UFA, L. 94, & UFOA, L. 854, 13 OCB2d 9 (BCB 2020)

(Scope/IP) (Docket Nos. BCB-4219-17 and BCB-4221-17)

Summary of Decision: The UFA and UFOA filed petitions alleging that the FDNY violated NYCCBL § 12-306(a)(1) and (4) and § 12-307(a) by refusing to bargain over the assignment of their members to Counter-Terrorism Task Forces and its impact on safety and workload. The City argued that the petitions are untimely, that the alleged change does not involve mandatory subjects of bargaining, and that the Unions failed to establish an impact on safety or workload. The Board found that most of the unilateral change claims are untimely and that the timely claims do not concern mandatory subjects of bargaining. It further found a *per se* safety impact, but not a practical impact on workload. The Board therefore ordered impact bargaining over safety and dismissed the Unions' remaining claims. ***(Official decision follows).***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Scope of Bargaining/Improper Practice Proceeding

-between-

UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, and UNIFORMED FIRE OFFICERS ASSOCIATION, LOCAL 854,

Petitioners,

-and-

THE CITY OF NEW YORK and THE FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On June 9, 2017, the Uniformed Firefighters Association, Local 94 ("UFA"), and the Uniformed Fire Officers Association, Local 854 ("UFOA") (collectively, "Unions"), filed

verified scope of bargaining/improper practice petitions against the Fire Department of the City of New York ("FDNY") and the City of New York ("City"). The Unions allege that the FDNY violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by refusing to bargain over the unilateral assignment of their members to Counter-Terrorism Task Forces ("CTTFs") that respond to active shooters and other aggressive deadly behavior. The Unions further allege that the assignment to these Task Forces involves mandatory subjects of bargaining and has *per se* and practical impacts on their members' safety and workload. The City argues that the petitions are untimely and that the alleged unilateral changes do not concern mandatory subjects of bargaining. The City further argues that the Unions fail to demonstrate that the alleged changes have a *per se* or practical impact on safety or workload.

The Board finds that most of the unilateral change claims are untimely and that the timely claims do not concern mandatory subjects of bargaining. The Board further finds that assigning bargaining unit members to operate in areas that expose them to risks from active shooters or other aggressive deadly behavior has a *per se* safety impact but that the facts did not demonstrate a workload impact. The Board therefore orders impact bargaining over safety and dismisses the Unions' remaining claims.

BACKGROUND

The UFA represents all FDNY employees in the titles Firefighter, Fire Marshal, Marine Wiper, Pilot, and Marine Engineer. The UFOA represents all FDNY employees in the titles of

Lieutenant, Captain, Battalion Chief, Deputy Chief, Fire Medical Officer, and Supervising Fire Marshal. The FDNY did not have a policy addressing the assignment of employees to respond to active shooters or other incidents involving aggressive deadly behavior prior to November 2015.

Response Protocol to Active Shooter Incidents

On November 16, 2015, the FDNY issued Operating Guide Procedure 105-01, titled "Interagency Response Protocol to Active Shooter Incidents" ("Response Protocol"). It states that "[i]ncidents involving active shooters, violent extremists, barricade situations or aggressive deadly behavior represent some of the most challenging responses to the first responder community . . . [and] test the strategic, operational, and tactical capabilities of first responders." (Ans. to UFA Pet., Ex. 1, § 1.1) Its "Safety Considerations" section states that the "primary incident objective is civilian and first responder life safety." (*Id.*, § 2.1) The Response Protocol notes that these incidents involve the New York City Police Department ("NYPD") "for threat suppression, site security, and force protection; and the FDNY for pre-hospital care including triage, treatment and transport of victims." (*Id.*)

The Response Protocol utilizes the United States Department of Homeland Security definition of "Active Shooter(s)," which is: "individual(s) actively engaged in killing or attempting to kill people in a confined and populated area; in most cases, active shooters use firearms, and there is no pattern or method to their selection of victims." (Ans. to UFA Pet., Ex. 1, § 1.1) The term "Aggressive Deadly Behavior" is not defined in the Response Protocol.

The Response Protocol defines three "threat designations" for incident zones: Hot, Warm, and Cold Zones. (Ans. to UFA Pet., Ex. 1, § 3) A Hot Zone is an area of a "known hazard, where the perpetrator(s) are shooting, roaming free, or are engaged by law enforcement" and where improvised explosive devices ("IEDs") may be present. (*Id.*, § 3.1) The Response Protocol provides that "[n]o FDNY personnel are to operate in designated Hot Zones. Only law enforcement personnel with the appropriate level of ballistic protection equipment will operate in Hot Zones." (*Id.*) A Warm Zone is defined as a "cleared area that has been deliberately searched by law enforcement, contains no identifiable threats, but has not been declared a Cold Zone" by the NYPD.[1] (*Id.*) In a Warm Zone, FDNY and Emergency Medical Services ("EMS") "personnel may be deployed for life safety operations only and shall be escorted by NYPD personnel, operating under their security."[2] (*Id.*) The Response Protocol further provides that:

> FDNY members shall only operate inside the Warm Zone **when requested by the NYPD for life saving intervention**. This operation must **be approved by a FDNY Deputy Chief**, unless the NYPD Incident Commander requests entry for immediate life-saving intervention. In such cases, an on-scene FDNY Battalion Chief may grant this approval. An **FDNY Staff Chief must be immediately notified of active shooter incidents**.

(*Id.*, § 5.4) (emphasis in original) A Cold Zone is defined as an area where there is "normal risk due to geographic distance from the threat, or the area has been secured by the NYPD." (*Id.*, §

[1] The Response Protocol also defines a "Warm Corridor" as a "[r]oute that has been cleared and under NYPD control for escorted entry & egress of responders, and for victims to & from the Warm Zone." (Ans. to UFA Pet., Ex. 1, § 3.1)

[2] The Unions do not represented FDNY employees in the EMS titles.

3.1) Command and operations posts as well as staging, medical, and transportation areas are to be located in Cold Zones.

The Response Protocol refers to Rescue Task Forces ("RTFs"), which are joint teams of FDNY and NYPD members operating at the scene of an active shooter or other aggressive deadly behavior. The purpose of an RTF is to provide "lifesaving medical treatment to victims" in a Warm Zone, and its "composition will be dependent on NYPD force protection and available units on the scene." (Ans. to UFA Pet., Ex. 1, § 7) The optimal RTF would include one EMS Officer, one basic life support ("BLS") ambulance, and one certified first responder engine, with the chauffeur remaining with the rig. (*See id.*, § 7.1.1) However, the Response Protocol provides that "[e]ntry [into a Warm Zone] should not be delayed awaiting specific FDNY resources." (*Id.*) RTFs are under the command of NYPD Officers, although "FDNY Officers shall maintain immediate supervision over members and defer to the highest-level medical expertise for patient care." (*Id.*, § 7.1.2)

FDNY members are cautioned in the Response Protocol that the "NYPD may have difficulty distinguishing between the perpetrators, victims or first responders" and establishes procedures to be "strictly followed" by members when confronted by a NYPD officer seeking to verify their identity. (Ans. to UFA Pet., Ex. 1, § 2.2) These procedures include: "[c]omply with the commands of law enforcement personnel"; "[r]emain motionless (no sudden movements)"; and "[d]o not turn your body unless instructed to do so by the challenging officer." (*Id.*)

The Response Protocol instructs FDNY members that if they encounter an active shooter prior to the arrival of the NYPD, they should "immediately withdraw, notify units on the scene

and request a forthwith police response" and that if "withdrawal is not possible," they should "seek hard cover/concealment." (Ans. to UFA Pet., Ex. 1, § 4.1) Hard cover is an "area impenetrable to ballistic weapons[] (e.g. thick concrete wall)"; concealment is "an obstacle that hides your exact location, but can be penetrated by ballistic weapons [] (e.g. sheetrock)." (*Id.*) FDNY members are instructed to, if possible, communicate to the NYPD the following information: "[n]umber, location(s), and description of shooter(s)"; "[n]umber & location(s) of victims and hostages, if any"; "[t]ypes of weapons in use (e.g., semiautomatic rifles, hand guns, explosives)"; and "[c]ommunication method used by [perpetrator(s)], if apparent (cell phones, etc.)." (*Id.*, § 4.2)

The Response Protocol notes that "these incidents may change rapidly" and that when the NYPD arrives, FDNY members are to "confer with the NYPD Incident Commander on the nature of threat, types of weapons, and location of victims, hostages and zones." (Ans. to UFA Pet., Ex. 1, §§ 2.1; 5.1) It provides that "FDNY units shall stage outside of the designated Warm and Hot Zones, with due regard for safety and the advice of the NYPD. They shall remain behind hard cover and out of the line-of-sight of any building that contains a shooter. Units shall use distance and shielding to increase safety." (*Id.*, § 5.2) (emphasis deleted)

The Response Protocol further provides that "FDNY and NYPD commanders shall co-locate within sight, voice, and arm's distance of each other at an Incident Command Post in the Cold Zone (behind hard cover and out of the line-of-sight)." (Ans. to UFA Pet., Ex. 1, § 6.4) (emphasis omitted) Active shooter incidents are to be considered "a Single Command incident" with a NYPD Officer as the Incident Commander while the "more complex situation that

involves an active shooter using fire and smoke as a weapon will require a Unified Command." (*Id.*, §§ 6.2; 6.3) The Response Protocol provides that FDNY and NYPD Commanders should discuss safety criteria for entering, operating, and exiting a Warm Zone, taking into consideration whether there are Police Officers at each entry point to the Warm Zone; whether there are elevators and stairs serving the area; whether there are designated areas of refuge; and whether there is adequate force protection in the Warm Zone. (*See id.*, § 6.7.4) The FDNY Command is also instructed to consider whether a Warm Corridor has been established to and from the Cold Zone.

When "the NYPD requests the FDNY to enter designated Warm Zones to address life safety and emergency medical concerns," the FDNY Command is to, among other duties, "[d]efine the threat," which entails determining the "[n]umber and location of shooter(s) [and] [w]eapons (hand guns, rifles, grenades, IEDs, fire, etc.)." (Ans. to UFA Pet., Ex. 1, § 6.7.1) (bullet points deleted) The FDNY Command is also instructed to "[i]dentify the life hazard and evacuation status and zones," which entails determining the "[n]umber and location of victims, hostages and trapped occupants." (*Id.*) Further, the FDNY Command "should establish sectors to avoid crossing [H]ot [Z]ones." (*Id.*, § 6.7.2) When entering a Warm Zone, the NYPD and FDNY RTF leaders will "collaborate and coordinate to ensure," among other things, that the FDNY personnel assigned to the RTF stay within a "force protection envelope." (*Id.*, § 7.5.1) The Response Protocol provides that, "[d]ue to the dynamic nature or the threat and mechanism of injury," medical treatment in a Warm Zone "should be limited to hemorrhage and airway control." (*Id.*, § 7.6.1) It further provides that "[i]f the area is determined not safe," FDNY

personnel assigned to the RTF will follow the direction of the NYPD RTF Leader "to leave the area and return to the Cold Zone" or a "protected area until [the] threat is removed." (*Id.*, § 7.5.1)

The Response Protocol addresses the equipment to be used by RTFs, providing that "RTF members shall only take equipment necessary for addressing life threatening conditions and to facilitate patient removal." (Ans. to UFA Pet., Ex. 1, § 7.2) It explicitly states that "[o]xygen and defibrillators shall NOT be brought into the Warm Zone" and that "[s]afety equipment will be determined by the [Incident Commander] for the threat environment." (*Id.*) All RTF members will be provided ballistic protection equipment. However, it is impossible for the RTF ballistic protection equipment to be worn with a complete set of bunker gear. (*See* Sur-reply to UFA Reply, p. 3, bullet (e))

The Response Protocol section titled "Fire and Smoke as a Weapon" addresses "a fire and/or smoke condition (smoke grenades), in which active shooting is occurring or possible firearms could be used against firefighters." (Ans. to UFA Pet., Ex. 1, § 8.2) It instructs that "members shall: [r]emain behind hard cover and out of the line-of-sight" and should "[q]uestion law enforcement if weapons are known or possibly present." (*Id.*) (bullet points deleted) If weapons are known or possibly present, FDNY personnel assigned to the RTF "are instructed to consider the area a Hot Zone; [a]lert on scene and incoming units of an active shooter . . . using the emergency alert tone with an urgent message to notify units that this is an active shooter incident and not a routine fire"; and "[c]ollaborate with NYPD on possible Warm/Cold Zone exposure protection and emergency medical needs." (*Id.*, § 8.2) This section further provides

that the "rapid restoration of fire suppression systems by the FDNY may take place in the Warm Zone(s) under NYPD force protection." (*Id.*, § 8.3)

Subsequent Events Related to the Response Protocol

On December 30, 2015, the FDNY issued Department Order 96 ("Order 96"), which sought the recruitment of Firefighters, Lieutenants, Captains, and Battalion Chiefs to staff a "Counter Terrorism Response Team" that will operate as part of a mass casualty medical group "[i]n the event of an active shooter or terrorist incident."[3] (UFA Pet., Ex. D) On March 2, 2016, the UFA and the FDNY held a labor-management meeting. According to the UFA, at this meeting, it raised its concerns regarding the Counter Terrorist Response Team, including safety impact, workload impact, training, and protective equipment and gear.

On September 2, 2016, FDNY Chief of Operations John Sudnik sent a memorandum regarding the "Interim Policy for Counter-Terrorism Task Force (CTTF) Operations" ("CTTF Memo"), which notified Borough Commands and Special Operations Command that "[i]n response to a recent series of Active Shooter incidents worldwide," the FDNY was "in the process of forming" CTTFs to work with the NYPD. (UFOA Pet., Ex. 1) "Effective immediately," the CTTF Memo provides that "the following procedures and terminology apply to CTTF Operations." (*Id.*) Each Borough Command will have a Borough Task Force ("BTF") to cover "specific pre-planned" events, such as New Year's Eve, and two Division Task Forces ("DTFs") "capable of responding to an active shooter incident." (*Id.*) The CTTF Memo states

[3] Order 96 noted that "[p]reference will be given to applicants with 2 years of experience as well as a military background, and/or prior experience as an EMT or paramedic." (UFA Pet., Ex. D)

that, as of September 2, 2016, DTF units had been "trained and designated" in Divisions 1 and 3, and lists the companies and units that comprise each DTF. (*Id*.) It notes that "additional DTFs will be designated in the near future." (*Id*.) A BTF or DTF will join with members of the NYPD's Strategic Response Group to form a RTF, whose duties "include rapid triage and removal of critical patients [] from the [W]arm [Z]one under NYPD force protection." (*Id.*) Each RTF would consist of an FDNY Officer, three Firefighters, an EMS Lieutenant, two Emergency Medical Technicians ("EMTs"), and four NYPD Sergeants.

The CTTF Memo also sets forth the "Response Policy" to reported or confirmed active shooter incidents. (UFOA Pet., Ex. 1) In the event of a reported active shooter, the initial response will include an Engine company, a Battalion Chief, a Fire Deputy Chief, three BLS ambulances, an EMS Conditions car, and an EMS Deputy Chief. In the event of a confirmed active shooter, one or more DTFs may be requested. The CTTF Memo references the Response Protocol for additional information.

On September 8, 2016, the FDNY issued Standard Operating Guideline No. 200-68 ("SOG 200-68"), which was later revised on October 20, 2016. SOG 200-68 restates the terminology and procedures contained in the CTTF Memo and provides greater detail regarding CTTF dispatch procedures, radio announcements, acknowledgments from responding units, and notifications in the event of reported or confirmed active shooter incidents. For example, SOG 200-68 requires Dispatchers to advise responding units to "use caution" and not to "enter any building without force protection." (UFOA Pet., Ex. 2) It also requires each responding unit to verbally respond to the instruction.

On September 22, 2016, the UFA and the FDNY held a second labor-management meeting at which the UFA raised safety concerns regarding the CTTF Memo. The UFOA was not present. According to the UFA, the FDNY represented that its bargaining unit members had been assigned to CTTFs and were "operationally on-line." (UFA Pet. ¶ 41; *see also* UFA Pet., Ex. G) Further, according to the UFA, the FDNY represented that these employees would receive a total of five days of training; that day one of training, regarding medical care, had already been completed; and that day two of training, regarding team movement, was ongoing. Despite the incomplete training, according to the UFA, the FDNY indicated that the CTTFs had been mobilized for the September 17, 2016 bombing in Chelsea. The City denied the UFA's claims as to the substance of this meeting but asserted that, at the meeting, the FDNY demonstrated how bargaining unit members should don safety gear.

In October 2016, the FDNY and NYPD published the "RTF Guide," which provides illustrations of the formations used by RTFs entering and treating patients in a Warm Zone. (UFA Pet., Ex. J) The "Triage and Treat" illustration shows seven FDNY members wearing ballistic helmets and ceramic plated vests around a patient with four NYPD Officers with drawn M4 automatic rifles at each of the four corners. (*Id.*) An RTF Instructor's Guide acknowledges that there are occasions when a "Warm Zone turns into a Hot Zone" and that, should this occur, the NYPD "will clear an area of refuge as they suppress the threat" while FDNY members "may

be directed to find cover or concealment" or "be forced into 'backing out.'"[4] (UFA Pet., Ex. L, p. 7)

On October 28, 2016, the UFA's counsel sent a letter to the City requesting to bargain over the FDNY's "Counterterrorism Response Team Program" and the CTTF Memo. (*See* UFA Pet., Ex. G) The letter addressed the FDNY's "unilateral decisions to create a 'Counterterrorism Task Force' that requires certain Fire units to respond to active shooter or terrorist incidents." (*Id*.) Counsel alleged that the CTTF Memo "placed Fire units on-line for these responses, absent sufficient training, and prior to alleviating the UFA's many concerns regarding safety to the membership." (*Id*.) Counsel opined that "training for these dangerous assignments" had been "minimal" and "incomplete" and that the FDNY was "proceeding with the implementation" without bargaining regarding training and safety. (*Id*.) Accordingly, the UFA requested discussion and the exchange of proposals "regarding how [the CTTF Memo] and any future policies related to counter-terrorism impact the UFA members' safety and workload, and any other related terms and conditions of employment." (*Id*.)

On November 15, 2016, the UFOA's counsel sent a letter to the City demanding bargaining over the FDNY's "Counterterrorism Response Team Program" and the CTTF Memo. (UFOA Pet., Ex. 3) Counsel noted that "[t]he FDNY's decision to create and to implement the [CTTF Memo] was done without any negotiations or agreement with or from the UFOA." (*Id*.) The UFOA asserted that this conduct involves mandatory subjects of bargaining and requested

[4] "Backing out" is evacuating by the same route used to enter a location. (UFA Pet., Ex. L, p. 7) The RTF Instructor's Guide notes that while a Warm Zone has "no visible threats . . . there may be potential threats to personal safety or health." (*Id.*, p. 4)

negotiation regarding "terms and conditions of employment and the impact of the changes."[5] (*Id*.)

On November 28, 2016, the FDNY issued a memorandum regarding training for "Emergency Response Plan IV (ERP)/Response to Active Shooter and Bombing Incidents" that noted that "[a]ll Members will be scheduled to attend this new program." (Ans. to UFA Pet., Ex. 3) The memorandum lists 12 groups of FDNY companies that would be trained in "the first installment of the new training phase . . . which has been completely revised to reflect the current threat trends," scheduled to begin on January 3, 2017, and run for approximately three months. (*Id.*) The memorandum stated that this is a "one-time only initiative" and that attendance is "independent from past phases of [Emergency Response Plan] training." (*Id*.) (emphasis omitted) It further notes that "[e]ach subsequent cycle will also run for 3 months for approximately two years." (*Id.*)

The City and both Unions met on December 21, 2016. According to the Unions, the City indicated a willingness to address their concerns and requested that they identify the specific issues to be resolved. According to the UFA and the City, the parties agreed to form a Joint Safety Committee.

On December 29, 2016, the FDNY revised the CTTF Memo to provide that the dispatched response to an active shooter incident would occur after the confirmation of an active

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[5] Specifically, the UFOA sought bargaining over subjects including, but not limited to: equipment; training; and working a Warm Zone, including responsibilities in the event the police escort is injured, protection in initial staging area and during rapid triage, and responsibilities involving explosives, including improvised, chemical, or biological devices.

shooter rather than after a report of an active shooter. Further, the revision announced that, effective December 31, 2016, a DTF will be "in service" in Division 11, in addition to Divisions 1 and 3, and stated which companies and units were included in Division 11's DTF. (UFOA Pet. Ex. 5)

On January 20, 2017, the FDNY announced a one-day "Cycle IV" CTTF-DTF training program on subjects including "Introduction to Ballistic Protective Equipment." (Ans. to UFA Pet., Ex. 4) Specific units in Divisions 14 and 15 were selected to participate in this cycle of the course, which was scheduled between February 14 and March 9, 2017.

According to the UFA and the City, the Joint Safety Committee met on February 10, 2017. According to the Unions, the City's Commissioner of Labor Relations stated that the Respondents were willing to discuss safety but would not negotiate over terms and conditions relating to CTTFs.

On March 21, 2017, the FDNY announced a "Cycle II Phase IA" CTTF-DTF training, offered in conjunction with the NYPD, on subjects including "Triage, Treatment and Movement of Patients Inside a 'Mock' Warm Zone." (Ans. to UFA Pet., Ex. 4) For DTFs in Divisions 1, 3, and 13, the one-day training was offered weekly from April 9 to June 9, 2017. One-day "Day II Phase IB" training in conjunction with the NYPD was announced on April 20, 2017, and offered weekly from May 13 to June 10, 2017, for the DTFs in the same three divisions.

On May 16, 2017, the FDNY further revised the CTTF Memo. The revision noted that "[t]he FDNY now has Division CTTF coverage in each Borough." (UFA Pet., Ex. I) In addition to the DTFs previously in service in Divisions 1, 3, and 11, the May 2017 CTTF Memo states

that as of May 15, a DTF will be in service in Divisions 6, 8, and 13 and stated which companies and units would comprise each DTF.

On May 30, 2017, the FDNY announced the third cycle of its "Emergency Response Plan IV (ERP)/Response to Active Shooter and Bombing Incidents" CTTF-DTF training program, which was first announced in November 2016. (Ans. to UFA Pet., Ex. 4) As before, the FDNY indicated that it was a "one-time only initiative" of a "new training phase . . . which has been completed revised to reflect the current threat trends" and is independent of prior phases of emergency response protocol training. (*Id*.) (emphasis omitted) This cycle of training was scheduled to commence July 5, 2017, and run for approximately three months. Again, FDNY stated that "each subsequent cycle will also run for 3 months for approximately 2 years." (*Id*.)

As of the filing of the petitions on June 9, 2017, while FDNY employees may have been dispatched as part of a CTTF, there is no claim that any of the Unions' bargaining unit members had operated in a Warm Zone. On June 17, 2017, the parties held a fifth labor-management meeting.

On June 30, 2017, Engine 83 and Ladder 29, which are part of the Division 6 DTF, were dispatched to a fire call where a gunman shot and killed one person, wounded six others, and then set a fire. After Engine 83 and Ladder 29 had left their station, they were notified that they were designated as an RTF and returned to the station to retrieve ballistic equipment. The City avers that, on June 30, 2017, no FDNY personnel entered either a Warm or Hot Zone. The parties disagree as to the extent that Engine 83 and Ladder 29 had received CTTF training prior to this incident.

On July 12, 2017, an expanded Response Protocol was re-issued ("July 2017 Response Protocol") with revisions drawn primarily from the CTTF Memos and SOG 200-68.[6] For example, the description of the "optimal" RTF team is the same as in the CTTF Memo, and the specific instructions as to how FDNY units are to be dispatched are in SOG 200-68. (Ans. to UFA Pet., Ex. 5, § 11.2) Provisions of the July 2017 Response Protocol that were not contained in the prior documents are as follows. With regard to encounters prior to the arrival of the NYPD, the July 2017 Response Protocol provides that FDNY units should "exercise extreme caution" not to enter a scene where a threat exists, identify a staging location to await the NYPD, use discretion when transmitting information regarding operations by radio, and transmit sensitive information by cell phone or secure frequencies. (*Id.*, § 3.1) If arriving to the scene after the NYPD, the July 2017 Response Protocol provides that the FDNY units shall approach "using extreme caution" so as "not to enter potential Warm or Hot Zones" and, if necessary, request to have a NYPD representative meet them in the Cold Zone. (*Id.*, §§ 6.1; 6.1.1) In the section on RTF equipment, the July 2017 Response Protocol adds "[b]allistic vests and helmets" to the list of items RTF members may bring to a response scene. (*Id.*, § 11.4.1) Further, the July 2017 Response Protocol adds a section on "Warm Zone Emergency Actions" that provides that "[i]f an RTF member suffers any incapacitating injury in the Warm Zone, that RTF will cease all

[6] The July 2017 Response Protocol is four pages longer than the November 2015 version. Its title was changed to "Interagency Response Protocol to Incidents Involving Aggressive Deadly Behavior." (Ans. to UFA, Ex. 5) The only significant deletion from the November 2015 Response Protocol is that the July 2017 Response Protocol does not have the "Fire and Smoke as a Weapon" section. Unless otherwise noted, "Response Protocol" used in this Decision refers to both versions.

operations and when safe to do so, exit the Warm Zone with the injured member" and that a "dedicated [Advanced Life Support] ambulance will be notified of any RTF member injury." (*Id.*, §§ 11.8.2; 11.8.3)

On November 17, 2017, a sixth labor-management meeting was held. The Unions assert that the City refused to bargain at the November 2017 meeting. According to the City, it stated its willingness to continue discussing "CTTF safety, training, inter-agency communication, and protective equipment" at the November 2017 meeting. (Sur Rep. at p. 6) According to the UFA, "the topic of the safety impact of FDNY Counter-Terrorism policies" remains an "agenda item" for further labor-management meetings. (UFA Pet. ¶ 20 n. 2)

POSITIONS OF THE PARTIES

Unions' Position

The Unions argue that all of their claims are timely. They contend that the statute of limitations for a unilateral change only begins to run after an action is implemented and the charging party is injured by the action. According to the Unions, the petitions were filed within four months of the City's refusal to bargain over the Response Protocol, which the Unions claim occurred at the February 10, 2017 labor-management meeting. In this regard, the UFOA argues that the CTTF was implemented no earlier than 90 days prior to the filing of its petition. The UFA notes that the City refers to the "continuing 'evolution'" of the Response Protocol and argues that the July 2017 Response Protocol, which was issued after the petitions were filed,

contains new sections that alter the prior version. (UFA Rep. Memo at p. 5) The Unions further argue that the four-month statute of limitations is inapplicable to practical impact claims.

The UFA argues that the Board, pursuant to NYCCBL § 12-309(a)(2), should declare the following to be mandatory subjects of bargaining: the essential duties and responsibilities that UFA members are required to perform during CTTF operations; performing the core competencies of the FDNY in a hostile environment such as a Warm Zone or potentially a Hot Zone; the overall procedures and safety standards during RTF deployments; communication issues between the FDNY and NYPD; the manner, content, and timing of training given to UFA members; issues regarding the adequacy and effectiveness of protective gear and equipment; and the clearly related safety and workload impact on the terms and conditions of employment for UFA members as a result of the FDNY's creation of a CTTF.[7]

The Unions also argue that the Response Protocol is a mandatory subject of bargaining over which the City has failed to bargain, in violation of NYCCBL § 12-306(a)(1) and (4) and § 12-307(a).[8] They assert that the performance of new duties not within the "inherent nature of the employment involved" is a mandatory subject of bargaining. (UFOA Pet. ¶ 33)

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[7] NYCCBL § 12-309(a)(2) provides, in pertinent part, that the Board "shall have the power and duty . . ., on request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining."

[8] NYCCBL § 12-306(a) provides in pertinent part:

> It shall be an improper practice for a public employer or its agents:
>
> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

According to the Unions, the Response Protocol unilaterally changed the working conditions of its members. Regarding Warm Zones, the Unions argue that the Response Protocol requires their members, for the first time, to "perform their traditional duties" and "core competencies" as well as new duties in incidents involving active shooters, violent extremists, barricade situations, or other aggressive deadly behaviors. (UFOA Pet. ¶ 24; UFA Pet. ¶ 105)[9] The Unions further argue that the Response Protocols changed the command structure, putting FDNY members in a RTF under the command of the NYPD. Regarding equipment, the Response Protocol requires bargaining unit members to use "new or different equipment," such as ballistic helmets and vests. (UFOA Pet. ¶ 30) According to the Unions, the use of tactical equipment that the FDNY never used before demonstrates that the Response Protocol changes the very nature of its members' work. The UFOA further argues that, while selection of equipment is generally a management prerogative, employee physical comfort with respect to the equipment is a mandatory subject of bargaining. Regarding training, the Unions argue the timing

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* * *

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

NYCCBL § 12-305 of the provides, in pertinent part: "Public employees shall have the right to self-organization, to form, join or assist public employee organizations, to bargain collectively through certified employee organizations of their own choosing and shall have the right to refrain from any or all of such activities. . . ."

NYCCBL § 12-307(a) provides in pertinent part that "public employers . . . shall have the duty to bargain in good faith on wages . . ., hours . . ., working conditions . . . ."

[9] According to the UFOA, while prior to the CTTF, its bargaining unit members were "deployed to such incidents," they only operated in Warm Zones "on a limited basis." (UFOA Pet. ¶ 22)

of training is a mandatory subject of bargaining and constitutes a new procedural obligation on employees that did not exist prior to the implementation of the Response Protocol. The Unions note that the training is necessary for the job to be performed safely. According to the Unions, as of the filing of the petitions, no bargaining unit members had completed the CTTF training, including members of the designated DTF units deemed "in service" by the FDNY, and some employees subject to assignment to an active shooter or other deadly behavior incident have received no CTTF training at all. (UFA Pet. ¶ 83)

Finally, the Unions argue that they have sufficiently pleaded specific facts to demonstrate practical impacts on safety and workload as a result of the Response Protocol, which should result in either a finding of a *per se* impact and breach of the NYCCBL or, alternatively, an evidentiary hearing. The UFA describes the Response Protocol as creating a "new category of peril of serious physical injury or death, beyond the customary constant risks and dangers" facing its members. (UFA Reply Memo at p. 20)

Citing to several specific sections of the Response Protocol, the Unions argue that the Board should find a *per se* safety impact because their members will be required to face elevated risks to safety when operating in a Warm Zone. These risks include both direct risks from active shooters and criminals engaged in aggressive deadly behavior as well as "friendly fire" risks of being mistaken for perpetrators and shot by members of law enforcement. (UFOA Reply ¶ 42) They also note that the FDNY's documents acknowledge that a Warm Zone can turn into a Hot Zone. The Unions argue that other safety risks exist such as those stemming from the lack of, or incomplete, training of members who may be called to participate in a CTTF. As an example,

the Unions refer to the confusion surrounding the June 2017 incident where an Engine Company was initially sent to respond to a fire and then designated an RTF, requiring it to return to its station to retrieve its ballistic gear. In addition, the CTTF ballistic protection equipment cannot be worn with a complete set of bunker gear, nor does it provide full protection.

The UFOA argues that the Response Protocol has a practical impact on workload because with it, "the City and FDNY are looking to expand and add to the regular work load of UFOA members." (UFOA Pet. ¶ 51) The UFA claims that it has demonstrated that the Response Protocol has a practical impact on workload because it has resulted in a "significant expansion of the job duties of UFA members which directly impacts the workload." (UFA Pet. ¶ 155) Specific workload impacts alleged by the UFA are: deployment to and entering a Warm Zone; performing triage and medical treatment in a Warm Zone; removal of victims from Warm Zones; verifying a UFA member's identity in a challenge situation; and new procedures regarding response encounters with an active shooter or aggressive deadly behavior situation both prior to and after the NYPD arrival, such as requesting the NYPD response, making specific notifications to dispatch, transmitting information to the NYPD, seeking concealment or hard cover, and establishing staging areas and a Command Post. Alternatively, the UFA requests an evidentiary hearing to address workload impact.

City's Position

The City argues that the four-month statute of limitations found in NYCCBL § 12-306(e) and §1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") applies and thus any claim that pre-dates February 9,

2017, which is four months before the petitions were filed, is untimely. According to the City, the Unions had actual notice of their claims regarding the Response Protocol before February 9, 2017, because it was issued in November 2015. In addition, the Unions acknowledge numerous other documents issued well before February 2017 that reference the policy regarding active shooters and other aggressive deadly behavior. Further, the parties had labor-management meetings on the topic prior to February 9, 2017. The City argues that any modifications to the Response Protocol after February 9, 2017, were *de minimis*.

The City further argues that all of the disputed actions are managerial prerogatives under NYCCBL § 12-307(b).[10] It maintains that the development of, revisions, and updates to protocols relating to the CTTFs are subjects that fall within the employer's discretion to "determine the standards of service" and to "maintain the efficiency of governmental operations" under NYCCBL § 12-307(b). According to the City, the FDNY has the managerial right to determine the quality of the services it delivers, and the Response Protocol and related training

[10] NYCCBL § 12-307(b) provides, in pertinent part, that.

> It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over . . . the technology of performing its work. Decisions of the city . . . on those matters are not within the scope of collective bargaining, but . . . questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

provide a means to effectively deliver services and advance the FDNY's central mission of protecting life and property. The City further claims that the FDNY's selection of equipment, including ballistic gear, is a proper exercise of its managerial rights to direct its employees and to determine the methods, means, and personnel by which government operations are to be conducted.

As to the safety impact claims, according to the City, the Board cannot find a *per se* safety impact because the Unions' allegations are entirely speculative and conclusory in nature and fail to present sufficient evidence establishing any sort of implicit safety impact. The City argues that the Unions have failed to identify with the required specificity how the voluntary participation of its members in CTTFs, along with the issuance of the Response Protocol, creates a practical impact on safety for its members. The City maintains that there is no support for the Unions' wholly conclusory allegations that their members are subject to an increased safety risk and that it is unclear how the unspecified risks allegedly caused by the Response Protocol "are any different from those faced by first responders on a daily basis." (Ans. to UFA Pet. ¶ 173; Ans. to UFOA Pet. ¶ 108)

As to the practical impact on workload claims, according to the City, the Unions failed to plead facts sufficient to show that the Response Protocol created an unreasonably excessive or unduly burdensome workload as a regular condition of employment.

DISCUSSION

After a thorough review of the pleadings and exhibits, the Board finds that most of the Unions' improper practice claims are untimely and that the remaining timely claims do not involve mandatory subjects of bargaining. In addition, the Board finds that the Unions' safety impact claims are timely and that assigning UFA and UFOA bargaining unit members to respond in Warm Zones has a *per se* practical impact on safety. Accordingly, the duty to bargain over the impact of that assignment arises, and the parties are directed to bargain for that purpose. However, the Board finds that the facts do not demonstrate a practical impact on workload. Therefore, we dismiss the Unions' remaining claims.

Timeliness

We first address the allegation that the Unions' petitions, filed on June 9, 2017, are untimely. *See Rondinella*, 5 OCB2d 13, at 14 (BCB 2012); *Nardiello*, 2 OCB2d 5, at 28 (BCB 2009) (explaining that timeliness is a threshold question). NYCCBL § 12-306(e) provides that a petition alleging "an improper practice in violation of this section may be filed . . . within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence." *See also* OCB Rule § 1-07(b)(4). The City alleges that the Unions had actual knowledge of their claims as early as November 16, 2015, when the Response Protocol was issued, and that therefore the petitions were filed more than four months after the claims accrued.

It is undisputed that the City issued the Response Protocol in November 2015 and sought volunteers for CTTFs as early as December 2015. While these documents announced the

FDNY's intention to assign bargaining unit members to certain duties, the record does not reflect that the implementation or assignment occurred on that date.[11] The Board has consistently held that "a party may choose to await performance of an action and file an improper practice charge within four months after the intended action is implemented and the charging party is injured thereby." *UFA*, 47 OCB 61, at 7 (BCB 1991). As a result, even if an employer has previously announced a change, it is only upon implementation of that change that a union has "knowledge of definitive acts to put it on notice of the need to complain." *UPOA*, 37 OCB 44, at 18 (BCB 1986); *COBA*, 69 OCB 26, at 6 (BCB 2002); *DC 37*, 6 OCB2d 24 (BCB 2013) (claims regarding a new job specification accrued when it was implemented despite earlier knowledge of proposed changes); *DC 37,* 79 OCB 21, at 13 (BCB 2007) (petitioner may have had knowledge that a Consent Decree required changes to job evaluations, but it was not until employees received evaluations containing new criteria that the petitioner "had notice of the negative impact"); *UFA*, 77 OCB 39, at 8 (BCB 2006) (finding that a unilateral change claim accrued "when the revised circular was issued," not when the revision was announced).

We find that the Unions had actual knowledge of the implementation of the Response Protocol when the CTTF Memo was issued on September 2, 2016, as it explicitly states that the Unions' members were "trained and designated" to perform the duties in two DTF units. (UFOA Pet., Ex.1) *Cf. UFA,* 47 OCB 61, at 7 (finding that the announcement of the intention to staff Fire Marshals on a joint public safety task force did not commence the statute of limitations

[11] The City only alleges facts supporting the issuance of the Response Protocol and does not address the date that it began to implement the Response Protocol.

because Fire Marshals had not yet been assigned to the task force). The fact that the UFA had actual knowledge of an implementation in September 2016 is further evident from its assertion that it raised safety concerns about the CTTFs being "operationally on-line" at the September 22, 2016 labor-management meeting. (UFA Pet. ¶ 41) Similarly, the UFOA's request for bargaining over the creation and implementation of the CTTF Memo on November 15, 2016, indicated that the UFOA also had knowledge of the implementation. Thus, the petitions, filed in June 2017, were filed more than four months after the Unions had actual knowledge of the "occurrence of the acts alleged to constitute the improper practice claims." OCB Rule § 1-07(b)(4). Accordingly, we find that the Union's unilateral change claims relating to the November 2015 Response Protocol and 2016 CTTF Memos are untimely and dismissed.

To the extent the Unions' petitions assert that the July 2017 Response Protocol, issued one month after the filing of the petitions, contained new provisions, their claims regarding these changes are timely filed, and the merits are addressed below. All claims relating to provisions of the July 2017 Response Protocol that are identical to the November 2015 version or documents issued in the fall of 2016, however, are untimely. *See DC 37*, 5 OCB2d 22 (BCB 2012).

We reject the Unions' argument that their claims did not accrue until February 10, 2017, when the City allegedly announced that it would not bargain over certain aspects of the Response Protocol. The Unions' petitions are not based simply on a demand to bargain and the City's refusal or failure to respond to that demand within a reasonable period of time. If that were the case, the date the City refused to bargain would be significant. *See UFA, L. 94*, 3 OCB2d 13, at 12 (BCB 2010). Here, the Unions' petitions assert that the City made unilateral changes to terms

and conditions of employment. Therefore, the date of the occurrence of the alleged unilateral change is the date the statute of limitations begins to run. *See UFOA*, 3 OCB2d 50, at 15-16 (BCB 2010) (claims challenging the unilateral implementation of a system for processing 911 emergency calls that excluded certain personnel accrued when the system was implemented); *UFT*, 3 OCB2d 44 (BCB 2010) (petition filed within four months of implementation of a restriction on hours of work timely); s*ee also City of Oswego*, 23 PERB ¶ 3007 (1990).[12] As stated earlier, the improper practice claims accrued when the Unions knew that the City implemented the Response Protocol.[13]

Additionally, the City argues that the four-month statute of limitations found in NYCCBL § 12-306(e) also applies to the Unions' practical impact claims. However, the statute of limitations provision set forth in NYCCBL § 12-306(e) expressly applies only to claims of "improper practice."[14] The "Board has long held that claims of practical impact, including safety impact, are not considered to be improper practice claims, since there is no duty to bargain unless and until the Board determines that a practical impact exists." *UFA*, 5 OCB2d 3, at 10-11 (BCB 2012) (citing *SBA*, 41 OCB 56, at 15-16 (BCB 1988)). Further, "the Board has expressly stated

[12] We note that the Unions had no reason to believe that their members would not be assigned to perform duties pursuant to the Response Protocol and CTTF Memo after September 2016. To the contrary, between September 2016 and May 2017, the FDNY continued to announce additional Divisions where employees were assigned to CTTF units.

[13] Moreover, for the reasons fully discussed later, even assuming the Unions' improper practice claims were timely, we would find that the Response Protocol and CTTF Memos are not mandatory subjects of bargaining.

[14] Claims of practical impact are brought under NYCCBL § 12-307(b).

that, because they are in the nature of scope of bargaining claims, the four-month statute of limitations applicable to improper practices is not applicable to practical impact claims." *Id.* (citing *UFOA*, 3 OCB2d 50, at 16; *EMS SOA*, 75 OCB 15, at 15 (BCB 2005)). Accordingly, we find the practical impact claims to be timely.

Timely Unilateral Change Claims

Based on our findings above, we only consider the merits of the Unions' improper practice claims as they relate to the new provisions of the July 2017 Response Protocol. The July 2017 Response Protocol contains many provisions identical to the November 2015 Response Protocol. It also incorporates additional details from the September and December 2016 CTTF Memos and SOG 200-68, which was issued on September 8, 2016, and revised on October 20, 2016. As noted above, claims regarding these provisions are untimely. However, a few instructions appear in the July 2017 Response Protocol that did not appear in any of the prior documents. These new items include the following instructions and procedures:

- FDNY units should "exercise extreme caution" when arriving at incidents involving aggressive deadly behavior. (Ans. to UFA Pet., Ex. 5, §§ 3.1, 6.1)

- Prior to the arrival of the NYPD, FDNY units should identify a staging location, use discretion when transmitting information regarding operations by radio, and transmit sensitive information by other means.

- If arriving to the scene after the NYPD, FDNY units should request to have a NYPD representative meet them in the Cold Zone, if necessary.

- Ballistic vests and helmets are specified as items that RTF members can bring into Warm Zones.

- In case of a Warm Zone emergency, if any RTF member suffers an incapacitating injury, the RTF will cease operations and exit the Warm Zone when safe to do so and an ambulance will be notified.

We find that all of these new provisions in the July 2017 Response Protocol are instructions to employees concerning how they should perform their duties in certain circumstances.[15]

NYCCBL § 12-306(a)(4) provides that it is "an improper practice for a public employer . . . to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." NYCCBL § 12-307 defines matters within the scope of bargaining as including wages, hours, and working conditions. The Board has "long held that a unilateral change to a mandatory subject of bargaining is an improper practice because it constitutes a refusal to bargain in good faith." *UFA*, 10 OCB2d 5, at 13 (BCB 2017), *affd*., *Matter of City of New York v. Uniformed Firefighters Assn., Local 94, IAFF, AFL-CIO*, 2018 NY Slip Op 30453(U) (Sup. Ct. N.Y. Co. Mar. 14, 2018) (Bluth, J.) (citations omitted). The burden is on the party asserting a unilateral change to a mandatory subject of bargaining to demonstrate "that (i) the matter sought to be negotiated is . . . a mandatory subject and (ii) the existence of such a change from existing policy." *Id.* (quoting *ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014)).

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[15] We do not decide whether the changes to the July 2017 Response Protocol are *de minimus*, because they do not implicate mandatory subjects of bargaining. *See PBA*, 11 OCB2d 20, at 20 (BCB 2018) (whether a claim is *de minimis* is part of the second prong, whether a change has taken place); *DC 37*, 5 OCB2d 21, at 17 (BCB 2012) (Board first determines whether unilateral change was a mandatory subject of bargaining and, if so, then analyzes whether the unilateral change was *de minimis*).

NYCCBL § 12-307(b) provides that '[i]t is the right of the [C]ity . . . [to] take all necessary actions to carry out its mission in emergencies." *See also DC 37*, 6 OCB2d 14, at 21 (BCB 2013). Further, "in order to maintain the efficiency of governmental operations, management may make appropriate assignments within the general job description for an employee's title." *PBA*, 73 OCB 12, at 19 (BCB 2004) (citing *UFA*, 47 OCB 61) (other citations omitted). *See also PBA*, 59 OCB 24, at 24-25 (BCB 1997). Here, the new instructions and procedures contained in the July 2017 Response Protocol are directions for an assignment that are consistent with the essential nature of the bargaining unit positions. *See UFA*, 47 OCB 61, at 10 (no duty to bargain over assignment of Fire Marshalls to joint NYPD/FDNY task force where additional law enforcement and security duties do not "change an aspect of the essential duties and functions" of their positions). Indeed, we have previously found that core competencies of Firefighters include "addressing immediate life safety hazards to the public, searching for and rescuing [the] injured, and providing pre-hospital emergency medical care and transport." *UFA*, 3 OCB2d 16, at 4 (BCB 2010).[16] Firefighters have previously been assigned to work with the NYPD on task forces, and the Board has noted that they are first responders to terrorist attacks. *See DC 37*, 6 OCB2d 9, at 2 (BCB 2013); *UFA, L. 94*, 4 OCB2d 3, at 2 (BCB 2011); *UFA*, 71 OCB 19, at 1-2 (BCB 2003).[17] Further, it is well within management's discretion to determine

[16] In *UFA*, 3 OCB2d 16, the Board found that the FDNY's assignment of Firefighters to clean up operations at the site of the explosion of a steam pipe that released asbestos was consistent with its right to direct employees and determine job assignments under the NYCCBL. *See id.* at 28.

[17] In *UFA*, 71 OCB 19, the Board explicitly rejected the UFA's request for mid-term bargaining for additional compensation due to increased "terrorist and Haz-Mat threats" its members faced.

the way a given assignment is performed. *See UFA*, 4 OCB2d 3, at 11 ("[o]nly the assignment of duties that are not within the inherent nature of the employee's position, such as the assignment of vehicle repairs to a police officer or craftsman work to a firefighter, is a mandatorily negotiable matter that bars the employer from unilateral action") (citations and quotation marks omitted); *UFA*, 47 OCB 61, at 10 (assignment of Fire Marshalls to joint public safety task force not mandatorily bargainable). Therefore, we find that the new provisions in the July 2017 Response Protocol are instructions to bargaining unit members relating to performance of their duties and are not mandatory subjects of bargaining.

Practical Impact Claims

Safety Impact

To establish a practical impact on safety, "it is not enough to allege a threat to employee safety . . . it is incumbent upon the Union to demonstrate that the alleged safety impact results from a management decision or action, or inaction in the face of changed circumstances." *UFA*, 37 OCB 43, at 17-18 (BCB 1986); *see also UFA*, 43 OCB 4, at 48 (BCB 1989), *affd.*, *Matter of Uniformed Firefighters Assn. of Greater N.Y. v. N.Y.C. Off. of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989) (Santaella, J.), *affd.*, 163 A.D.2d 251 (1st Dept. 1990). Among the "[f]actors considered in determining whether a practical impact on safety exists [are] whether the employer has adopted measures that offset any potential threat to safety and whether the employees' adherence to management procedures and guidelines would obviate

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Id. at 14.

any safety concerns." *UFA, L. 94*, 5 OCB2d 2, at 22 (BCB 2012) (citing *UFA*, 3 OCB2d 16, at 30; *EMS SOA*, 79 OCB 7, at 30-31 (BCB 2007)).

The Board, however, "has never 'require[d] a union to show that injuries have actually resulted from management's action in order to demonstrate a practical impact on safety.'" *UFA, L. 94, & UFOA, L. 854*, 8 OCB2d 13, at 27 (BCB 2016) (quoting *EMS SOA*, 79 OCB 7, at 31); *see also SBA*, 23 OCB 6, at 25 (BCB 1979), *affd.*, *Matter of Sergeants' Benevolent Assn. of the City of N.Y. v. Bd. of Collective Bargaining of the City of N.Y.*, Index No. 11950/1979 (Sup. Ct. N.Y. Co. Aug. 7, 1979) (Riccobono, J.); *PBA*, 15 OCB 5, at 13 (BCB 1975). "A potential impact arising from exposure to a dangerous condition can be a basis for finding that a practical impact on safety [exists] and ordering the parties to bargain over said impact." *UFA*, 3 OCB2d 16, at 30; *see also EMS SOA*, 79 OCB 7, at 31. Accordingly, where a union has demonstrated that there is a "concrete potential for injury . . . the record is sufficient to order the parties to bargain over its amelioration." *UFA*, 3 OCB2d 16, at 30-31.

To establish that "a *per se* practical impact exists, warranting bargaining over alleviation, the Board must be able to determine, based on the pleadings alone, and without benefit of a hearing, that a practical impact exists."[18] *UFA*, 4 OCB2d 30, at 29. *See also UFA, L. 94*, 5 OCB2d 2, at 23; *UFA*, 47 OCB 25A, at 28-29 (BCB 1991). We have repeatedly held that "a clear threat to employee safety" may demonstrate a practical impact warranting bargaining "before actual impact has occurred." *UPOA*, 39 OCB 37, at 5-6 (BCB 1987) (citing *CIR*, 37

[18] In contrast, the Board has ordered hearings where there is a "disputed question of fact" as to whether the employer's proposed action will have a safety impact. *See UFA*, 47 OCB 25A, at 31.

OCB 38 (BCB 1986); *CWA*, 29 OCB 37 (BCB 1982)); *see also UFA*, 71 OCB 19 at 7. Thus, "[i]n a *per se* practical impact case, [] there is no question that the action proposed by the employer will result in a practical impact on the affected employees." *UFA*, 47 OCB 25A, at 28.

Here, in finding a *per se* safety impact, we rely upon express language in the City's Response Protocol and FDNY training materials regarding the uncontroverted risks to employees' safety when working in a Warm Zone.[19] Accordingly, we find that the assignment of the Unions' members to respond in Warm Zones creates a "concrete potential for injury." *UFA*, 3 OCB2d 16, at 30. On its face, the Response Protocol recognizes the risky nature of responding to active shooters and other aggressive deadly behavior and operating in Warm Zones. For example, it instructs that FDNY units are to approach the "scene using extreme caution" so as "not to enter potential Warm or Hot Zones." (Ans. to UFA Pet., Ex. 5, §§ 6.1; 6.1.1) The Response Protocol acknowledges that lifesaving interventions in a Warm Zone should be limited "[d]ue to the dynamic nature of the threat and mechanism of injury." (*Id.* at § 11.7.1) Further, it warns that "[t]he NYPD may have difficulty distinguishing between the perpetrators, victims, or first responders." (*Id.* at § 2.2)

Prior to the issuance of the Response Protocol, the FDNY did not have a policy governing the conduct of personnel entering an area where there may be ongoing criminal

[19] While the dissent characterizes the record as out of date, they do not assert that the inherent risks of an active shooter or other aggressive deadly behavior, as indicated in FDNY's documents contained in the record, no longer exist.

activity such as an active shooter or other aggressive deadly behavior.[20] To use the terminology of the Response Protocol, the FDNY's prior policy was to assign its personnel only to Cold Zones where there was only a "normal risk due to geographic distance from the threat, or the area has been secured by the NYPD." (Ans. to UFA, Ex. 5, § 5.1) While a Warm Zone "contains no identifiable threats," by definition it has an elevated level of risk compared to a Cold Zone. (*Id.*) The Response Protocol requires that FDNY personnel "be escorted by NYPD" and "operat[e] under their security" in any area designated by the NYPD as a Warm Zone. (*Id.*) The RTF Guide graphics detailing operations in a Warm Zone show FDNY personnel protected on all four corners by NYPD personnel with automatic weapons drawn. (*See* UFA Pet., Ex. J) The Instructors' Guide notes that in a Warm Zone "there may be unknown potential threats to personal safety or health" while in a Cold Zone "first responders can operate with minimal threat to personal safety or health." (UFA Pet., Ex. L, p. 4)

Further, the Response Protocol expressly identifies numerous safety risks unrelated to traditional FDNY duties. For example, it states that operating in Warm Zones may result in exposure to "hand guns, rifles, grenades, [and] IEDs." (Ans. to UFA, Ex. 5, § 8.6.2) The issuance of ballistics gear further indicates that Firefighters are expected to be exposed to new threats of serious bodily harm. In addition, at several points, the Response Protocol recognizes

[20] The City did not plead that it had assigned Firefighters to respond to Warm Zones in active shooter incidents prior to issuance of the Response Protocol or aver that the Response Protocol was not new. On its face, the Response Protocol indicates that the assignment of bargaining unit members to perform life-saving responses in active shooter Warm Zones was new. It sets forth new procedures that resulted in the issuance of new equipment (ballistics gear) and additional training requirements.

that FDNY personnel may be injured as a result of criminal behavior. (*See, e.g.*, Ans. to UFA, Ex. 5, § 11.8.2: "if an RTF member suffers any incapacitating injury in the Warm Zone, that RTF will cease all operations and when safe to do so, exit the Warm Zone with the injured member"; § 11.8.3: an "ambulance will be notified of any RTF member injury.") Thus, the safety risk in operating in Warm Zones is not only implicit in the job assignment, it is explicit in the Response Protocol. *See UFA*, 4 OCB2d 30, at 28.

While the Response Protocol contains procedures to minimize risks to FDNY members, it also recognizes that substantial safety risks remain. For example, while it identifies the optimum composition of a RTF, it explicitly states that "[e]ntry [into a Warm Zone] should not be delayed awaiting specific FDNY resources." (Ans. to UFA, Ex. 5, § 11.2.2) *See SBA*, 23 OCB 6, at 24 (policy that reduced number of police cars available to back-up solo supervisors found to have practical impact on safety in part because solo supervisor may be first on the scene that "will require his immediate action"). The Response Protocol also acknowledges that it may not be possible for responding FDNY members to withdraw from the scene of an active shooter when they lack NYPD protection.[21] (*See* Ans. to UFA, Ex. 5, § 4.1) It instructs FDNY members to seek hard cover or concealment but acknowledges that concealment merely "hides" the FDNY members and "can be penetrated by ballistic weapons." (*Id.*)

Critically, we find that the City has not alleged facts to demonstrate that it has obviated these safety risks. The City maintained only that the Response Protocol did not have a safety

[21] In addition, the Response Protocol instructs that when there is a risk of mis-identification by a police officer, the FDNY member should "[r]emain motionless (no sudden movements)" and "not turn your body unless instructed to do so." (Ans. to UFA, Ex. 5, § 2.2)

impact on the Union's members; notably it made no arguments concerning amelioration. The City did not claim that only employees who received training would be assigned to operate in Warm Zones. In addition, the City did not assert that the necessary training was completed. Documents issued by the FDNY indicate that some employees were assigned to CTTFs and some training was given prior to November 2016. Nevertheless, the November 28, 2016 memo regarding "Response to Active Shooter and Bombing Incidents Training" indicated that: "**All Members** will be scheduled to attend this **new** program." (Ans. to UFA, Ex. 3) (emphasis added) "[T]he first installment of the new training phase . . . which has been completely revised to reflect the current threat trends" was scheduled to begin on January 3, 2017, and run approximately for 3 months. (*Id.*) It further states that "[e]ach subsequent cycle will also run for 3 months for approximately two years."[22] (*Id.*) Indeed, the documents show that, at least in part, if the new training was held on schedule, employee training would not have been completed until January 2019, more than three years after the initial assignments were made. According to the dissent, more than 1,000 firefighters have received training during the past two years. There are, however, over 11,000 FDNY firefighters. Thus, even if our dissenting colleagues' assertion is true, the dissent has not asserted that the training for those members identified in the November 28, 2016 memorandum has been completed.[23]

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[22] Other FDNY documents issued after November 2016 indicated that training classes not described in the November 2016 memo were still being scheduled.

[23] The dissent states that they have been informed that all firefighters who would be assigned to a Warm Zone have received training. As discussed in the next paragraph, safety risks have been identified that would not be ameliorated by training. Moreover, the Board is unable to consider

In its Sur-reply, the City acknowledged that the CTTF safety equipment, which includes the ballistic vests and helmets, cannot be worn over a complete set of bunker gear. (*See* Sur-reply to UFA, p. 3, bullet (e)) In addition, we note that ballistic vests and helmets do not provide full body protection. We acknowledge that the Response Protocol provides the Incident Commander with discretion to determine the safety equipment used to maximize protection and safety. (*See* Ans. to UFA, Ex. 5, § 11.4.2) However, since FDNY members cannot simultaneously employ their ballistic safety gear and all of their fire safety gear, FDNY members entering a Warm Zone may be required to enter an area where there is a fire or the potential for a fire without bunker gear or may be required to enter an area where shots may still be fired without ballistic protection. Either scenario creates obvious un-ameliorated safety risks to fire personnel.[24] *See UFA*, 3 OCB2d 16, at 28-29 (safety impact found where FDNY failed to follow procedures that would have ameliorated the safety risk); *COBA*, 49 OCB 40, at 16 (BCB 1992) (failure to provide proper equipment held to constitute a practical impact on safety); *UFA*, 49 OCB 39, at 40 (BCB 1992) (safety impact found where FDNY failed to consider the impact of a new "program on other facets of its firefighting operations, which may impact directly on the safety of full duty firefighters and fire officers."); *SBA*, 23 OCB 6, at 25 ("In a plan . . . which by its own terms is concerned with consideration of safety of the affected personnel, we believe it

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comments made or information provided by one party to a Board member that are not already contained in the record.

[24] Staffing the CTTFs with volunteers does not remove the safety impacts.

wrong to leave to chance or to discretion the manner in which such significant matters as these are to be dealt with.").

Accordingly, since the existence of a threat to employee safety is clear in the Response Protocol, and the FDNY's documents indicate that employees would be assigned to respond in Warm Zones at active shooter incidents in advance of receiving the training, the finding of a *per se* practical impact is supported by the record.[25] In sum, we find no factual dispute that warrants a hearing. *Cf. UFA*, 5 OCB2d 3, at 15 (ordering a hearing when the City disputed that the Modified Response Program caused delays that created a safety risk); *UFOA*, 3 OCB2d 50, at 17 (ordering a hearing when there was a dispute regarding whether Alarm Receipt Dispatchers were allowed to speak under the new Unified Call Taking system). Having determined there is a *per se* practical impact on safety, we order bargaining over that impact. *See UFA*, 3 OCB2d 16, at 35; *UFA*, 49 OCB 39, at 44; *COBA*, 49 OCB 40, at 18; *SBA*, 23 OCB 6, at 28.

In reaching this conclusion, we note that there are aspects of the Unions' bargaining demands that raise employee safety concerns such as: the procedures for communication within and outside the command, employee responsibilities when an escort or RTF member is injured, employee protection in the staging area or during rapid triage, and comfort and fit of protective gear and equipment. To the extent the Unions seek to negotiate over the impact that the Response Protocol and CTTF Memos have on employee safety, that impact is a mandatory

[25] In response to our dissenting colleagues, we emphasize that the finding of a safety impact is based on more than just the lack of complete training. The issues raised relating to safety equipment and the clear threat outlined in the response protocol and other FDNY documents are all factors that establish the practical impact on employee safety.

subject of bargaining.[26] *See COBA*, 27 OCB 16, at 88 (BCB 1981) (where safety issues are intertwined with management prerogatives, the safety impact is bargainable). *See also UFA*, 3 OCB2d 16, at 26. Similarly, with respect to the Unions' demands concerning training, we find that the FDNY's failure to train all employees on this assignment prior to designating them to a CTTF has clear safety implications that gives rise to a bargaining obligation.[27]

Workload Impact

In contrast, we find that the Unions have not alleged facts to demonstrate that there is a practical impact on workload. We have long held that, "[f]or the Board to find a practical impact on workload, 'a petitioner must allege sufficient facts to show that the managerial decision created an unreasonably excessive or unduly burdensome workload as a regular condition of employment.'" *DC 37, L. 3621 & L. 2507*, 11 OCB2d 10, at 21 (BCB 2018) (quoting *UFA*, 7

[26] Conversely, the FDNY's decision to assign bargaining unit members to enter the Warm Zone is not a mandatory subject of bargaining. *See UFA*, 4 OCB2d 3, at 11; *UFA*, 47 OCB 61, at 10. Similarly, the use of ballistics equipment, and the type of ballistics gear and equipment, are not mandatory subjects of bargaining. The "Board has long held that decisions regarding the selection or use of equipment involve the City's discretion over the methods, means and technology of performing its work, and that to the extent a union's demands usurp that discretion, they infringe on the exercise of managerial prerogative and are rendered non-mandatory." *LEEBA*, 3 OCB2d 29, 43-44 (BCB 2010) (finding a demand for body armor to be a demand for equipment and not mandatorily bargainable); *see also UFA*, 43 OCB 4, at 60 (finding demands regarding "protective equipment" to be "clearly nonmandatory subjects of bargaining").

[27] However, the Unions' demands relating to the type or content of the training are not mandatory subjects of bargaining. The Board has held that, in general, "the determination of the quantity and quality of training provided is a management prerogative." *UFA*, 71 OCB 19, at 11 (unilateral decision to provide enhanced training for newly-designated Special Operations Support Ladder Companies is a non-mandatory subject of bargaining). *See also UFA*, 43 OCB 4, at 154-155; 336.

OCB2d 4, at 23 (BCB 2014)). *See also UFA*, 71 OCB 19, at 8; *LBA*, 51 OCB 45, at 31 (BCB 1993), *affd., Toal v. MacDonald*, 216 A.D.2d 8 (1st Dept. 1995); *Local 94, UFA*, 1 OCB 9, at 4 (BCB 1968). Further, "[a] petitioner 'does not demonstrate a practical impact [on workload] merely by enumerating additional duties assigned to employees or by noting a new assignment of duties covered in the job specifications.'" *Id.* (quoting *Local 333, UMD*, 5 OCB2d 15, at 14-15 (BCB 2012)). *See also UFA*, 71 OCB 19, at 13; *SBA*, 41 OCB 56, at 17. A "claim of increased workload during the workday does not amount to a workload impact absent a showing that employees were subject to working more time than scheduled or overtime to complete their work." *Local 333, UMD*, 5 OCB2d 15, at 15-16 (citing *UFA*, 77 OCB 39 at 15-17). *See also UFA*, 73 OCB 2, at 7-8 (BCB 2004); *ADW/DWA*, 69 OCB 16, at 8 (BCB 2002); *PPOA, L. 599, SEIU*, 17 OCB 2 (BCB 1976). Merely showing that employees are "working to their full capacity," even where there has been "an increase in responsibilities," does not constitute a workload impact. *DC 37, L. 3621 & L. 2507*, 11 OCB2d 10, at 22 (citing *ADW/DWA*, 69 OCB 16, at 7; *PPOA, L. 599, SEIU*, 17 OCB 2, at 15). Factors indicating that a workload impact may exist include employees being "disciplined for being unable to complete their required work in a timely manner" and "whether employees are 'subject to working more time than scheduled or overtime to complete their work.'" *Id.* at 22-23 (quoting *Local 333, UMD*, 5 OCB2d 15, at 15-16; citing *PPOA, L. 599, SEIU*, 17 OCB 2, at 15; *UFA*, 77 OCB 39 at 15-17; *UFA*, 73 OCB 2, at 7-8; *ADW/DWA*, 69 OCB 16, at 8).

In support of its workload impact claim, the Unions merely list new procedures and protocols that their members must follow when operating in a Warm Zone. However, the

Unions have not shown that employees face discipline for being unable to complete the work assigned, must work more time than scheduled, or are unable to meet assigned deadlines as a result of the new procedures and protocols. Indeed, the facts alleged by the Unions do not demonstrate "an unreasonably excessive or unduly burdensome workload as a regular condition of employment." *DC 37, L. 3621 & L. 2507*, 11 OCB2d 10, at 21 (quoting *UFA*, 7 OCB2d 4, at 23). Accordingly, further proceedings on this claim are not warranted, and the workload impact claim is dismissed. *See PBA*, 41 OCB 42 (BCB 1988).

Thus, the petitions are granted to the extent that we direct bargaining over of the *per se* safety impact determined above and denied as to all other claims.

ORDER

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

DETERMINED, that the assignment of members of the Uniformed Firefighters Association, Local 94, and the Uniformed Fire Officers Association, Local 854, to operate in designated Warm Zones as defined in Operating Guide Procedure 105-01 has a *per se* practical impact; it is further

ORDERED, that the verified scope of bargaining/improper practice petitions, docketed as BCB-4219-17 and BCB-4221-17, filed by the Uniformed Firefighters Association, Local 94, and the Uniformed Fire Officers Association, Local 854, against the Fire Department of the City of New York and the City of New York, be, and the same hereby is, granted as to petitioner's *per se* safety impact claims; it is further

DIRECTED, that the Uniformed Firefighters Association, Local 94, the Uniformed Fire Officers Association, Local 854, and the New York City Fire Department collectively bargain concerning the practical impact on safety set forth here and schedule mutually agreeable bargaining sessions as soon as practicable; and it is further

ORDERED, that the remaining claims in the verified scope of bargaining/improper practice petitions filed by the Uniformed Firefighters Association, Local 94, and the Uniformed Fire Officers Association, Local 854, docketed as BCB-4219-17 and BCB-4221-17, are hereby dismissed.

Dated: April 2, 2020
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

I dissent (see attached dissent)

M. DAVID ZURNDORFER
MEMBER

I concur in the dissent (see attached dissent)

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

DISSENT OF M. DAVID ZURNDORFER
IN BCB-4219-17 AND BCB-4221-17
IN WHICH CAROLE O'BLENES CONCURS

We dissent. The Majority's decision is fatally flawed because it is based upon a record that is both out of date and woefully incomplete. It also ignores factual disputes that should be resolved not by conjecture but only after a hearing.

In June 2017, the Unions in this case filed Petitions claiming that the FDNY's issuance of its Response Protocol on November 16, 2015 calling for the deployment of bargaining unit personnel in a Warm Zone in certain circumstances, creates a practical impact on safety giving rise to a duty to bargain.

The issues before the Board today are whether, as a result of the Response Protocol, a) there currently exists (or will exist in the future) a clear threat to employee safety, and b) whether the FDNY has adopted measures that offset that threat. UFA, Local 94, 5 OCB2d 2 (2012). The Board's decisions in practical impact cases make clear that the petitioning Union must demonstrate that the alleged threat is "a clear and present or future threat to employee safety." CEU, L. 237 IBT, 11 OCB2d 19 (BCB 2018). See, e.g., Local 1182, CWA, 5 OCB2d 241(2012) ("the proper inquiry is whether there is a clear present or future threat to employee safety"); Local 333, UMD, ILA, 5 OCB2d 15 (2012) (for there to be a practical impact on safety requires finding of "a clear present or future threat to employee safety"); UFA 5 OCB2d 2 (2012) ("to establish a practical impact on safety . . . the Unions must demonstrate that the exercise of a management right has created a clear and present or future threat to employee safety"); UFOA, 3 OCB2d 50 (2010) (petitioner must demonstrate "a clear and present or future threat to employee safety"). Allegations that such a threat existed at some point in the past do not suffice.

The record in this case consists only of the pleadings, the most recent of which was dated February 16, 2018. Thus the record contains nothing concerning events related to the issues herein that have transpired during the past twenty-five and a half months. Yet the Majority somehow concludes, based on this record, that a practical impact on safety currently exists.

It seems obvious to us that in order to decide whether a practical impact on safety currently exists, there must first be a hearing in which the parties are allowed to submit any relevant and material evidence concerning conditions as they exist currently. We are at a loss to understand how the Majority can reach its decision based on this obviously inadequate and incomplete record. The inadequacy of the record – and the wrong-headedness of the Majority's approach – is especially striking with respect to the training that bargaining unit members have received to ameliorate this risk.

The FDNY argued that bargaining unit members subject to deployment in a warm zone receive training obviating the threat to employee safety. The Majority rejects that argument because "the City did not assert that the necessary training was completed by the time the pleadings were filed." (Maj. at 35) They continue:

> "[T]he first installment of the new training phase . . . was scheduled to begin on January 3, 2017, and run approximately for 3 months. Each subsequent cycle will also run for 3 months for approximately two years. Indeed, the documents show that, at least in part, if the new training was held on schedule, employee training would not have been completed until January 2019, more than three years after the initial assignments were made." (Maj. at 36)

Thus, the Majority concludes as follows:

> "Accordingly, since the existence of a threat to employee safety is clear in the Response Protocol, and the FDNY's documents indicate that employees would be assigned to respond in Warm Zones at active shooter incidents in advance of receiving the training, the finding of a per se practical impact is supported by the record." (Maj. at 36)

However, as noted above, the relevant inquiry is whether the necessary training has now been completed (and not whether it had been completed at the time the pleadings were filed) and whether employees would be assigned today to respond to a Warm Zone in advance of receiving the training (and not whether they would have been assigned in 2017-18).[1]

We have been advised by the FDNY that since the record in this case closed in February 2018, it has been almost continuously providing day long training sessions to bargain unit personnel who are subject to assignment in a Warm Zone. Indeed, more than a thousand members of the two bargaining units have been trained during the past two years with respect to the conditions they would face – and how best to ameliorate the risk – in the event they are assigned to operate in a Warm Zone. I have been informed that virtually every member who may be assigned to work in a Warm Zone has now received such training.

Petitioners have the burden of demonstrating that a practical impact on safety currently exists. CEU, Local 237, IBT, 11 OCB2d 19 (2018). Since all of the evidence submitted by Petitioners in support of their claim of practical impact is long out of date, the Petitions should be dismissed. Alternatively the Board should direct that a hearing be held for the purpose of establishing a record upon which the Board may determine whether a practical impact on the safety of the affected employees currently exists.

[1] I am advised that since the Response Protocol was issued in 2015, bargaining unit members have operated in a Warm Zone on only one occasion, on June 30, 2017.