UFA v. City, 47 OCB 49 (BCB 1991) [Decision No. B-49-91]

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

DECISION NO. B-49-91

UNIFORMED FIREFIGHTERS
ASSOCIATION 01- GREATER NEW YORK, DOCKET No. BCB-1265-90
Petitioner,
-and-

THE CITY OF NEW YORK,
Respondent.
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INTERIM DECISION AND ORDER

On March 26, 1990, the Uniformed Firefighters Association of Greater New York ("the UFA" or "the Union") filed a petition pursuant to Section 12-307b of the New York City Collective Bargaining Law ("NYCCBL")[1] in which it is alleged that

[1] Section 12-307b of the NYCCBL states as follows:

> 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; to 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. (emphasis added)

implementation of the "Roster Staffing Program"[2] by the New York City Fire Department ("the Department") has resulted in an excessive threat to the safety of New York City firefighters and an unreasonably excessive and unduly burdensome workload. On April 23, 1990, the City of New York ("the City") filed a notion to dismiss the petition and an affidavit and memorandum of law in support thereof. On May 11, 1990, the Union filed an affidavit and memorandum of law in response to the City's motion to dismiss or stay the scope of bargaining petition. In its response, the UFA requested, inter alia, that the Board order immediate injunctive relief. Thereafter, with the consent of the UFA, the City, on June 4, 1990, filed a reply to the Union's response to the motion to dismiss.

On June 27, 1990, this Board issued Decision No. B-39-90 in which we denied the City's notion to dismiss the scope of bargaining petition and ordered the City to serve and file an answer. On October 1, 1990, the City filed an answer and brief in support of the dismissal of the petition. On May 28, 1991, the UFA filed a reply.

BACKGROUND

On February 24, 1989, this Board rendered its determination

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[2] This program was formerly known as the "Roster Manning Program."

in a scope of bargaining proceeding between these same parties, Decision No. B-4-89, wherein we held, inter alia, that the subject of staffing is within the City's statutory managerial prerogative and, therefore, beyond the scope of mandatory collective bargaining. We also held that the deletion of the minimum staffing provision from the successor to the parties' 1984-1987 collective bargaining agreement could not result in a practical impact on the safety or workload of the firefighters in that the City had not proposed a reduction in staffing levels. Since the determination of the levels of staffing is within the City's managerial prerogative, this Board determined that an inquiry into the practical impact of its decision in that area would be necessary only if the City took affirmative steps to change the existing staffing levels.

Sometime after we issued the scope of bargaining decision, the City notified the UFA that it was developing a plan which included the assignment of four rather than five firefighters to certain fire engine companies. When the proposed change in staffing levels was brought to the attention of the Office of Collective Bargaining ("OCB"), a notice of hearing was sent on June 6, 1989 to the UFA and the City, stating that a Trial Examiner designated by OCB would consider the question of whether the reduction of minimum staffing levels in firefighting companies, from five-firefighter to four-firefighter crews, creates a practical impact an the safety and workload of

firefighters.

Thereafter, on July 14, 1989, the Fire Department issued a draft order setting forth its proposed roster staffing program, adaptive response policy and revised engine company tactics (hereinafter collectively referred to as the Roster Staffing Program), thus making it clear that the plan proposed by the City included more than just a reduction in the existing minimum staffing levels. Consequently, the scope of the question originally noticed for hearing by the OCB was expanded to include all of the elements of the City's newly proposed plan.

Hearings were held before Professor Walter Gellhorn, a Trial Examiner designated by the OCB, in July and August 1989. The question addressed by the City and the UFA at those hearings was whether implementation by the City of its proposed roster staffing program would result in a practical impact on the workload and safety of the affected firefighters.

On December 18, 1989, this Board rendered its final decision in the matter. In Decision No. B-70-89, we held that after carefully reviewing the record of the hearings before Professor Gellhorn, we were unpersuaded that the City's plan to assign four rather than five firefighters to certain engine companies, considered together with its roster staffing program, adaptive response policy, and the revision of engine company tactics, would have the objectionable effects the UFA had feared. Therefore, this Board held that the City's proposed plan could be

made operative by unilateral management action rather than as a product of negotiation. In reaching our decision, we stated that:

> We wish to emphasize that our decision is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future.

Accordingly, this Board dismissed, in its entirety, the petition filed by the UFA requesting that the City be directed to bargain concerning its plans to reduce the staffing levels in some fire engine companies.

On January 31, 1990, the City implemented its roster staffing program. Thereafter, on March 26, 1990, the UFA filed the scope of bargaining petition at issue in the case at bar, claiming that "the City's roster staffing program as implemented by the Department clearly creates an excessive threat to the safety of New York City firefighters and an unreasonably excessive and unduly burdensome workload." In its scope of bargaining petition, the UFA contends that the staffing levels achieved by the Department since the roster staffing program was implemented by the Department on January 31, 1990 fall far below that which was projected by the City in the prior scope of bargaining proceeding before this Board. Therefore, the Union argues, implementation of the roster staffing program has

resulted in a practical impact on the workload and safety of firefighters. Accordingly, the City should be directed to bargain with the Union to alleviate the impact.

The City, in its motion to dismiss the scope of bargaining petition, contended that the scope of bargaining petition filed by the UFA was barred by the doctrines of res judicata and/or collateral estoppel because all of the issues addressed therein were decided, or could have been decided, in the prior scope of bargaining proceeding. The City further argued that the Union's petition should be dismissed as premature in that it sought to prove a practical impact on the workload and safety of firefighters based upon only seven weeks experience under the roster staffing program. Finally, the City argued that the petition should be stayed pending the outcome of challenges co, Decision Nos. B-4-89 and B-70-89 filed by the UFA pursuant to Article 78 of the CPLR. The City maintained that the relief sought by the Union in those proceedings would, if granted, duplicate and obviate the relief sought in the instant scope of bargaining petition.[3]

In Decision No. B-39-90, we found that res judicata did not bar the Board's consideration of the petition, as "there is a significant difference between the issues presented by the

[3] It should be noted that Decision Nos. B-4-89 and B-70-89 were upheld by the Appellate Division, First Department and the Supreme Court, New York County, respectively.

parties in the proceeding leading to board Decision No. B-70-89, and the issues presented by the UFA in the instant scope of bargaining petition." We noted that the question considered by the Board in the earlier proceeding was "whether the configuration of elements described by the City and set forth in the record therein would result in a practical impact on the workload and safety of the affected firefighters," whereas the issue presented in the instant scope of bargaining petition is "whether the Roster Staffing Program, as implemented by the Department, has resulted in a practical impact on the workload and safety of firefighters." The Board further rejected the City's assertion that the Union's scope of bargaining petition was premature, finding that where "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 matter and the fact that time may be of the essence in alleviating any safety impact that may be found to exist." Finally, the Board rejected the City's assertion that the instant matter should be stayed pending the outcome of related court cases, finding "that the Article 78 proceedings referred to by the City differ substantially from the matter now before the Board, and do not provide a basis upon which to stay the instant petition."'

POSITIONS OF THE PARTIES

Union's Position

The Union argues that roster staffing, as implemented, has a practical impact on New York City firefighters. In its petition, the Union asserts that "[e]ven though its history is relatively brief, roster staffing has already proved itself to be thoroughly unworkable as a substitute for five-firefighter minimum staffing." In support of its position, the UFA alleges that:

1. the roster staffing program has failed to produce staffing levels projected by the City in the practical impact hearings before Professor Gellhorn;

2. the Department has found it to be administratively impossible to allocate firefighters according to the priorities set forth in the roster staffing proposal;

3. because of the problems caused by the roster staffing program, the City has abandoned its Alarm Assignment and Response Policy, which normally provides for the dispatch of two engine companies and two ladder companies on receipt of an alarm for a structural fire from an alarm box;

4. because the Department is operating at an absolute minimum in terms of staffing, the Department has been forced to run ladder companies with four firefighters and engine companies with as few as three firefighters for the remainder of a tour whenever a fire results in Fire Department medical officers placing firefighters on medical leave because of fire-related injuries;

5. the Department has been forced to increase detailing of firefighters to equalize staffing levels, resulting in a reduction of firefighting effectiveness because firefighters are working in unfamiliar companies in unfamiliar areas; and

6. there have been at least four civilian deaths that might not have occurred if five-firefighter minimum staffing had still been in place, demonstrating that roster staffing poses not only a threat to firefighters, but also to the civilian public.

The Union alleges that Citywide Daily Report forms prove that the roster staffing program has failed to achieve the staffing levels projected by the City at the 1989 practical impact hearing. For example, the Union asserts that whereas the City predicted that it would maintain "Level A" on 59.6 percent of all tours, the report forms establish that during the period from February 10, 1990 through March 22, 1990 the City achieved Level A on only one tour. The Union asserts that although the Board's 1989 decision stated that it would be "commonplace" for the initial engine company to respond with five firefighters, the report forms demonstrate that five-firefighter engine companies are not "commonplace" at all. Moreover, the Union alleges that while the City told the Board at the 1989 hearing that under roster staffing there would be an 85 percent probability that the first due engine company at a structural fire would have five firefighters, there is only a 24 percent chance of this occurring under roster staffing as implemented.

In support of its argument that the City is unable to allocate available firefighters according to the priorities set forth in its roster staffing proposal, the Union alleges that although the City stated during the 1989 hearing that roster staffing would provide for the detailing of available firefighters to high priority engine companies, these high priority engine companies are consistently operating with four rather than five firefighters. The Union alleges that the City's

prediction at the 1989 hearing that engine companies housed alone would be staffed with five firefighters about 90 percent of the time has not been achieved under the roster staffing program as implemented.

The Union also alleges that the City changed its proposed alarm response policy once roster staffing was implemented. The Union notes that in its 1989 practical impact decision the Board found that the City's adaptive response procedure would help to alleviate any practical impact that would result from the reduction in engine company staffing. Relying on language in the decision which stated that "[t]he City's speedy provision of a 'second-due engine company' as a matter of routine may reasonably be viewed as a ... supplement," the Union contends that the City's alteration of its dispatch policy has a practical impact on Firefighters. The Union alleges that the City has changed its policy from one which required two engine companies, two ladder companies, special units, and a Battalion Chief to respond upon receipt of an alarm to one which suggested that these companies respond "if available," but required that only one engine company, one ladder company, and one Battalion Chief be dispatched.

The Union further alleges that due to staffing shortages generated by roster staffing, fires are being fought by four-firefighter ladder companies and three-firefighter engine companies. The Union contends that as the City presented its

proposal at the 1989 practical impact hearing, roster staffing would guarantee, at a bare minimum, that fires would be fought by five-firefighter ladder companies and four-firefighter engine companies. The Union explains that an engine company stretches the firehose and extinguishes the fire, while a ladder company searches for and rescues civilians, ventilates the burning building, and searches for the source of the fire.

The Union explains that a ladder company has five positions: (1) the forcible entry person, who has the primary responsibility of opening the door to the fire apartment and searching for civilians on the fire floor; (2) the extinguisher person, who has responsibility for assisting with forcible entry, assisting in search and rescue and using the portable fire extinguisher where necessary; (3) the roof person, who is responsible for ventilating the roof; (4) the chauffeur, who operates the aerial and tower ladders to aid with rescue and ventilation; and (5) the outside ventilation person, who is stationed on a fire escape on the level of the fire floor, and is primarily responsible for ensuring proper ventilation at the fire floor. The Union alleges that under roster staffing, reduction in ladder company staffing from five to four firefighters occurs frequently. For example, the Union contends that an the night of February 18, 1990, following a fire in the 15th Division, nine out of twelve ladder companies rode with four firefighters for the remainder of the tour -- from after midnight to 9 a.m. The Union asserts that the

City's inability to staff ladder companies with five firefighters for the full tour has an impact on the safety and workload of all firefighters. The Union points out that the Department has no guidelines in its operational manuals for operating ladder companies with four firefighters. Furthermore, the Union alleges that the Department does not have a practice or policy concerning which specific ladder company position the company officer should eliminate when the ladder company is operating with four instead of five firefighters. The Union states that when a ladder company is forced to respond with four firefighters, ladder company officers eliminate the outside ventilation position. The Union contends that the safety of both firefighters and the civilian public depend on the presence and skill of the outside ventilation person. For example, the Union alleges that a fifth person, filling the outside ventilation position, would have saved the life of an elderly disabled woman who died in a fire which was responded to with four firefighters from Ladder Company 150 on the night of February 28, 1990. The Union claims that the outside ventilation person would have been responsible for "laddering" the rear of the building, which did not have a fire escape, and attempting to rescue anyone inside. According to the Union, the forcible entry team coming from the front of the building could not get to the rear of the building, where the woman's apartment was located, because of heavy smoke conditions. The Union also contends that three-firefighter engine

companies have responded to fires under roster staffing. The Union explains that the Department will detail a firefighter from a five-firefighter ladder or engine company to a three firefighter engine company and that the officer in charge of the three-firefighter engine company has the option of keeping the engine company open while awaiting the detail. If the company is kept open, the three-firefighter engine company must respond to any emergency which occurs before the fourth firefighter arrives. The Union alleges that Engine Company 15, on February 28, 1990, began its tour with four firefighters and then was reduced to three firefighters after one firefighter had to take medical leave. Similarly, the Union alleges that on March 1, 1990, Engine Company 9, which lost one firefighter to injury as a result of a fire, was the first company to arrive when a second fire broke out an hour later.

The Union further alleges that the increased detailing required by roster staffing reduces engine company effectiveness. The Union explains that prior to roster staffing, if a company were understaffed at the outset of a tour, the Department would hire on overtime an additional firefighter from the same company's previous tour. The Union contends that under roster staffing, if an engine company begins a tour with three firefighters, the Department will detail a firefighter from an engine company with five firefighters to the engine company with three firefighters. The Union argues that the detailed

firefighter might be unfamiliar with the neighborhood the company serves as well as with the other members of the company, hindering that engine company's firefighting effort. The Union asserts that although it is extremely important for the engine company's chauffeur to be familiar with a neighborhood, the City, nonetheless, has detailed even these individuals. Relying on language in the Board's 1989 decision which stated that the reduction in engine company staffing would not have a practical impact because, in part, of the "speedy dispatch of a second-due" engine company, the Union contends that due to the detailing of engine company chauffeurs, the response time of all engine companies, both first and second-due, is anything but "speedy."

Finally, the Union contends that roster staffing is dangerous to both firefighters and the civilian public. The Union notes that it presented evidence at the 1989 practical impact hearing regarding the difficulty of stretching a heavy firehose as quickly as possible while wearing full gear. The Union explains that in a five-firefighter engine company, four firefighters stretch the hose while one remains with the engine; accordingly, in a four-firefighter engine company, only three firefighters are available to stretch the hose, making the job that much more difficult. Moreover, the Union notes that in a four-firefighter engine company no one is available to relieve those stretching the hose line.

The Union further argues that reduced staffing in engine

companies not only increases workload unduly, but also dramatically reduces the firefighter's margin of safety. The Union explains that reduced engine companies take longer to attack a fire and that members of reduced engine companies are more likely to be alone in dangerous areas. The union discusses accounts of recent fires, which it contends make clear the dangers of operating with four-firefighter engine companies. The Union asserts that a fire which occurred on February 5, 1990 and was responded to by a four-firefighter team from engine company 84 is such an example. The Union alleges that when engine company 84 signaled for help, its companion ladder company, ladder company 34, was unavailable because it was responding to another fire; accordingly, ladder company 23 responded from further away. Similarly, the Union contends that the two closest engine companies also were already out on another call. The Union alleges that this incident demonstrates the inadequacy of the City's adaptive response policy, which should have provided for the "speedy" dispatch of a second engine company when the two closest engine companies were responding to other calls. Moreover, the Union contends that this incident demonstrates the necessity of always staffing engine companies with five firefighters, as even when engine companies are quartered with ladder companies, the ladder company may not be available. The Union further alleges that had engine company 84 had five firefighters when it responded to the call, it would have

completed the hose stretch more quickly and extinguished the fire, possibly enabling a firefighter to reach and rescue a civilian who died. The Union further alleges that inadequate staffing increased the dangers and workload the firefighters confronted: had there been five firefighters, the lieutenant may have had assistance in attempting to rescue the civilian; a firefighter may not have been exhausted and injured; someone may have been able to carry forcible entry tools to the fire apartment while the hose was being stretched or helped with the stretch itself by removing kinks from the hose.

The Union alleges that an incident which occurred on March 10, 1990 and was responded to by engine company 234 further demonstrates the inadequacy of roster staffing. The Union contends that engine company 234 began a hose stretch to the fourth floor of the building with only three firefighters; accordingly, the firefighters had to ask civilians to help with the stretch and undo any kinks in the hose, a job normally performed by the fourth firefighter on the stretch. The Union alleges that had the company had a fifth firefighter, it would have been able to complete the stretch and put the fire under control more quickly. Accordingly, had the fire been under control sooner, the ladder and rescue company firefighters may have been able to save three children who died in the fire. The Union further asserts that the longer the rescue and ladder company firefighters are in the fire apartment without the engine

company applying water to the fire, the more likely it is that the ladder and rescue company firefighters will suffer serious injury or die. The Union also contends that the second-due engine company, engine company 227, arrived too late to help with the first hose stretch and consequently had to commence stretching a second line.

In its brief submitted in support of its scope of bargaining petition, the Union argues that the Board should order the City to engage in collective bargaining with the UFA and to discontinue the implementation of the roster staffing program until the City completes such bargaining. The Union argues that decisions by the Board clearly establish that when a managerial decision threatens employee safety, it creates a per se practical impact, and that once a per se practical impact is found to exist, the employer must immediately engage in collective bargaining with the affected employees' union to determine how the practical impact will be alleviated. Moreover, the Union asserts that until collective bargaining over the alleviation of a per se practical impact takes place, the employer may not implement its planned action but must maintain the status quo.

As a remedy,, the Union requests that the Board make a determination pursuant to Section 12-307b of the NYCCBL finding that the City's Roster Staffing Program, as actually implemented and operated by the Department, has a practical impact on New York City firefighters and, therefore, falls within the scope of

collective bargaining. The Union further requests that the Board issue an order:

1. directing the City to engage in collective bargaining with the UFA over the means to alleviate the practical impact caused by roster staffing;

2. directing the city to discontinue its implementation of roster staffing and to return to the level of staffing required by the 1984-1987 collective bargaining agreement between the City and the UFA; and

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

City's Position

The City disputes the Union's argument that the City's roster staffing program has failed to achieve the staffing levels that the Department predicted at the 1989 practical impact hearing. Similarly, the City disputes the Union’s argument that the City is unable to allocate available firefighters according to the priorities set forth in its roster staffing proposal.

The City also disputes the Union's allegation that since the implementation of roster staffing, the City changed its dispatch policy. The City contends that the Department's policy with respect to the dispatch of units has not changed due to roster staffing, except to the extent that, under the adaptive response component of the roster staffing program,, the Department now sends an additional engine more frequently than it did previously. The City further alleges that before roster staffing, the response to a single source report of a structural

fire called for the dispatch, at a minimum, of one engine company, one ladder company, and a chief officer; at a maximum, two engines, two ladders and a chief officer would be dispatched. Accordingly, the City contends that before roster staffing, the designated second engine and second ladder company were dispatched only if they were available. The City asserts that the policy under roster staffing is the same. The City explains that under roster staffing, the "adaptive response" rule applies when one of the engine companies dispatched to a structural fire has four firefighters, in which case the new adaptive response policy mandates that a second engine be sent; if the second engine company that would normally be assigned is unavailable, the dispatcher must dispatch another engine company from the predetermined list of companies that has been established for each alarm location.

Furthermore, the City disputes the Union's argument that due to staffing shortages generated by roster staffing, fires are being fought by four-firefighter ladder companies and three-firefighter engine companies. However, the City admits that on February 18, 1990, following a fire in the 15th Division, nine of twelve ladder companies rode with four firefighters from approximately midnight to 9 a.m. The City explains that, when a ladder company is operating with four firefighters, it is the Fire Department's policy that the officer in charge of the unit at the scene of the fire decides how to deploy the firefighters,

taking into consideration, among other factors, the type of building, fire conditions and the experience of the firefighters The City further admits that on February 28, 1990, only four firefighters reported for duty for the "6 x 9" tour at Ladder Company 150. The City denies that the outside ventilation position had been eliminated when Ladder Company 150 responded to a fire that night, contending that the chauffeur had been designated to cover that position. The City contends that a civilian casualty occurred "before the arrival of the units" and that the deceased woman appeared "to have been the victim of a homicide (in that the fire was set, and an accelerant was used)." According to the City, roster staffing had no impact on the civilian casualty or on the safety or workload of the firefighters.

The City similarly denies the Union's allegation that three firefighter engine companies have responded to fires under the roster staffing program. However, the City admits that, due to medical leaves commencing after the start of a tour, some units have had their staffs reduced to three firefighters, and that such units have remained opened if an additional firefighter is detailed to bring the staff up to four. The City admits that on February 28, 1990, Engine Company 15 began its tour with four firefighters and that one firefighter took medical leave after the start of the tour. The City adds, however, that Engine Company 15 did not respond to any incidents for the remainder of

the tour. Similarly, the City admits that on March 1, 1990, Engine Company 9 began its tour with four firefighters, but that one firefighter took medical leave after the start of the tour, thereby leaving three firefighters to respond to a call before a detailed firefighter arrived. However, the City adds that when Engine Company 9 responded that it was understaffed, an additional unit was dispatched at the same time to support Engine Company 9 and that a third unit was dispatched shortly thereafter. The City contends that roster staffing had no practical impact, in this instance, on firefighter workload or safety.

The City similarly denies the Union's allegation that the increased detailing required by roster staffing reduces engine company effectiveness. However, the City admits that, under roster staffing, detailing of firefighters has occurred more often. The City further admits that engine company chauffeurs have been detailed to other firehouses on occasion.

Finally, the City denies the Union's allegation that roster staffing is dangerous to both firefighters and the civilian public. Moreover, the City denies the Union's allegation that accounts of recent fires make clear the dangers of operating with four-firefighter crews. The City contends that the fire responded to by engine company 84 on February 5, 1990 had been deliberately set by the occupant of another apartment with the use of an accelerant. Furthermore, the City contends that

although nearby engine and ladder companies were responding to another alarm, engine company 84 received additional support units. The City asserts that there were no response or operational delays and that roster staffing had no impact on the civilian fatality or on firefighter workload or safety. As to the incident which occurred on March 10, 1990 and was responded to by engine company 234, the City contends that the three children had been left alone by their babysitter and had started the fire by playing with a cigarette lighter. Moreover, the City notes that there were no smoke detectors in the fire apartment, which might have led to the earlier discovery of the fire. The City further notes that it is not uncommon for civilians to assist in the stretching of the hose line.

The City raises several affirmative defenses in its answer: first, that the petition is barred, in whole or in part, by the doctrines of res judicata and/or collateral estoppel; second, that the petition is barred, in whole or in part, on the grounds that it is premature; third, that the petition is barred, in whole or in part, on the grounds that it duplicates proceedings currently pending in court; fourth, that the petition fails to, state a claim upon which relief can be granted; fifth, that the petition is barred, in whole or in part, on the ground that the alleged failure, if any, to attain protected staffing levels has resulted from atypical medical leave usage levels; sixth, that the petition its barred, in whole or in part, by the doctrine of

estoppel, on the ground that the alleged failure, if any, to attain projected staffing levels has resulted from actions by firefighters and/or Petitioner that have caused medical leave usage levels to be artificially inflated and unrepresentative. The City does not concede that any such failure to attain the projected staffing levels signifies a practical impact on firefighter workload and/or safety.

In its brief, the City argues that the petition does not contain any alleged fact which would support a conclusion that the roster staffing program has a practical impact. The City notes that when an action normally outside the boundaries of mandatory collective bargaining is challenged because that action creates a practical impact, the challenger bears a heavy burden of persuasion. The City argues that the UFA may not meet this burden with anecdotal accounts of instances in which a fifth firefighter arguably would have made a difference. The City argues that the petition alleges only one arguably pertinent fact -- that during the first six weeks of the implementation of the roster staffing program, firefighter absenteeism was higher than the City had projected at the 1989 hearing. The City contends that as a result of this, more tours started with four-firefighter engine companies and fewer started with five-firefighter engine companies than the City had projected.

The City argues that the petition consists of: (1) a repetition of arguments that the Union previously presented to

the Board, without success; (2) anecdotal descriptions of four fires -- a form of evidence previously rejected by the Board as a basis for establishing a practical impact; and (3) conclusions, assertions, arguments and other rhetorical flourishes, which are not factual and must be disregarded altogether. Moreover, the City contends that the one fact that the Union has alleged is plainly insufficient to meet its heavy burden. The City argues that the Union has not come forward with enough evidence to establish that an impact "has resulted." The City contends that a discrepancy between the projected and actual attendance figures neither constitutes a practical impact, nor establishes, by any standard of proof, that such an impact has resulted.

The City notes that mere conclusory allegations of practical impact are not sufficient to justify even the holding of a hearing. According to the City, as the Union's evidence consists entirely of anecdotal descriptions of four fires, the Union's evidence is not material to the issue before the Board -- firefighter safety and workload. Moreover, the City argues that, even if material, the Union's anecdotal evidence is insufficient to raise an inference that a practical impact can be shown to exist. Arguing that the term "practical impact" refers to an unreasonably excessive or unduly burdensome workload as a regular condition of employment, the City argues that the Union's anecdotal evidence represents, at best, a microscopic sample of the incidents the fire department handles each year and,

therefore, cannot permit any meaningful conclusion about what occurs as a regular condition of employment. The city further notes that as none of the anecdotal evidence even purports to describe conditions of safety or workload that are unusual for this vocation, the Union has alleged no facts which establish the existence of a practical impact on firefighter workload or

Accordingly, the City contends that the petition should be dismissed as it fails to allege any facts -- as contrasted with mere conclusory statements -- that demonstrate that roster staffing is the proximate cause of an unreasonably excessive or unduly burdensome workload as a regular condition of employment.

DISCUSSION

In its brief submitted in support of its scope of bargaining petition, the Union argues that the Board should order the City to engage in collective bargaining with the UFA and to discontinue the implementation of the roster staffing program until the City completes such bargaining. The Union argues that decisions by the Board clearly establish that when a managerial decision threatens employee safety, it creates a per se practical impact, and that once a per se practical impact is found to exist, the employer must immediately engage in collective bargaining with the affected employees' union to determine how the practical impact will be alleviated. Moreover, the Union

asserts that until collective bargaining over the alleviation of a per se practical impact takes place, the employer may not implement its planned action but must maintain the status quo.

In Decision No. B-25-91, we noted 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 reviewed the development of the concept of practical impact on safety under the NYCCBL and set forth the appropriate standard to be applied in such cases. We distinguished practical impact on safety cases from per se practical impact cases, finding that in the latter there is no question that the action proposed by the employer will result in a practical impact on the affected employees, whereas in the former, 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. Accordingly, whereas in per se practical impact case, no hearing will be required before ordering the City to bargain in order to alleviate the impact, a hearing will be necessary in a practical impact on safety case in order to enable the Board to make a determination as to whether there is a practical impact. Upon a finding by this Board that there exists a practical impact, the employer will be ordered to bargain.

In the instant case, the Union argues that the roster staffing program, as implemented, has a practical impact on safety. Previously, in Decision No. B-70-89, we determined that

it had not been established by the UFA that the roster staffing plan, as proposed, would have a safety impact. The UFA asserts that the City, in urging the Board in the earlier proceeding to find that its roster staffing proposal had no safety impact, submitted certain projections to the Board regarding the plan's future implementation, which experience has shown it did not attain. The UFA contends that since the program's implementation, staffing levels have fallen far below the level projected by the City at the earlier proceeding. It may be said that we anticipated this possibility in Decision No. B-70-89 when we stated:

> We wish to emphasize that our decision is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future.

In the instant scope of bargaining petition, the UFA argues that: 1- the roster staffing program has failed to produce the staffing levels projected by the City at the earlier practical impact proceedings; 2- the Department has not been able to allocate firefighters according to the priorities set forth in the roster staffing proposal; 3- the City has changed its adaptive response procedure because of the problems caused by the roster staffing program; 4- the Department has run ladder companies with four firefighters and engine companies with three firefighters under roster staffing; 5- roster staffing has

increased the detailing of firefighters; and 6- at least four civilian deaths have occurred, which might not have happened with five-firefighter minimum staffing. We find that the facts alleged by the UFA in support of these allegations sufficiently raise a claim that the roster staffing program, as implemented, has a safety impact. We note, however, that the heavy burden of persuasion the challenger ordinarily bears in proving the existence of a practical impact on safety[4] is even greater when the challenge is raised so soon after the prior determination of this Board on the subject and on the heels of the City's implementation of the program. Moreover, we note that the instant petition covers only the period from January 31, 1990 through March 26, 1990; the Union makes no allegations concerning the safety impact of the roster staffing program as it has been administered from the latter date to the present time. Further allegations in this regard would have served to better buttress the Union's claim. In any case, we will require evidence as to what has transpired during that period relevant to the issue of practical impact.

Finally, we briefly address the affirmative defenses raised by the City in its answer. The first three affirmative defenses raised by the City -- res judicata, the petition's prematurity, and the duplicity of simultaneous Court and Board proceedings --

[4]Decision No. B-70-89.

were fully discussed and rejected by this Board in Decision No. B-39-90. Accordingly, we need not again discuss those defenses. We should note, however, that the instant scope of bargaining petition cannot now be premature, as the roster staffing program has been implemented. Moreover, we note that the Appellate Division, First Department and the Supreme Court, New York County, have upheld our determinations of this issue in our decisions B-4-89 and B-70-89, respectively.[5]

The City further alleges that the petition fails to state a claim upon which relief may be granted and that the petition is barred by the doctrine of estoppel, in that any failure to attain the projected staffing levels has been the result of atypical medical leave usage by firefighters. As to the former affirmative defenses, we find that the petition states a claim of practical impact on safety. As to the latter, we find that the relevance of atypical medical leave usage levels and the relative fault of the respective parties for this occurrence are matters more properly determined by this Board after a hearing on the issue of whether the roster staffing program, as implemented, has a practical impact on safety.

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[5] Uniformed Firefighters Association v. New York City Office of Collective Bargaining, 163 A.D.2d, 558 N.Y.S.2d 72 (1st Dep't 1990); Uniformed Firefighters Association v. New York City Office of Collective Bargaining, N.Y.L.J, p.25, col.4 (Sup. Ct. N.Y. Co. Dec. 20,1990).

ORDER

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

ORDERED, that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which this Board may determine whether there has been a practical impact on safety as a result of the City's unilateral implementation of the roster staffing program.

DATED: New York, N.Y.
October 23, 1991

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

ELSIE A. CRUM
MEMBER