25-91	dismissed petition for injunction based on lack of SMJ	Uniform Firefighters Ass'n. v. City of N.Y., N.Y. Co. S.Ct., 12/26/90, *aff'd,* 173 A.D.2d 206, 569 N.Y.S.2d 634 (1st Dep't 1991), *aff'd,* 79 N.Y.2d 236, 581 N.Y.S.2d 734 (1992).	65

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

DECISION NO. B-25-91

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK, DOCKET NO. BCB-1347-90
Petitioner,

-and-

CITY OF NEW YORK,
Respondent.

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In the Matter of

UNIFORMED FIRE OFFICERS ASSOCIATION, DOCKET NO. BCB-1359-91
LOCAL 854, IAFF, AFL-CIO,
Petitioner,

-and-

CITY OF NEW YORK,
Respondent.

----------X

INTERIM DECISION AND ORDER

On December 12, 1990, the Uniformed Firefighters Association of Greater New York ("UFA" or "petitioner") filed a scope of bargaining petition, docketed as BCB-1347-90, in which it alleged that the assignment of "light duty" firefighters to the position of Division Aide will have a direct, immediate and specific adverse impact on the safety of both "light duty" firefighters assigned as Division Aides and full duty firefighters. On

December 24, 1990, the City of New York ("City" or "respondent"), represented by its Office of Labor Relations, filed a motion to dismiss the scope of bargaining petition, and an affidavit in support thereof. The UFA filed an answer to the City's motion on January 4, 1991 and, on January 17, 1991, the City filed a reply.[1]

In Decision No. B-6-91, the Board of Collective Bargaining ("Board") held that contrary to the City's assertion in its motion to dismiss, the UFA's scope of bargaining petition was not filed prematurely merely because the order in question, Department Order 168, was scheduled to go into effect after the scope of bargaining petition was filed. The Board further held that the UFA had alleged sufficient facts in support of its claim that issuance of Department Order 168 will have a practical impact on the safety of both light duty firefighters assigned as Division Aides and full duty firefighters to withstand the City's motion to dismiss. Accordingly, the Board denied the City's motion to dismiss the UFA's petition, and directed the City to file its answer thereto. The Board noted that upon receipt of the City's answer, the UFA would be given an opportunity to file its reply.

On February 11, 1991, the City filed an answer to the UFA's scope of bargaining petition. The UFA filed its reply on February 22, 1991.

On January 16, 1991, the Uniformed Fire Officers Association, Local 854,

[1] In Decision No. B-6-91, we noted that Section 13.11 of the Revised Consolidated Rules of the Office of Collective Bargaining, which concerns motions other than those made during a hearing, does not provide for the submission of a reply by the moving party to "answering affidavits" filed by the petitioner. We determined, however, that since no objection was raised by the UFA to the filing by the City of a reply, and the contents of the reply did not prejudice any rights of the UFA, we would accept the additional pleading.

IAFF, AFL-CIO ("UFOA" or "petitioner") filed a scope of bargaining petition, docketed as BCB-1359-91, in which it alleged that the assignment of "light duty" firefighters to the position of Division Aide will have a direct and immediate adverse impact on the safety of members of the UFOA bargaining unit.[2] The City filed an answer to the UFOA's scope of bargaining petition on February 26, 1991. The UFOA filed its reply on March 27, 1991.

The above-described scope of bargaining petitions have been consolidated for the purpose of issuing the instant interim decision since they both allege a practical impact on the safety of uniformed Fire Department personnel resulting from the assignment of light duty firefighters to the position of Division Aide pursuant to Department Order 168.

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[2] On January 28, 1991, the City filed a motion to dismiss the UFOA's scope of bargaining petition, and an affirmation and memorandum of law in support thereof. Subsequently, by letter dated February 14, 1991, Richard Betheil, counsel to the UFOA, informed Steven C. DeCosta, Deputy Chairman and General Counsel of the Office of Collective Bargaining, that pursuant to the terms of an agreement between the UFOA and the City, the City had agreed to withdraw its motion to dismiss the scope of bargaining petition, without prejudice to its filing an affirmation and an answer to the petition.

Mr. Betheil also informed Mr. DeCosta that pursuant to the terms of the agreement between the UFOA and the City, the UFOA had agreed to withdraw, without prejudice, the improper practice petition it filed on December 18, 1990, docketed as BCB-1350-90, wherein the UFOA alleged a violation of Section 12-306a of the New York City Collective Bargaining Law resulting from the Fire Department's plan to implement Department Order 168.

Finally, in his letter of February 14, 1991, Mr. Betheil requested that the scope of bargaining petitions filed by the UFA and the UFOA, docketed as BCB-1347-90 and BCB-1359-91, respectively, "be consolidated for decision by the Board and for all other purposes." In support of his request, Mr. Betheil stated that "[b]oth cases involve the assignment of light duty Firefighters to perform the duties of a Division Aide and the impact of that change on those individuals and other members of the Fire Department uniformed force."

BACKGROUND

On November 26, 1990, the Fire Department issued Department Order 168,[3]

[3] Department Order 168 states, in relevant part, as follows:

2.3 LIGHT DUTY DIVISION AIDES

Effective January 1, 1991, the position of Division Aide will no longer be classified as a full duty position. All full duty firefighters presently assigned or detailed as Division Aides SHALL be replaced by light duty firefighters. This reduction in full duty headcount is one of the budget reduction measures mandated for this Department.

All light duty firefighters who anticipate remaining on light duty for at least one year are encouraged to apply for assignment as a Division Aide. The Department intends to fill these positions, to the greatest extent possible, with long term light duty personnel. These positions will be considered priority light duty assignments.

Interested members shall forward a report no later than December 10, 1990 to Deputy Chief Edmund P. Cunningham, Bureau of Personnel requesting consideration for such assignment. Report shall include member's name, badge number, assigned unit and present light duty assignment.

The Bureau of Personnel in conjunction with the Bureau of Operation and the Bureau of Health Services shall review all applications and select those long term light duty firefighters most qualified to serve as Division Aides. Selected members shall be assigned, whenever possible, to the Division of their choice. Work schedule shall be in accordance with the established firefighter group chart.

2.4 TRANSFER REQUESTS, DIVISION AIDES

Effective January 1, 1991, the position of Division Aide will no longer be a full duty position. Only light duty firefighters will be assigned and/or detailed as Division Aides from that date forward. All presently assigned and/or detailed full duty Division Aides shall be re-assigned effective January 1, 1991. Full duty Aides assigned to Divisions shall forward a Transfer request to the Deputy Chief of Personnel Edmund P. Cunningham before December 19, 1990. Full duty aides who are detailed to Division shall, unless they request a transfer to another unit, return to their assigned unit, effective 0900

(continued...)

wherein it announced its intention to staff the position of Division Aide with light duty firefighters. Firefighters are placed on light duty when, for any reason, they are unable to perform the physically demanding duties of a firefighter.

Fire Department procedures provide that in the event of a fire scene operation, Battalion Chiefs and their Aides (referred to as Battalion Chief Aides) are the first level of Command to report to the scene. In the case of an expanding firefighting operation, Deputy Chiefs and their Aides (referred to as Division Aides) are dispatched to the scene. If a multiple alarm is called, Deputy Assistant Chiefs and their Aides and Assistant Chiefs and their Aides (referred to as Staff Chief Aides) are dispatched to the scene. Finally, in the event that a fourth alarm is called, the Chief of Department and his Aide would be dispatched to the scene.

At the time Department Order 168 was announced, 305 individuals were serving as Aides to the various Chiefs. Of these, 55 were serving as Division Aides and would be affected by Department Order 168. The remaining 250 Chief's Aide positions are not affected by Department Order 168, and will continue to be filled by full duty firefighters.

In general, the role of Chief's Aides in fire and emergency operations includes emergency vehicle operation, reconnaissance, intelligence gathering and communication of this information to the Command Chief at the scene.

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[3](...continued)
hours, January 1, 1991.
Every effort shall be made, to the greatest extent possible, to assure that effected members are transferred to a unit of their choice.

According to petitioners, the Chiefs (Command Chiefs) in charge of fire and emergency scene operations rely heavily on the Aides to communicate their observations of the fire structure and its surroundings, as well as the fire operation itself. They are the Command Chief's principal communication links to the firefighting unit. The Command Chief evaluates the information provided by the Aides and directs the firefighting operation accordingly. In order to make these observations, Aides are often dispatched to advanced positions within the fire structure and exposure buildings.[4]

The Chief's Aides also may be called upon to give assistance at the fire scene if prior to the arrival of the Firefighter Assist Team or Rescue Company the Incident Commander determines that a firefighter is in need of assistance. This procedure was developed in response to a citation issued to the Fire Department, on or about July 16, 1989, by the New York State Department of Labor, Division of Public Employee Safety and Health (PESH) for the violation of Section 1910.134(e)(3)(i) of the Occupational Health and Safety Act ("OSHA").[5] Section 1910.134(e)(3)(i) requires the presence of at least one other person in areas where the wearer of a respirator could be overcome by a toxic or oxygen deficient atmosphere. By letter dated December 3, 1990, PESH accepted the Fire Department's proposal to amend its procedures which provides, inter alia, that:

> 6. If prior to the arrival of the Firefighter Assist Team or Rescue Company the Incident Commander determines that a member may become in need of assistance, the IC shall designate any of the

[4] It is not disputed that prior to the issuance of Department Order 168, Division Aides performed the duties described above.

[5] 29 CFR Section 1910.134(e)(3)(i).

following for assistance or rescue:

6.1 Companies held in reserve.

6.2 Companies available for immediate reassignment.

6.3 Members available for immediate reassignment. Example: - Ladder Company Chauffeur, Roofman, members of Rescue or Squad Companies, etc.

6.4 Uncommitted chauffeurs or **chief's aides**.

6.4.1 It is imperative that the IC reassign these members as early as possible in the operation.

6.4.2 These members shall be properly equipped per Department Regulations 11.3.1 and be placed in a stand-by position at the command post or other location designated by the IC.
(Emphasis added)

Accordingly, the citation against the Fire Department was removed.

The UFA and the UFOA filed scope of bargaining petitions against the City on December 12, 1990 and January 16, 1991, respectively, in which they requested that the Board find that the City's unilateral change in the assignment of light duty firefighters to the position of Division Aide, effective January 1, 1991, has a practical impact on the safety of members of their bargaining units and, therefore, is within the scope of bargaining. The UFA and the UFOA further requested that the Board issue an order: (1) directing the City to engage in collective bargaining with the UFA and the UFOA over the means to alleviate the practical impact caused by such change; (2) directing the City to rescind Department Order 168, paragraphs 2.3 and 2.4 pending the outcome of the ordered negotiations pursuant to its broad remedial powers under NYCCBL Section 12-309a(4);[6] and (3) granting the UFA and the UFOA

[6] Section 12-309 of the NYCCBL provides, in relevant part, (continued...)

such other and further relief as may be deemed just and proper by the Board.

On January 4, 1991, the Fire Department issued All Units Circular No. 290 (AUC 290), Operating Guidelines For Light Duty Division Aides, which limits the duties of light duty firefighters assigned as Division Aides pursuant to Department Order 168 as follows:

> 1. Light duty division aides shall not operate with self contained breathing apparatus ("SCBA") nor shall they perform any duties which require members to use a SCBA. For example, light duty division aides shall not operate in confined spaces or areas within buildings where toxic substances or toxic products of combustion or an oxygen deficiency are present. See also AUC 220 (Revised) Self-Contained Breathing Apparatus (SCBA) Policy.
>
> 2. Light duty division aides shall not be assigned to perform interior structural firefighting operations. Interior structural firefighting is defined, as including but not limited to, the physical activity of fire suppression, rescue or both, inside of buildings or enclosed structures which are involved in a fire situation.
>
> 3. Light duty division aides shall not use the sliding pole in quarters. When responding, light duty division aides must only use the stairway to the apparatus floor.
>
> 4. Light duty division aides shall not perform any duty as part

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[6](...continued)
as follows:

> a. Board of collective bargaining. 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:
>
> * * *
>
> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter. For such purposes, the board of collective bargaining is empowered to establish procedures, make final determinations, and issue appropriate remedial orders;
>
> * * * *

> of the Firefighter Assist Team either prior or subsequent to the arrival of the Firefighter Assist Team.
>
> 5. Light duty division aides shall not perform any physical task at fire or emergency operations which would normally be performed only by a full duty firefighter assigned to Staff Officer, Battalion, Engine Company, Ladder Company, Rescue Company, Squad Company, Marine Company or Hazmat Unit. For example, a light duty division aide could provide a communication link by monitoring handi-talkie traffic and operating Department radios and could also maintain the command and control board. However, a light duty division aide would not be required to climb a ladder or assist on a hose stretch.

Thereafter, on or about February 2, 1991, light duty firefighters were assigned to the position of Division Aide.

POSITIONS OF THE PARTIES

Petitioners' Position

The petitioners claim that the alleged changes in the duties assigned to Division Aides pursuant to AUC 290 fails to alleviate the practical impact on safety Department Order 168 will have on light duty firefighters assigned to that position, and completely fails to address the impact Department Order 168 will have on the safety of full duty firefighters and all other uniformed Fire Department personnel. At best, the petitioners contend, whether the announced changes in the duties of Division Aides will alleviate the practical impact on safety resulting from the assignment of light duty firefighters to that position raises factual issues requiring a hearing and the opportunity to fully litigate the issues.

The petitioners allege that in the past, the Fire Department has repeatedly rejected the use of light duty firefighters or civilians as Chief's Aides, finding that they were unable to perform the duties of that position.

In this regard, the Petitioners note that in 1982, Homer Bishop, Chief of Operations of the Fire Department, requested a duty status determination for Staff Chief Aides from Dr. Cyril Jones, Chief Medical Officer of the Fire Department.[7] In his request to Dr. Jones, Chief Bishop stated as follows:

> At fire operations [Staff Chief's Aides] operate directly in the fire zone by performing reconnaissance for the Command Chief and obtaining intelligence from units within the fire building and exposure buildings. They are often called upon to enter into advanced positions to obtain status reports as to progress or the need for further assistance. They can be subjected to the same extremes of weather, heat and smoke as those engaged in engine operations or ladder work. They must be able to climb ladders and fire escapes with agility and promptness. They must be well versed in firefighting tactics and strategy to carry out the orders and instructions of the Command Chief.
>
> In view of the foregoing, it is my position that the Staff Chiefs' Aide should be a "full duty" firefighter. Recently, this position has been questioned. However, it is my feeling that the logic requiring a firefighting chief to be "full duty" also applies to those assigned as their aides.

Dr. Jones, according to the petitioners, observed first hand the activities performed by Chiefs' Aides at fire scenes, and concluded that the position taken by Chief Bishop was correct. The petitioners note that in his letter to Chief Bishop, dated December 1, 1982, Dr. Jones stated:

> I have discussed this matter with the medical officers of the Division and it is our medical consensus that Staff Chief and Battalion Aides should have Full Duty Status.

The petitioners claim that just a few months ago Chief William Feehan, the current Chief of Operations, reached substantially the same conclusion as Chief Bishop and Dr. Jones. In response to proposals to civilianize the position of Chiefs' Aides, Chief Feehan stated that:

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[7] Staff Chiefs occupy the rank above Deputy Chief, and are present at the fire scene of only the largest fires.

> The most compelling reason for this Department to categorically and unequivocally maintain that Chief's Aides MUST be firefighters is the Aide's function as a member of the Command Team at fire and emergency operations. This is vital to the effectiveness of our fireground operation and to the safety of both firefighters and civilians.[8]
>
> A Chief's Aide at a fire or at an emergency operation is an intrinsic and irreplaceable link in our Command chain.

Thereafter, on November 30, 1990, all of the Staff Chiefs of the Fire Department wrote to Mayor David Dinkins jointly to request that Division Aides continue to be full duty firefighters. The petitioners note that the reasons cited by the Staff Chiefs in support of their position were substantially the same as those set forth in Chief Feehan's memorandum. Specifically, the Staff Chiefs claimed that a "Chief and his 'aide' function as a team" and that the "chief's ability to command effectively and efficiently would be fatally compromised if he did not have the assistance of his aide." The Staff Chiefs further claimed that "the presence of a full duty 'aide', one capable of performing all critical tasks in a reliable manner, is an absolute necessity at fire and emergency operations." In conclusion, they urged that the "Retention of full duty Deputy Chiefs' 'Aides' in the Fire Department's command and control structure is a matter of life safety."

The petitioners assert that, in apparent recognition of the accuracy of the determinations by senior uniformed members of the Fire Department that the

[8] As noted supra at pages 7 - 8, to comply with the requirements of Section 1910.134(e)(3)(i) of the Occupational Safety and Health Act, the Fire Department developed a procedure whereby the Chief's Aides may be called upon to give assistance at the fire scene if prior to the arrival of the Firefighter Assist Team or Rescue Company the Incident Commander determines that a firefighter is in need of assistance. The procedure developed by the Fire Department was accepted by PESH by letter dated December 3, 1990.

position of Division Aide requires a full duty firefighter, the Fire Department has substantially redefined the functions to be performed by a Division Aide, thus effectively removing light duty Division Aides from the fire scene. The petitioners argue, however, that the change in duties, as set forth in AUC 290, will only exacerbate the immediate threat to the safety of their members presented by Department Order 168 because the City has effectively eliminated a key member of the firefighting team without making arrangements for any other employee (or employees) to perform those functions.

In support of their position, the petitioners note that, historically, Division Aides have functioned as the Deputy Chief's eyes and ears at a fire. By now requiring Division Aides to stay clear of the "hazard area" the petitioners maintain that the City will substantially reduce the Division Aide's ability to communicate with the Deputy Chief and vice-a-versa. It is asserted by the petitioners that such a change will require more dependence upon radio communication, which will delay the communication of vital orders and information and, as a result, compromise the overall firefighting operation.

The petitioners further argue that the removal of full duty firefighters from the position of Division Aide will deplete overall operational safety. In support of its position, the UFA explains that Division Aides make independent and critical fire ground observations which are relayed on a face-to-face basis to the Deputy Chief. Frequently, during periods of reconnaissance, Division Aides will observe deteriorating fire conditions which impact dramatically on firefighter safety. This information, once relayed to the Deputy Chief, determines the overall operating strategy. Based

upon this information, the Deputy Chief may order operating forces to leave the fire structure to avoid firefighters being caught in a building collapse. "In this

context," the UFA states,

> it is clear to see the vital role the Division Aide plays in the operation. Thus, contrary to [the City's] assertion, removal of this reconnaissance role impairs safety rather than alleviating safety implications. Additionally, total reliance on radio communications for the relay of orders will deny the Deputy Chief the chance to confirm through facial expression and body language, whether or not his commands have carried the appropriate impact.

Thus, the UFA maintains, contrary to the City's assertion, "handi-talkie" communications are not as dependable or efficient as first hand observation and communications.

The UFA alleges that in periods of high fire response activity there have been occasions when the Deputy Chief and Division Aide were the first Chief and Aide to arrive at the fire scene. The UFA further alleges that the Fire Department has experienced periods of high fire response activity frequently enough to have developed and implemented a "fall-back" plan to deal with this contingency. The plan developed by the Fire Department, the UFA claims, requires the dispatching of a Deputy Chief and Division Aide to the fire scene when no Battalion Chiefs are available.

The UFA contends that the existence of the above-referenced plan supports its assertion that the assignment of light duty firefighters to the position of Division Aide has a practical impact on the safety of all uniformed Fire Department personnel. On one hand, the UFA claims, the safety of Division Aides will be impacted if they are directed to enter the "hazard area" with the Deputy Chief before the other Chiefs and Chiefs' Aides arrive at the fire scene. On the other hand, if the Deputy Chief were to enter the "hazard area" alone, as suggested by the City, the Deputy Chief's actions would conflict with Fire Department policy and OSHA regulations.

In any event, the petitioners maintain that the City has completely failed to address the issue of how, when and by whom the "hazard area" will be defined at the fire scene; or how light duty Division Aides can effectively perform the duties required of the position while staying out of "this amorphous and undefined" area. The petitioners contend that the term "hazard area" is undefinable and any guideline based on keeping light duty Aides away from this undefinable area is totally meaningless as a means of alleviating any impact on safety.

Furthermore, the petitioners claim that the "hazard area" can and will expand during the course of a firefighting operation, often with little or no warning. It is this type of fire scene operation, i.e., fires that are escalating and becoming more serious in nature, to which Division Aides are dispatched. Thus, the petitioners conclude that a guideline such as that proposed by the City, and thereafter issued as AUC 290, will create confusion at the fire scene in that there can be no uniformity in its application to each fire. Such confusion, the petitioners submit, can cost precious seconds or minutes in the command chain.

In its reply, the UFA admits that civilian individuals are present at fire scenes. It notes, however, that such individuals are not engaged in the firefighting operations and, therefore, asserts that "any analogy to their placement at the fire scene is irrelevant and inappropriate in considering the impact on overall firefighter safety imposed by Department Order No. 168." The UFA submits that contrary to the City's assertion, its claims of safety impact are not speculative. Rather, the UFA asserts that it has not alleged any "actual occurrence" of firefighter injury resulting from Department Order

168 because the assignment of light duty firefighters to the position of Division Aide is "unprecedented in the history of the Fire Department [and], thus, no data base exists from which to draw such a citation." The UFA does not dispute the City's claim that fire scenes inherently pose risks to the safety of all firefighters. It does, however, dispute the City's assertion that most foreseeable situations which could pose a threat to safety due to the use of some light duty Division Aides have been anticipated and addressed.

The petitioners also suggest that the medical screening proposed by the City to ensure that light duty firefighters are capable of performing the duties required of Division Aides under Department Order 168 "are too variable and ill-defined to ensure that their performance by light duty personnel will not jeopardize the safety of UFOA [and UFA] bargaining unit members." In support of their position, the petitioners note that pursuant to Department Order 168, a firefighter deemed to be medically incapable of performing the physically demanding duties of a full duty firefighter may be assigned limited duties at a fire scene. Although these limited duties appear to conform with the firefighters limited capabilities, due to unforeseeable circumstances, such as an explosion or a building collapse, the firefighters may suddenly be required to perform activities beyond his or her capabilities. For this reason, the petitioners submit that the City "takes an incredibly myopic view of the impact those assignments have on the entire bargaining unit." Medical screening, according to the petitioners, does absolutely nothing regarding the impact the loss of a full duty Division Aide has on the overall efficiency of the operation. Moreover, the petitioners contend, "the additional burden of

closely monitoring and supervising the light duty aide detracts from the Deputy Chief's ability to deal effectively with the overall operation and the safety of all operating forces present at the scene."

The petitioners deny the City's assertion that PESH has "constructively determined" that the Fire Department is in compliance with federal safety regulations. Rather, the petitioners note that in a letter dated December 3, 1990 from Patricia Adams, PESH Program Manager, to Michael Munns, Associate Counsel of the Fire Department, PESH simply warned the City that if its plan is implemented, the Fire Department should ensure that they are in compliance with OSHA regulations. As confirmed in a letter dated January 2, 1991 from Ms. Adams to Christopher O'Hara, counsel to the UFA, the petitioners argue, "PESH did not approve the plan as the City would have the Board believe."

Finally, the UFA claims that contrary to the City's assertion, the Board is empowered pursuant to Section 12-309a(4) of the NYCCBL to issue appropriate remedial orders. Thus, the UFA argues, "[i]n the event [it] is successful in establishing the existence of a per se impact on the safety of firefighters, it would be appropriate for the Board to order the rescission of the light duty assignments pending negotiations between the parties."

In conclusion, the petitioners assert that the assignment of "light duty" firefighters to the position of Division Aides has a per se practical impact on the safety of the members of their bargaining units. Accordingly, the petitioners claim that the Board should grant the relief requested in their petitions on the basis of the pleadings submitted in this matter. Alternatively, the petitioners contend that the Board should direct a hearing to resolve any disputed issues of fact presented by the pleadings.

Respondent's Position

The City contends that the petitioners have failed to allege sufficient facts to demonstrate a prima facie practical impact on safety resulting from the assignment of light duty firefighters to the position of Division Aide pursuant to Department Order 168 and its implementation under AUC 290. Rather, the City argues that the petitioners' allegations of a "clear threat" to employee safety are based on a series of "mistaken assumptions supported by past anecdotal reports" which are "irrelevant, outdated and inapposite" to the matter at issue herein because they assumed that light duty Division Aides would be required to perform the duties of "full duty" firefighters.

In support of its position, the City notes that before a light duty firefighter is assigned as a Division Aide under Department Order 168, a medical officer will perform a medical examination to determine whether the firefighter is medically capable of performing the duties of the position. Thus, the City argues, contrary to the petitioners' allegations, there is no chance that a light duty firefighter will be medically incapable of performing the duties required of a Division Aide.

The City also disputes the UFA's assertion that medical screening of light duty firefighters for the position of Division Aide is not practicable because it is impossible to predict every physical contingency that might arise at a fire scene. First, the City notes that in its assignment of light duty Division Aides, the Fire Department has anticipated safety concerns and has taken precautions to address those concerns, as evidenced by the fact that light duty Division Aides will be confined to "non-hazardous areas" at a fire. In any event, the City claims that the UFA's assertion that medical screening is impractical must be rejected because it presumes that, contrary to its

history and experience, the Fire Department has no control or supervisory authority over its Chiefs Aides in responding to fires, or over the actions of light duty Division Aides at the fire scene.

The City explains that the "hazard area" to which light duty Division Aides will not be assigned "is the recognized area at fire and emergency operations to which personnel from other responding agencies are not assigned and within which only firefighters protected by full protective clothing and breathing [apparatus] are directed to proceed." The City notes that civilian individuals are often present at a fire scene, i.e., Emergency Medical Service Workers, Police Department liaison, Red Cross workers, employees from the Building and Water Departments and individuals from the media, and they are prohibited from entering the hazard area. "Similarly", the City states, "light duty Division Aides will be directed not to enter such hazard area."

In response to the possibility raised by the UFA that the Deputy Chief and his Aide may be the first to arrive at the fire scene, thus posing a safety risk if the light duty Division Aide is directed to enter the hazard area, the City submits that "[o]n the speculative chance that the Division Chief might be the first at the scene, no safety threat would be posed as the Chief himself should enter the hazard area, obviating any need for the Aide to do so, until other Chiefs and Division Aides arrive on the scene." With regard to the petitioners assertion that the duties described in the operational guidelines to Department Order 168 cannot be performed if the Division Aide is not in the hazard area or is not by the Deputy Chief's side, the City claims that this speculation is obviated by the fact that Division

Aides will use "handi-talkies" to relay the Chief's orders and communicate with the Chief directly.

The City maintains that contrary to the petitioners assertions, the precautionary measures the Fire Department has assured it will take, as set forth in the operational guidelines for light duty Division Aides, "negate even an unspoken inference of any clear threat to safety here." The City notes that while the petitioners speculate that the overall efficiency of the unit will be diminished as a result of Department Order 168, they have not cited any "actual occurrence" which could pose a threat to the safety of the light duty Division Aide or other firefighters directly due to the presence of light duty Division Aides.

Furthermore, according to the City, PESH "has constructively determined that the Fire Department is in compliance with federal safety regulations," as evidenced by the fact that upon notice of the Fire Department's proposed plan to assign light duty firefighters to the position of Division Aide, PESH did not file an objection. The City notes that all PESH requested was an assurance, thereafter supplied by the Fire Department in a letter dated December 7, 1990, that light duty firefighters assigned as Division Aides would not be required to perform any full-duty activities that were inconsistent with their light duty status.

In its answer to the UFOA's scope of bargaining petition, the City claims that absent a prima facie case of "per se impact" the petition filed by the UFOA must be dismissed on the ground that the assignment of light duty firefighters to the position of Division Aide is a management prerogative

under Section 12-307b of the NYCCBL.[9] The City states that this Board has "repeatedly construed Section 12-307(b) to guarantee the City the unilateral right to assign and direct employees, to determine what duties employees will perform during work time, and to allocate duties among unit and nonunit employees, unless this right has been limited by the parties themselves in their collective bargaining agreement." (Emphasis in original.) In the instant matter, the City argues, the UFOA has not alleged anything in its collective bargaining agreement that limits the City's statutory management right to assign work to the Fire Department's employees as it deems necessary to maintain the efficiency of operations. Accordingly, the City asserts that the scope of bargaining petition filed by the UFOA must be dismissed in its entirety.

In its answer to the UFA's scope of bargaining petition, the City admits that a fire scene poses "inherent risks to the safety of all firefighters." It argues, however, that "every possible risk no matter how remote cannot be anticipated or prevented in advance -- by regulation [or] supervision."

[9] Section 12-307b of the NYCCBL provides, in relevant part, as follows:

> b. It is the right of the city, or any other public employer, acting through its agencies, to... maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted;... 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.

According to the City, "most foreseeable situations which could pose a safety threat by the use of some light duty Division [A]ides have been anticipated and addressed." Therefore, since "speculation, disguised as an unsafe event or Petitioner's opinion of adverse safety practical impact does not constitute factual allegations sufficient to scope out a bargaining duty from the reserved management rights and [Section] 12-307(b) of the New York City Collective Bargaining Law," the City asserts that the UFA's scope of bargaining petition also must be dismissed in its entirety. In any event, the City maintains that the Board does not have the authority or power to grant the relief requested by the UFA at paragraph (2) of its Request for Relief - an order directing the City to rescind Department Order 168 pending the outcome of the ordered negotiations. The City alleges that the Board is without the authority or power to issue injunctive relief and, therefore, the Board may issue a cease and desist order only upon a determination that a party has committed an improper practice by violating its bargaining obligation.[10]

DISCUSSION

It is apparent in reviewing the pleadings filed by the parties herein that some confusion has developed with regard to the standard to be applied in cases in which a practical impact on safety is alleged. Accordingly, we take this opportunity to review the development of the concept of practical impact on safety under the NYCCBL, and to set forth the appropriate standard to be

[10] The City cites Decision No. B-44-86 in support of its position.

applied in such cases.

DEVELOPMENT OF THE CONCEPT OF PRACTICAL IMPACT

The term "practical impact" was first used by this Board in Decision No. B-9-68. The issue considered in that case concerned the proper scope of recommendations that could be made by an impasse panel following a finding of impact resulting from management's exercise of its authority in the areas of workload and manning.

Several important points must be noted in connection with Decision No. B-9-68. First, we indicated that the question of whether a "practical impact" exists is a question of fact to be determined by the Board on a case-by-case basis. "[T]he determination of the existence of a practical impact," we stated, "is a condition precedent to determining whether there are any bargainable issues arising from the practical impact."

In Decision No. B-9-68, we also addressed the procedures to be followed in the event the Board determines that a practical impact exists. We stated that:

> 1. Once the Board determines that an "impact" exists, the City will be required expeditiously to take whatever action is necessary to relieve the "impact". Relieving the impact can be done by the City on its own initiative if it chooses to act through the exercise of rights reserved to it in [the NYCCBL]. If it cannot relieve the "impact" in that manner, or it chooses to take alternative action by offering changes in wages, hours and working conditions - means which are not reserved to the City specifically under [the NYCCBL] then, of course, the City cannot act unilaterally but must bargain out these matters with the Union. In that case, failure to agree will permit the Union to use the procedures of the law to the full including the use of an impasse panel.
>
> 2. If the Board should determine that an "impact" exists and (1) the City does not, or cannot, act expeditiously to relieve the "impact" as provided ... above, or, (2) if the Union alleges that the City having exercised rights under [the NYCCBL] has failed to

> eliminate the "impact", this Board will order an immediate hearing, under its rules ... If the Board should find that the "impact" still remains, the City shall bargain with the Union immediately over the means to be used and the steps to be taken to relieve the "impact" ... Thereafter, if the parties cannot agree and reach an impasse, an impasse panel shall be appointed which shall have the authority to make recommendations to alleviate the impact including, but not limited to, recommendations for additional manpower or changes in workload.[11]

Thereafter, in Decision No. B-3-75, this Board considered the question of whether the City was required to meet with the Union and discuss its plans to lay off employees prior to implementation of the layoff plan. We distinguished the employer's decision to lay off employees for lack of work from other types of management action that might result in a practical impact, and held that practical impact on those laid off or to be laid off is implicit in any exercise of that prerogative. We determined that whenever the employer exercises that particular power a practical impact will be deemed to have occurred and to have been established. Thus, the concept of a per se practical impact was established.

In Decision No. B-3-75, this Board further stated that:

> Because practical impact is held herein to be implicit in any exercise by management of its prerogative to lay off, we further hold and enunciate as a rule in this Decision, that the Union need not wait until employees are, in fact, laid off before it exercises its right to negotiate the impact of management's decision. With respect to those issues over which the employer has discretion to act, and which relate to the practical impact of a managerial decision to lay off employees, the City is obligated to bargain immediately.[12]

In addition, in Decision No. B-3-75, this Board distinguished the practical impact situation involved therein (per se practical impact) from

[11] Decision No. B-9-68 at 7-8.

[12] Decision No. B-3-75 at 14.

other types of cases in which practical impact is alleged. In this regard, we stated that:

> We do not hold herein that a per se practical impact flows from every exercise of a managerial prerogative. In certain situations, the impact of a management decision on working conditions, specifically, job security, may be only slight or indirect and may involve questions of fact requiring hearings or other procedures to establish the facts. In the latter circumstances and in other circumstances, such as that underlying our Decision B-9-68, management's action may be so directly related to the mission of the agency that even if practical impact is alleged and subsequently determined by this Board to exist, management should first have the opportunity to act unilaterally to alleviate the impact.
>
> In the instant decision, we determine only that a management decision to lay off employees will result per se in a practical impact and that the impact is immediately bargainable.
>
> Having decided this case differently than Decision B-9-68 with respect to practical impact, the Board thereby makes known its intention to determine other scope of bargaining disputes involving alleged practical impact on a case-by-case basis.[13]

PRACTICAL IMPACT ON SAFETY

This Board first considered a claim of practical impact on safety in Decision No. B-5-75, a case involving the City's plan to reduce police officer manning in radio motor patrol cars. In that decision we held that the City may be required to bargain over changes in manning if the Board determines that such changes will have a practical impact on safety. In setting forth the standard to be applied where practical impact on safety is alleged, this Board stated as follows:

> 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 a warrant for a finding which will require bargaining at the time when implementation of any

[13] Id. at 15.

> projected change is proposed. Our finding is intended to afford the Union the opportunity to show how the specific elements of any such plan infringe upon employee safety and to enable this Board to evaluate the issues thus raised. We believe that since issues of safety are allegedly involved, those issues should be resolved prior to implementation, and that bargaining and impasse procedures should be promptly utilized in dealing with any specific plan of change which is found to entail a practical impact so as to expedite the process of freeing the City to take necessary action to implement. * *
> If the proposed change is challenged as a threat to the safety of the affected police officers it must, if there is a dispute as to bargainability, be submitted to the Board which, on the basis of the relevant evidence, will determine whether or not the proposed plan in fact involves a threat to safety. Should the Board find that the proposed plan in fact involves a practical impact upon safety, we will direct that there be bargaining for its alleviation.[14]

Thereafter, in Decision No. B-41-80, this Board classified the various types of practical impact claims it had considered into different categories. The category into which the practical impact claim fell determined how the matter was to be handled. For example:

> 1. WORKLOAD CLAIMS - We held that there is no duty to bargain in such cases until we determine whether a practical impact exists; i.e., whether the exercise of a managerial prerogative has resulted in an unreasonably excessive and unduly burdensome workload as a regular condition of employment. If a practical impact is found to exist, the employer may act unilaterally to relieve the impact through the exercise of its reserved management rights; or it may seek to relieve the impact by negotiating changes in wages, hours and working conditions. If this Board finds that the employer has not expeditiously relieved the impact, the employer has a duty to bargain with the Union over the means to be used and the steps to be taken to relieve the impact.
>
> 2. EXCEPTIONAL CIRCUMSTANCES - We recognized that implicit in certain actions taken by the employer is the fact that the action so taken will have a practical impact on the affected employees. Thus, there is no question of fact to be decided by this Board; there is no dispute that a practical impact will result from the employer's exercise of its management prerogative. One example of

[14] Decision No. B-5-75 at 13-14.

this "per se" impact is the impact of the employer's decision to lay off employees on those laid off or scheduled to be laid off.[15] The practical impact of such a decision is immediately bargainable; a Union need not wait until employees are actually laid off before it exercises its right to negotiate the impact of the employer's decision.

3. THREATS TO EMPLOYEE SAFETY - We have also recognized that a finding of practical impact may attach to the exercise of a management prerogative if the exercise of such prerogative results in a threat to employee safety. Whether a threat to safety would result from the employer's exercise of its management right may be a question of fact to be decided by this Board after a hearing is held and a record developed.[16] In cases where we determine that management's exercise of its prerogative would in fact result in a threat to safety we will require bargaining to alleviate the impact at the time when implementation of the managerial decision is proposed.[17]

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[15] In Decision No. B-23-85, we stated as follows with regard to per se impact:

> Certain actions of the employer will result in a per se practical impact, automatically triggering the right to negotiate. Such actions include managerial decisions to lay off employees and those that involve imminent threats to safety. (Emphasis added; citations omitted).

[16] We have stated in numerous cases that while the question of whether a management action has a practical impact on employees within the meaning of Section 12-307b of the New York City Collective Bargaining Law is a question of fact which may require the holding of a hearing, "conclusory" or "bare" allegations of practical impact do not warrant the holding of a hearing. As a precondition to the Board's consideration of a practical impact claim, the Union must specify details which demonstrate the existence of the alleged safety threat. See e.g., Decision Nos. B-6-90; B-59-89; B-4-89; B-69-88; B-37-87; B-6-87.

[17] In a more recent case, Decision No. B-39-90, this Board further stated that:

> Where, as here, a practical impact on employee safety is alleged it is the Board's policy to expedite the matter due to the sensitive nature of the subject

(continued...)

The distinctions set forth in the different categories of cases described above were to some extent blurred in a number of our later decisions. For example, in Decision No. B-37-82, this Board ordered that a hearing be held to determine whether a practical impact on safety exists. In so ordering, we stated that:

> We have recognized, in past cases, that the existence of a clear threat to employee safety constitutes a per se practical impact which warrants the imposition of a duty to bargain over the impact of a management decision prior to the time that decision is implemented. 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 of whether there is a clear threat to employee safety, if disputed by the employer, is a matter to be determined by this Board before the obligation to bargain arises. The fact that a threat to safety constitutes a per se practical impact justifies imposing a duty to bargain prior to the time of implementation; it does not relieve the union of the burden of first proving the existence of such threat to safety. (Emphasis added).[18]

The problem with the above-referenced language is that it confuses a claim of per se practical impact with a claim that simply alleges a practical impact on safety. In both categories of cases, upon a finding by this Board that there exists a practical impact the employer will be ordered to bargain immediately, prior to implementation of the proposed plan. In a per se practical impact case, however, there is no question that the action proposed by the employer will result in a practical impact on the affected employees. Such a result is implicit in the action proposed by the employer. In a

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[17](...continued)
matter and the fact that time may be of the essence in alleviating any safety impact that may be found to exist.

[18] Decision No. B-37-82 at 22.

"regular" safety impact case, on the other hand, whether the employer's proposed action will have an impact on the safety of the affected employees is a matter in dispute between the parties. Unlike the per se practical impact situation, such a result is NOT implicit in the action proposed by the employer. Accordingly, upon a finding that sufficient evidence has been presented by the Union to warrant further inquiry, we will order a hearing at which time the parties will be given an opportunity to present evidence in support of their positions.

Thus, while it might be accurate to state that a clear threat to employee safety constitutes a per se practical impact and, in such cases, no hearing is required because there are no outstanding factual questions to be resolved by the Board, ordering a hearing to determine whether a per se practical impact exists is a contradiction of terms.[19]

The merging of the per se and non-per se categories in cases involving practical impact on safety is evident in many Board decisions.[20] For example, in Decision No. B-38-86 this Board stated:

> In Decision No. B-5-75, the Board expanded the concept of per se, finding that where

[19] We note that as of this date, this Board has never been presented with a case in which we determined that a proposed management action would result in a per se practical impact on safety. Rather, in every case decided by this Board in which a practical impact on safety was alleged, after finding that a substantial question was presented we ordered a hearing, thereby providing the parties with an opportunity to present evidence in support of their positions. Only after careful consideration of the record developed at such hearings have we determined whether the proposed management action would result in a practical impact on the safety of the affected employees.

[20] See e.g., Decision Nos. B-59-89; B-31-89; B-69-88; B-31-88; B-37-87; B-41-86.

> the proposed change is challenged as a threat to safety, ... it must, if there is a dispute as to bargainability, be submitted to this board, which, on the basis of the relevant evidence, will determine whether or not the proposed plan in fact involves a threat to safety.
>
> If the Board finds that adverse practical impact on safety is likely to occur, the Board will direct bargaining for alleviation of the threatened impact immediately - before the proposed change is implemented.
>
> Thus, the per se impact situations are those in which we deem the potential consequences of the exercise of a management right to be so serious as to give rise to an obligation to bargain before actual impact has occurred. (Citation omitted.)[21]

This is not accurate. Originally, a per se impact situation was identified as one in which there is no question of fact to be determined by the Board. Therefore, impact may be found on the papers alone **AND** bargaining will be ordered prior to implementation of the proposed plan. In a case alleging practical impact on safety (which is not on its face a "per se" impact), however, even if there is a factual question to be decided by this Board, upon a finding of safety impact we may order bargaining prior to implementation of the plan. Thus, it is not correct to refer to a matter as per se simply because the Board orders bargaining prior to implementation of the proposed plan. Accordingly, we now find that the term "per se" practical impact was misapplied in the prior Board decisions referred to above. The fact that we ordered a hearing to enable us to resolve factual questions concerning the alleged safety impact indicates that those cases did not fit into the "per se" category.

Applying the above-stated principles and standard to the instant matter,

[21] Decision No. B-38-86 at 20-21.

we find that a disputed question of fact exists as to whether Department Order 168 will have a practical impact on the safety of light duty firefighters assigned as Division Aides, full duty firefighters and other uniformed Fire Department personnel which requires further inquiry by this Board. Accordingly, we shall 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 determine the safety impact issues presented by the UFA and the UFOA. Due to the sensitive nature of the issues presented in this matter, we urge the parties to this proceeding to cooperate in the timely scheduling, commencement and completion of a safety impact hearing.

In reaching this conclusion, we note that we are not persuaded by the City's assertion that the petitioners' allegations of a practical impact on safety are based on a series of "mistaken assumptions supported by past anecdotal reports" which are "irrelevant, outdated and inapposite" to the matter at issue herein. To the contrary, we find that while some of the circumstances presented by Department Order 168 differ from those addressed in prior memoranda and reports concerning the appropriate duty status of Chiefs Aides, the conclusions reached in those memoranda and reports may nevertheless be relevant to our consideration of the instant safety impact issue and, therefore, raise questions of fact which should be more fully addressed in a hearing.

In this regard, we recognize that the duty status determination requested by Chief Bishop in 1982 specifically concerned Staff Chiefs Aides. In addition, some of the conclusions reached in that report arguably may not

be applicable to our consideration of the matter at issue herein since AUC 290 restricts the activities to be performed by light duty firefighters assigned as Division Aides pursuant to Department Order 168. We note, however, that in his request to Chief Medical Officer Dr. Jones, Chief Bishop stated that "... it is my feeling that the logic requiring a firefighting chief to be 'full duty' also applies to those assigned as their aides." Moreover, it may be argued that the conclusions reached by Dr. Jones and the other medical officers of the Division supports the position taken by Chief Bishop. Thus, we find that it is possible that aspects of the 1982 duty status determination are applicable to the safety impact issue presented by the UFA and the UFOA in their scope of bargaining petitions. Similarly, we find that consideration of Chief Feehan's report and the Staff Chiefs' November 30th letter to Mayor Dinkins also may be relevant to the instant matter even though some of the assumptions upon which they were based differ from the circumstances that exist herein.

Furthermore, we are not persuaded by the City's assertion that it has anticipated and addressed most foreseeable situations and is confident that no impact on safety will result from the Fire Department's issuance and implementation of Department Order 168. Instead, we find that the petitioners have raised a number of questions which may be vital to our determination of the safety impact issue presented herein. Accordingly, we find that further inquiry by this Board is required.

In so finding, we are influenced by some of the petitioners' allegations which, we suggest, could be more fully explored in a hearing before a Trial Examiner. For example, the petitioners contend that a change in duties, as

set forth in AUC 290, only exacerbates the immediate threat to the safety of uniformed Fire Department personnel because the City has effectively eliminated a key member of the firefighting team without making arrangements for any other employees to perform those functions. We note that while the City has denied the petitioners contention, it has not stated what, if any, arrangements have been made for the completion of duties previously performed by Division Aides by some other group of employees. Moreover, we note that the parties dispute

> . whether removal of the reconnaissance role of light duty Division Aides impairs the safety of all uniformed Fire Department personnel because "handi-talkie" communication is inadequate, and
>
> . whether the procedure recommended by the City in the event the Deputy Chief and Division Aide are the first Chief and Aide to arrive at the fire scene is practical or violates Fire Department policy and/or OSHA regulations;

and find that more information about those issues would be helpful to the Board in its consideration of the safety impact question.

We also find that contrary to the City's assertion, the fact that some civilians are present at the fire scene does not, by itself, demonstrate that the assignment of light duty firefighters as Division Aides has no practical impact on safety. As the UFA pointed out, the roles played by civilians and firefighters at a fire scene are very different. In this connection, we also find persuasive the UFA's claim that the assignment of light duty firefighters as Division Aides is unprecedented, and may be the reason that no "actual occurrences" have yet been reported. In any event, we find that contrary to the City's assertion, a question of fact remains as to whether PESH has constructively approved the plan to assign light duty firefighters as Division Aides.

Finally, we address the petitioners' request that the Board order rescission of Department Order 168 pending completion of negotiations to alleviate the practical impact on safety resulting from the issuance of Department Order 168.[22] The UFA, in support of its request, argues that the Board is empowered pursuant to Section 12-309a(4) of the NYCCBL to issue appropriate remedial orders. Accordingly, the UFA submits, if it is successful in establishing the existence of a per se impact on the safety of firefighters, it would be appropriate for the Board to order rescission of the light duty assignments pending negotiations between the parties. The City, on the other hand, argues that the Board is without the authority or power to issue injunctive relief and, therefore, may issue a cease and desist order only upon a determination that a party has committed an improper practice by violating its bargaining obligation.

We find that contrary to the UFA's assertion, Section 12-309a(4) is not applicable to the matter at issue herein because that provision pertains to the powers and duties of this Board in improper practice proceedings, not scope of bargaining proceedings.[23] In any event, however, we find it unnecessary to determine at the present time whether this Board may order rescission of Department Order 168 pending negotiations between the parties since no finding can be made on the safety impact issue until

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[22] Although the City addressed the issue of the relief requested only in its answer to the UFA's petition, we take administrative notice of the fact that the UFA and the UFOA requested the exact same relief in their respective scope of bargaining petitions.

[23] Section 12-309a(4) of the NYCCBL is set forth supra at note 6, pages 8 - 9.

completion of the hearing ordered herein.

O R D E R

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 issue of a practical impact on the safety of light duty firefighters assigned as Division Aides and full duty firefighters resulting from the issuance and implementation of Department Order 168 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 the issue of a practical impact on the safety of the members of the Uniformed Fire Officers Association resulting from the issuance and implementation of Department Order 168 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.

DATED: New York, New York
April 25, 1991

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

GEORGE B. DANIELS
MEMBER

ELSIE A. CRUM
MEMBER