economic reasons, have a reasonable claim of entitlement to preservation of the work. The custom had been to utilize private contractors and the exception was to involve City employees on a non-exclusive basis. Accordingly, we find that the City's decision under these circumstances is not a matter which falls within the scope of mandatory collective bargaining as to MVOs.

Having determined that the City may subcontract the duties of MVOs and that it may not be required to negotiate with respect to that decision, we next consider whether the City is obligated to bargain, as the Petitioner contends, concerning the per se practical impact of its decision on MVOs. DC 37 submits that an impact on employees laid off or to be laid off is implicit in any layoff situation. The City argues that because bargaining on the impact of its decision would interfere with its right to relieve employees from duty in accordance with its needs, "the impact of that decision is a nonmandatory subject of negotiations." The City also implies that because per diem MVOs have no expectancy of continuing employment, there can be no impact.

As Petitioner correctly points out, we have long held that a management decision to lay off employees results in a per se practical impact;[42] and that the practical impact resulting from the employer's decision to lay off is

[42] Decision Nos. B-37-82; B-41-80; B-21-75; B-18-75; B-3-75.

immediately bargainable.[43] The City does not deny, nor do the facts belie, that per diem MVOs will be terminated as a direct consequence of the City's decision. The City's characterization of its actions as a "decision to eliminate per diem assignments of the MVOs" rather than a layoff is, in our view, a distinction without a difference. Rather, we find that Petitioner has established that there have been or will be layoffs of bargaining unit members, since there is no dispute that City employees who serve in MVO positions will be replaced by private employees performing the same duties, and that, therefore, the City has an obligation to bargain over the impact of its decision.[44]

We are unpersuaded that the imposition of a duty to bargain over impact of the layoffs in this situation would abridge the City's right to eliminate the positions in the first place, as the City contends. The PERB decision upon which the City relies for this argument concerned a demand that would require, notwithstanding any layoff of teachers, that class sizes not increase.[45] There, PERB held that while the employer had a duty to bargain the impact of a decision to layoff personnel, the demand went much further,

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[43] Id.

[44] In view of this finding, we note that resolution of the dispute concerning the civil service status of affected MVOs, i.e., per diem or provisional, is not necessary for purposes of this decision. For reasons already stated supra, at 22-23, provisional MVOs would have the same collective bargaining rights concerning the bargainability of layoff procedures and related issues, as per diem MVOs under the NYCCBL.

[45] Pearl River Union, 11 PERB ¶4530 (1978).

"as it would interfere with the District's well established prerogative of fixing the number of students in a class" and was, therefore, nonmandatory.[46]

Clearly, the disposition in Pearl River Union has no bearing on our decision here. The Petitioner has not made specific bargaining demands at this time. Furthermore, we will not speculate as to the scope of the negotiations that will take place. There are various types of alleviation that Petitioner conceivably could seek which neither conflict with Civil Service Law nor infringe on rights conferred by Section 12-307b of the NYCCBL.[47] We emphasize, however, that our determination herein does not require the City to agree on any specific demand, but merely to negotiate, subject, of course, to the possibility of resorting to an impasse panel.[48] Furthermore, if the City disputes the bargainability of a specific demand put forth during bargaining, it, too, is free to request a determination as to whether a matter is within the scope of collective bargaining, pursuant to Section 12-309a(3) of the NYCCBL.

Finally, the City cannot avoid a duty to negotiate by simply making a unilateral determination that there is no impact any more than the City could avoid an obligation to discuss a grievance on the ground that in its judgment the grievance is without merit. Moreover, it is well settled that the

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[46] Id, at 4569.

[47] I.e., severance pay, layoff procedures, reasonable notice, recall rights. See e.g., Decision No. B-21-75. See also, Decision No. B-3-73 (We held that a demand for a seniority clause for "seasonal" lifeguards was not inconsistent with Civil Service Law or with management rights and, therefore, was a mandatory subject of bargaining.)

[48] Decision No. B-18-75.

question whether or not there has been an impact on employees as a result of an exercise by the City of a management right is a matter exclusively within the jurisdiction of this Board.[49]

For all of these reasons, we conclude that the City's decision to subcontract the transportation services at issue creates a per se practical impact on affected MVOs and order the City to bargain immediately on measures for the alleviation of that impact. However, we decline to enjoin the planned phase-in of Vera drivers until completion of the bargaining process, as the Petitioner requests. In so doing, we note that the plan contemplates a gradual termination of per diem MVOs commencing in February 1990, and only in the event that reduction through attrition is insufficient.[50] Moreover, it is well settled that practical impact bargaining is directed toward alleviating adverse effects resulting from the exercise of managerial prerogatives. Neither bargaining nor ultimate resort to an impasse panel for such alleviation would warrant delaying the City's implementation of its decision to lay off employees.[51]

Having determined that layoffs resulting from the phase-in of the Vera contract constitute a per se impact on affected MVOs, we now turn to the

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[49] Decision Nos. B-13-74; B-9-68.

[50] We note also that an HRA interoffice memorandum, dated January 11, 1990, concerning the failure of Vera to provide the number of vehicles required by the contract, indicates that Vera provided a total of only 8 units despite the requirement for a minimum of 15 units to be made available in the first month of the contract. Therefore, it is reasonable to assume that the impact of the City's decision will not be felt as soon as it was originally projected.

[51] See e.g., Decision No. B-18-75.

question whether unilateral implementation of the Vera contract has also had a per se practical impact on the safety of affected MV Supervisors and Caseworkers, as Petitioner asserts. In our first decision concerning this particular issue, we held that "the introduction of questions of safety into consideration of bargainability constitutes basis for a finding by this Board that a practical impact may attach to any change ... [emphasis added]."[52] We stated further:

> Where it is apparent to this Board that a particular exercise of management prerogative would constitute a threat to employee safety, we believe there is warrant for a finding which will require bargaining at the time when implementation of any projected change is proposed.[53]

However, this does not mean that a union need only claim a practical impact on safety in order to require the employer to bargain. The question whether there is a threat to safety, if disputed by the employer, is a matter to be determined by this Board before the obligation to bargain arises.[54] In Decision No. B-31-88, we held:

> The fact that a threat to safety constitutes a per se impact justifies imposing a duty to bargain prior to implementation; it does not relieve the union of first proving the existence of such threat to safety.

In the instant matter, Petitioner contends that the facts alleged clearly demonstrate that "the ex-convicts used by Vera to perform driving services for CWA ... do not possess the necessary training, skill and qualifications" to ensure the safety of "anyone coming in contact with them."

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

[53] Id., at 13. See also, Decision Nos. B-69-88; B-6-79.

[54] See e.g., Decision Nos. B-69-88; B-31-88.

Therefore, Petitioner seeks an immediate bargaining order without recourse to an evidentiary hearing. Respondent argues that DC 37's offer of proof, with the exception of a single isolated incident, consists of nothing more than "a string of conclusory allegations" which fail to constitute an even arguable basis for a prima facie finding of practical impact.

With respect to the alleged safety impact on MV Supervisors, we agree with Respondent that DC 37's claims are unfounded and, thus, do not support a prima facie claim of practical impact. Petitioner fails to cite any facts, other than the allegation that two Vera drivers had been cited for traffic violations, which would tend to prove that direct or immediate harm results from the required interaction between Vera drivers and MV Supervisors. Petitioner merely speculates as to the nature of the alleged harm to MV Supervisors, suggesting that because these violations occurred, serious questions are raised concerning whether the City is able to ensure that Vera drivers are safe, trained and "properly screened." It is well-settled that we will not direct a hearing, much less find a per se impact, on the basis of conclusory allegations that impact has occurred or will occur.[55]

Moreover, even assuming, arguendo, that there is a lapse in the screening procedures utilized by Vera in hiring its drivers, we are unpersuaded that the Petitioner has demonstrated an apparent connection between the consequences of such a lapse and the safety of MV Supervisors. We do not credit the implication that MV Supervisors may be put in a difficult situation in the event it becomes necessary to "write-up" a Vera driver

[55] Decision Nos. B-69-88; B-31-88; B-38-86; B-23-85.

inasmuch as there is nothing in the record which would indicate that MV Supervisors have more than tangential contact with Vera drivers.[56]

On the other hand, we find that, under the circumstances of this case, the Petitioner's showing with respect to Caseworkers does raise a substantial issue of safety impact sufficient to warrant a hearing in this matter. As the Henry Affidavit illustrates, Caseworkers come in regular and direct contact with Vera drivers in the performance of their required duties.[57] Because the frequency and level of Caseworkers' exposure to Vera drivers is significant, we find that Petitioner's presentation of facts which call into question the adequacy of the skills and training of Vera's drivers and/or demonstrate a possible breach in the screening process, supports a safety impact claim requiring further inquiry by this Board.

Thus, we find that a disputed question of fact exists as to whether the "contractual safeguards" included in the agreement between the City and Vera, in both scope and practice, adequately address the potential risks encountered by Caseworkers who work in such close proximity to Vera drivers.[58]

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[56] We note that the changes contemplated by the Vera contract as it relates to MV Supervisors requires them to call "Vera dispatching personnel to send drivers in vehicles to pick up children and/or employees of CWA." There is no indication that Vera drivers are dispatched from the work sites of MV Supervisors. See Rosenblum Affidavit, at ¶20, supra, at 12-13.

[57] We note that Caseworkers are "required on a daily basis to use automobiles and drivers provided by CWA" in the performance of their duties. See Henry Affidavit, at ¶6.

[58] See Decision No. B-31-88 (We held that a change in the Department of Correction's policy relating to the involuntary mechanical restraint of outposted inmate patients constituted a change in circumstances for hospital employees who work in close proximity with them.)

Accordingly, we will direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining, for the purpose of establishing a record upon which we may ascertain whether there exists any safety impact on affected Caseworkers. This finding is made on the basis of a number of incidents not sufficient to warrant a finding of per se practical impact, but certainly enough to warrant the holding of a hearing to determine whether any practical impact exists. Furthermore, in reaching this conclusion we are cognizant that the planned phase-in of Vera drivers is still in its earliest stages and that as the number of Vera drivers assigned to CWA increase, so does the potential for the alleged harm.

Finally, we consider Petitioner's contention that implementation of the Vera contract has had a resultant practical impact on workload of MV Supervisors. When a claim of practical impact specifically on workload has been alleged, a union has the burden to come forward with details of the nature and extent of the alleged impact.[59] We have long held that in order to warrant a finding of practical impact, the union must demonstrate an increase sufficient to constitute "an unreasonably excessive or unduly burdensome workload as a regular condition of employment."[60]

Specifically, DC 37 alleges that in addition to continuing to be responsible for supervising the work of MVOs, these employees must also supervise the work of Vera drivers. The resultant increase in the scope of their supervisory responsibilities, Petitioner contends, constitutes a practical impact on workload within the contemplation of Section 12-307b of

[59] Decision Nos. B-66-88; B-56-88; B-37-82; B-9-68.

[60] Decision Nos. B-66-88; B-2-76; B-23-75; B-18-75.

the NYCCBL. In further support of its position, DC 37 points out that the parties have previously agreed to bargain over changes such as those arising from implementation of the Vera contract.[61] Respondent denies that the Vera contract has any impact on the workload of MV Supervisors, contending that the only demonstrable difference in their duties involves placing a call to a Vera dispatcher rather than calling for a City car. Moreover, the City asserts, regardless of whom these employees supervise, the nature and scope of their responsibilities remain the same. Thus, the City argues, Petitioner cannot demonstrate that an "unreasonably excessive or unduly burdensome workload" has resulted from the change.

As we have held, practical impact is a factual question, and the existence of such impact cannot be determined when insufficient facts are provided by the union.[62] The Petitioner's sole witness on this issue (Mr. Rosenblum) fails to rebut the City's argument that the changes in MV Supervisor's duties are de minimis. In any event, based on the record before us we are not persuaded that the indicated changes constitute even a prima facie claim of practical impact on workload.[63]

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[61] See Article V, Section 2 of the Agreement, supra, note 15, at 13.

[62] Decision Nos. B-37-82; B-41-80.

[63] See Decision No. B-2-76 (We held that even though there was an indication in the record that there had been some increase in workload, we were not persuaded that the increase was sufficient to constitute "an unreasonably excessive or unduly burdensome workload as a regular condition of employment.")

We note DC 37's reliance on Article V, Section 2 of the Agreement, in support of its claim of practical impact. However, we do not read the cited language of Article V, which paraphrases the practical impact clause of the NYCCBL, to be a concession that there is a practical impact. Rather, we read it as an acknowledgement by the City that DC 37 has the right to negotiate any practical impact on employees which results from management's actions. Nevertheless, it is not the function of this Board, in a scope of bargaining proceeding, to enforce the terms of the parties' Agreement.[64]

We find, therefore, that Petitioner has failed to allege facts sufficient to establish that any unreasonably excessive or unduly burdensome workload has resulted and, thus, the City has no obligation to bargain pursuant to Section 12-307b of the NYCCBL, over the impact of its managerial decision to implement the Vera contract to the extent it affects MV Supervisors.

Accordingly, we shall order immediate bargaining between the parties with respect to the per se impact on MVOs laid off or to be laid off and that a fact-finding hearing be conducted in order to determine whether a practical impact on the safety of Caseworkers exists. On the basis of the record before us at this time, all other aspects of the instant petition shall be dismissed. We recognize, however, that circumstances may change upon full implementation of the contract between the City and Vera. In this connection we note that our decision is without prejudice to the filing of a scope of bargaining petition if at any future time Petitioner is prepared to set forth new facts

[64] See Decision No. B-37-82.

demonstrating a change in circumstances and supporting an allegation of practical impact on either the safety or workload of MV Supervisors.

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 demand herein on the per se impact of layoffs on MVOs is a mandatory subject of bargaining; and it is further

ORDERED, that the parties shall forthwith commence good faith collective bargaining in accordance with NYCCBL Section 12-307 for the purpose of reaching agreement on terms for the alleviation of said practical impact; and it is further

ORDERED, that the issue of practical impact on the safety of Caseworkers is to be referred to a Trial Examiner designated by the Office of Collective Bargaining for the purpose of conducting a hearing and establishing a record upon which this Board may determine whether any practical impact exists; and it is further

ORDERED, that all other aspects of the instant petition be, and the same hereby are, dismissed.

DATED: New York, New York
February 26, 1990

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

DEAN L. SILVERBERG
MEMBER