DC 37, L. 2507 & 3621, 14 OCB2d 11 (BCB 2021)

(IP) (Docket No. BCB-4301-18)

Summary of Decision*:** The Union claimed that the City and the FDNY violated NYCCBL § 12-306(a)(1), (4), and (5) by unilaterally implementing a procedure known as the 1:12 rule that denied unit members the ability to use their accrued annual leave. Alternatively, if the 1:12 rule were found to be a nonmandatory subject of bargaining, the Union argued that the City was required to bargain over its practical impact on terms and conditions of employment. The City argued that the grant or denial of leave falls within its management rights, that there was no change in policy, that the Union did not establish any practical impact, and that the claim should be deferred to the grievance procedure. The Board found that the 1:12 rule constitutes a mandatory subject of bargaining but that the Union did not meet its burden of establishing a change from existing policy. Having found that the 1:12 rule was a mandatory subject of bargaining, the Board also denied the Union's request for impact bargaining. Accordingly, the petition was dismissed. ***(Official decision follows).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, and its affiliated LOCALS 2507 & 3621,

Petitioners,

- and-

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

Respondents.

DECISION AND ORDER

On December 15, 2018, District Council 37, AFSCME, AFL-CIO, ("DC 37") and its affiliated Locals 2507 and 3621 (collectively, the "Union") filed a verified improper practice petition against the City of New York ("City") and the Fire Department of the City of New York

("FDNY"). The Union alleges that the FDNY unilaterally changed its procedures for the use of annual leave by Emergency Medical Technicians, Paramedics, Lieutenants, and Captains by implementing a procedure known as the 1:12 rule that denies these employees their ability to use their accrued annual leave in violation of § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] Alternatively, if the 1:12 rule is found to be a nonmandatory subject of bargaining, the Union argues that the City is required to bargain over its practical impact on terms and conditions of employment. The City argues that the right to grant or deny requests for annual leave falls within its management rights, that there has been no change in its leave policy, that the Union has failed to establish any practical impact on terms and conditions of employment, and that the claim should be deferred to the parties' contractual grievance process. The Board finds that the 1:12 rule constitutes a mandatory subject of bargaining but that the Union has not met its burden of establishing a change from existing policy. Having found that the 1:12 rule is a mandatory subject of bargaining, we also deny the Union's request for impact bargaining. Accordingly, the petition is dismissed.

[1] We deem the petition to also allege a violation of NYCCBL § 12-306(a)(5), which prohibits unilateral changes to a mandatory subject of bargaining during the period when a collective bargaining agreement has expired but remains in effect pursuant to the *status quo* provision of NYCCBL § 12-311(d). *See* NYCCBL §§ 12-306(a)(5) and 12-311(d). This Board "look[s] beyond statutory citations to the essence of the claims asserted in resolving improper practice claims." *Local 621, SEIU*, 5 OCB2d 38, at 2 n. 1 (BCB 2012) (quoting *SSEU, L. 371*, 1 OCB2d 20, at 12 (BCB 2008) (internal quotation marks omitted)). Where the alleged facts, if proven, could constitute a violation of a statutory provision not cited by the petitioner, we may deem the petition to allege such a violation. *See CSTG, L. 375*, 7 OCB2d 14, at 2 n.1 (BCB 2014) (citing *Seale*, 79 OCB 30, at 7 (BCB 2007); *Wynder v. McMahon*, 360 F.3d 73, 77 (2d Cir. 2004)). As described *infra*, the pleadings and accompanying exhibits evidence that the collective bargaining agreements between the parties expired on April 5, 2018, and remain in *status quo*.

BACKGROUND

The Trial Examiner held a four-day hearing and found that the totality of the record, including the pleadings, exhibits, transcript, and briefs, established the relevant facts set forth below.

FDNY's Bureau of Emergency Medical Services ("EMS") covers the five boroughs of New York City and is responsible for the operation and staffing of all ambulances deployed utilizing the City's 911 system. DC 37 is the certified collective bargaining representative of FDNY employees in the civil service titles of Emergency Medical Specialist – EMT ("EMT"), Emergency Medical Specialist – Paramedic ("Paramedic"), Supervising Emergency Medical Service Specialist Level I ("Lieutenant"), and Supervising Emergency Medical Service Specialist Level II ("Captain"). Local 2507 is the DC 37 affiliate representing EMTs and Paramedics, while Local 3621 represents Lieutenants and Captains. DC 37 and the City are parties to the citywide collective bargaining agreement for the period covering 2010 to 2018, which expired on April 5, 2018 ("Citywide Agreement"), as well as a unit agreement of the same duration covering the EMS job titles referenced above ("EMS Agreement"). Both agreements remain in *status quo* under NYCCBL § 12-311(d).

EMTs' responsibilities include providing Basic Life Support services ("BLS"), pre-hospital emergency medical care, transporting patients to appropriate medical facilities, and operating FDNY vehicles including ambulances. Paramedics' responsibilities include the same duties as EMTs as well as providing Advanced Life Support services ("ALS"). Lieutenants are responsible for overseeing EMS emergency transport units, consisting of ALS units staffed with Paramedics and BLS units staffed with EMTs. Their supervisory functions include ensuring that vehicles and equipment comply with applicable regulations, checking the status of patients'

injuries, making sure that patients are sent to the correct hospitals, and assuring that EMTs and Paramedics are cleared from hospital emergency rooms in a timely manner. They also assign, supervise, and evaluate EMTs and Paramedics. Captains are commanding officers of a station. They have most of the same supervisory functions as Lieutenants, and they also supervise Lieutenants assigned to their station. One of their additional job duties is preparing the staffing schedule for their station, which includes granting and denying requests for annual leave.

Each ambulance is staffed by two EMTs or Paramedics. EMS personnel generally work a five-two, five-three schedule, meaning that each employee works five days and then takes two days off and then works five days and takes three days off. EMS personnel on this schedule generally work eight-hour shifts. They are assigned to platoons that have different days off. A smaller number of EMS personnel work twelve-hour shifts. The work week for these employees consists of three days some weeks and four days other weeks. To be fully staffed, as a rule a station must have three employees for each ambulance and tour so that when two employees are working, the third employee has his or her day off. For example, to operate one ambulance for three eight-hour tours in a 24-hour period requires six EMTs or Paramedics, but to fully staff a station to regularly operate that ambulance on that schedule requires nine EMTs or Paramedics.

To illustrate the staffing needed to keep all ambulance units in operation, the Union provided three EMS stations as examples: Station 35 in Williamsburg, Station 32 in Carroll Gardens, and Station 18 in the Bronx.[2] The record shows that Station 35 operated ambulances on three 8-hour tours. Seven ambulances, consisting of five BLS units staffed by EMTs and two ALS units staffed by Paramedics, ran on both the day and evening shift, while three ambulances,

[2] The evidence presented by the Union regarding staffing at these stations was not rebutted by the City.

consisting of two BLS units and one ALS unit, ran on the midnight shift. On each shift, a "conditions car" operated by a Lieutenant would also operate. (Tr. 87) Therefore, on any given day, 24 EMTs, ten Paramedics, and three Lieutenants would be needed to maintain all ambulances and the conditions car in operation on all three tours. As of August 2018, 40 EMTs, 13 Paramedics and nine Lieutenants were employed at Station 35.

Station 32 operated three ambulances on two daily eight-hour tours. Of these ambulances, two were BLS units staffed by two EMTs, and one was an ALS unit staffed by two paramedics. Station 32 also operated five ambulances on two daily 12-hour tours. Of these ambulances, four were BLS units, and one was an ALS unit. Therefore, on any given day, 24 EMTs and eight Paramedics would be needed to maintain all ambulances in operation. As of August 2018, 37 EMTs, 13 Paramedics, and nine Lieutenants were employed at Station 32.

Station 18 operated four ambulances on two daily eight-hour tours. All four ambulances were BLS units staffed by EMTs. Station 18 also operated three ambulances on two daily 12-hour tours. Of these ambulances, two were BLS units, and one was an ALS unit. On each 12-hour shift, a supervisory vehicle known as a "fly car," staffed by a Lieutenant and a Paramedic, would also operate.[3] (Tr. 144) Therefore, on any given day, 24 EMTs, six Paramedics, and two Lieutenants would be needed to maintain all ambulances and the fly car in operation. As of August 2018, 39 EMTs, nine Paramedics, and eight Lieutenants were employed at Station 18.

Annual leave allowances for bargaining unit members are set forth in Art. V, § 2, of the Citywide Agreement, as modified by the EMS Agreement. Bargaining unit members accrue between 15 and 27 annual leave days per year based on their years of service. FDNY Operational

[3] The record does not reflect whether a similar supervisory vehicle staffed by a Lieutenant operates from Station 35.

Guide Procedures 120-02 (April 15, 2010), entitled “Annual Leave” (“OGP-120-02”), sets forth procedures for the request and approval of annual leave by bargaining unit members. These include provisions regarding the increments of time in which annual leave requests are to be made, when they are to be made, and a provision providing that scheduling conflicts will be resolved by seniority. A member may accumulate a maximum leave balance equal to two years of his or her annual leave allowance. Any annual leave balances exceeding the two-year allowance are converted to sick leave unless the FDNY authorizes it to be carried over to the following year. OGP 120-02 further provides that the Commanding Officer for each station shall establish the number of annual leave requests that may be approved for each title within the station, “[which] will vary based on staffing levels and minimum staffing requirements.”[4] (Jt. Ex. 3)

The parties’ dispute concerns what is referred to as the “1:12 rule.” The 1:12 rule is a scheduling rule or guideline providing that for every 12 employees per title at a station, one employee can be granted annual leave per day.[5] On or about August 7, 2018, the Division Chiefs for Division Two in the Bronx and Division Three in Brooklyn emailed Captains in their respective Divisions regarding scheduling of annual leave. Both emails included a chart listing the number of EMTs, Paramedics, and Lieutenants employed at each station in the respective Division and the number of employees in each job title who could be granted annual leave per day based on the 1:12 rule. The email sent by Division Two Chief Michael Fields stated in relevant part as follows:

> Base[d] on the 1 in 12 RULE, the following commands are allowed to grant the following Annual/Comp time leave per day.

[4] The terms “minimum staffing constraints,” “minimum staffing level,” and “minimum staffing requirements” are used in OGP 120-02 but are not defined. (Jt. Ex. 3)

[5] As described *infra*, the parties dispute when the 1:12 rule was established, whether it was previously enforced, and how it was interpreted and applied.

> A request to exceed the 1:12 rule must be made in writing; it will be evaluated on a case by case basis and can only be approved by a Division 2 Chief.
>
> Captains or lieutenant[s] do not have discretion to exceed 1 in 12. Any officer who exceeds the 1 in 12 will receive command discipline. Ignorance is not a defense.

(U. Ex. 2) (capitalization as in original). The accompanying chart set forth the number of permitted annual leave requests for each station in Division Two, including Station 18. It shows that of the 39 EMTs, nine Paramedics and eight Lieutenants employed at Station 18, a maximum of three EMTs, one Paramedic, and one Lieutenant could take annual leave or comp time on any particular day based on the 1:12 rule.

The email sent by Division Three Chief Stacy Scanlon stated, "Please find below the active member staffing for each station by title with the number of members who can be granted leave . . . [Compensatory Time] or [Annual Leave] per day per title." (U. Ex. 1) It contained a similar chart to the one sent by Commander Fields setting forth the number of permitted annual leave requests by job title for each station in Division Three based on the 1:12 rule.[6] The Division Three chart included Stations 32 and 35. It shows that of the 40 EMTs, 13 Paramedics, and nine Lieutenants employed at Station 35, a maximum of three EMTs, one Paramedic, and one Lieutenant could take annual leave or comp time on any day based on the 1:12 rule, while of the 37 EMTs, 13 Paramedics, and nine Lieutenants at Station 32, only three EMTs, one Paramedic, and one Lieutenant could take annual leave or comp time.The parties held a labor-management meeting on or about August 16, 2018, at which the Union expressed its opposition to

[6] The staffing and annual leave numbers set forth in the Division Two and Division Three charts indicate that the FDNY was "rounding down" the number of employees eligible for annual leave under the 1:12 rule. For example, if there are 23 employees in a job title, only one may take annual leave at a time; if there are 24 employees, two may take annual leave.

implementation of the 1:12 rule as set forth in the emails. Union representatives were told at the meeting that the 1:12 rule would now be "a hard and fast rule." (Tr. 184)

History of the 1:12 Rule

The parties offered conflicting evidence regarding the history of the 1:12 rule and its application prior to August 2018. Three FDNY EMS Captains testified on behalf of the Union: Lisa Freitag, Will Merrins, and Kevin Haugh. Vincent Variale, President of Local 3621 and Vice President of District Council 37, and Michael Greco, Vice President of Local 2507, also testified on behalf of the Union. Cesar Escobar, Deputy Assistant Chief for the FDNY, and Alvin Suriel, Assistant Chief of FDNY EMS Operations, testified on behalf of the City.

Chief Suriel testified that the 1:12 rule ensures that minimum staffing can be maintained when granting annual leave requests despite sick leave, emergency leave, and other unexpected absences. According to Suriel, references in OGP 120-02 to "minimum staffing requirements" mean "to ensure that you're following the 1 in 12 rule." (Tr. 334) The 1:12 Rule requires that "[f]or every up to twelve members one gets off." (Tr. 354) Suriel testified that if there were more than twelve employees but less than 23 employees in a title, a Captain "would need direction from your Deputy Chief" in order to approve more than one annual leave request. (Tr. 355) He said the 1:12 rule was "always taught [this] way" to him, both at the Academy and by his mentors within the FDNY, and that he has known about the 1:12 rule since he started as an EMT in 1989. (Tr. 355)

Chief Escobar testified that the 1:12 rule allows Captains to generate a master schedule for their station that "give[s] one member off in each rank for every 12 members there are in a 24-hour period." (Tr. 292) According to Escobar, the 1:12 rule is utilized to ensure that stations are properly staffed with BLS and ALS units to respond to 911 assignments. He said the 1:12 rule

was being used to calculate minimum staffing requirements when he began to work at EMS in 1994. Suriel and Escobar both said that they were denied time off based on the 1:12 rule when they worked as EMTs, and Suriel testified that, as a supervisor, he denied annual leave requests many times based on the 1:12 rule before August 2018.

In contrast, the witnesses for the Union testified that prior to August 2018, the 1:12 rule was a discretionary scheduling guideline. Captain Freitag testified that she had never been instructed to, and never had, followed the 1:12 rule prior to receiving the August 7, 2018 email. Captain Haugh testified that it was "rumored . . . that 1:12 was a loosely followed policy that had been carried over from the [New York City Health and Hospitals Corporation] days." (Tr. 159) President Variale said that when he had worked as a Lieutenant at Station 57 with Captain Lisa Gloffke, she told him the 1:12 rule was a discretionary guideline. Captain Merrins testified that the 1:12 rule was explained to him by his Deputy Chief after he was transferred to Station 35 as a Captain in 2004. He was not told that the 1:12 rule was a policy that must be strictly followed. Instead, it was explained to him as "just how we do scheduling." (Tr. 128) However, when questioned regarding OGP 120-02, Merrins testified that "minimum staffing levels . . . [were] referred to as the 1:12." (Tr. 87)

According to the witnesses for the Union, prior to August 2018, Captains would grant annual leave requests so long as they could keep all ambulances running. Freitag and Haugh testified that they would grant employee requests for annual leave if the requesting employee was able to arrange coverage for their tour and that they had never had a schedule rejected by their supervisors. Variale testified that, in or about 2004 to 2005, when Captain Gloffke was on leave from work for approximately a year, he prepared the schedules for Station 57 on his own. He said that though the schedules he prepared were not compliant with the 1:12 rule, they were approved

by the division commander. Greco testified that, when he worked as a Paramedic before 2018, his Captain would always approve his requests for annual leave so long as he supplied a replacement. Freitag, Merrins, and Haugh said that, when finding coverage for employees who requested annual leave, they did not consider whether overtime would be incurred.

The Union's witnesses testified that there was a lack of agreement within EMS regarding how the 1:12 rule should be applied. Captain Merrins testified that he had been taught that one employee out of every 12 per job title, per tour, could be granted annual leave (as opposed to per title, per day) and that the number of employees eligible for leave should be rounded up instead of down (e.g., if there were 13 employees in a title and tour, two employees would be eligible for annual leave a day). Merrins testified about a meeting of Captains and Chiefs from Division Three in Brooklyn held in June or July 2018, at which Captains were told "that we needed to start enforcing the 1:12" and to "really tighten it up." (Tr. 93-94) However, according to Merrins, the Chiefs who were present disagreed among themselves regarding whether the 1:12 rule was to be applied per title, per tour or per title, per day and whether the number of employees eligible for annual leave should be rounded up or rounded down if it exceeded 12. Variale also testified that at the labor-management meeting held to discuss the 1:12 rule on or about August 16, 2018, the Chiefs who were present could not agree whether the number of employees eligible for leave should be rounded up or rounded down.

The Union and the City offered testimony concerning what, if anything, was taught to Captains about the 1:12 rule when they attended the FDNY EMS Academy for training upon being promoted to Captain. Captains Merrins, Haugh, and Freitag testified that they were not told about

the 1:12 rule at the Academy.[7] Chief Escobar, who is Chief of the FDNY EMS Academy, testified that the 1:12 rule has been taught at the Academy as part of Captains' training on scheduling since before he himself took the Captains' training in 2011. According to Escobar, the 1:12 rule is taught as part of an exercise on preparing a station schedule. A handout from 2014 used as part of this training exercise for Captains regarding how a master schedule is generated states in part, "[p]lease base your decisions on 1:12, per title and available leave balances." (City Ex. 1) Escobar testified that he had been given a nearly identical handout when he attended the Academy in 2011 and did the scheduling exercise. Suriel testified that when he was trained on minimum staffing levels at the Academy in 2010, as part of the same class that Freitag attended, he was taught to use the 1:12 rule and given the handout exercise that Escobar described.

The City presented other evidence that the 1:12 rule was used by the FDNY prior to August 2018. In September 2017, two Captains in Division Two were issued Command Disciplines stating in part that they had "disregarded the 1/12 rule" when creating their respective station's monthly schedules. (City Exs. 5 and 6) The City also introduced four emails sent to Captains in Division Three that refer to the 1:12 rule. An email dated March 5, 2017, sent by the Division Chief to recipients including Captain Freitag and Captain Merrins, states in part that "some [units] showed more members than permissible on annual leave based on the 1:12 rule." (City. Ex 7-A) An email dated December 26, 2017, sent by the Deputy Division Chief to various Captains, directs them to "[p]lease make sure that you are consistent with the '1 in 12' accepted practice for granting time off." (City Ex. 7-B) An email dated December 27, 2017, sent by the Deputy Division Chief to Merrins, states in part, "[p]lease adjust your schedule to be consistent with '1 in 12' accepted

[7] Merrins attended Captains' training at the EMS Academy in 2001, Haugh attended in 2003, and Freitag attended in 2010.

practice for granting time off." (City Ex. 7-C) An email dated April 26, 2018, sent by Chief Scanlon to recipients including Freitag and Merrins, directs them to "forward your station 1-12 [numbers] for each title . . . ." (City Ex. 7-D) Merrins responded to this email, stating that he was providing "1 in 12 levels for the station" by job title. (Id.)

Enforcement of the 1:12 Rule After August 2018

Captains Freitag, Merrins, and Haugh testified that after receiving the August 7, 2018 emails they prepared their schedules and granted leave requests in accordance with the 1:12 rule as set forth in the emails. Freitag and Merrins testified that, subsequent to August 2018, they had denied annual leave requests every month based on the 1:12 rule. Merrins said that he had also been instructed by Chiefs on two occasions to deny specific leave requests based on the 1:12 rule. Freitag said that, in addition to denying leave requests herself, she knew of two Captains who had been denied leave based on the 1:12 rule. Captain Haugh testified that he had denied leave to two paramedics based on the 1:12 rule, but that he would have denied those same leave requests prior to August 2018, because they were made by junior paramedics requesting annual leave during the peak summer period. According to Freitag and Merrins, enforcement of the 1:12 rule had led to an increasing number of employees calling in sick instead of requesting annual leave that they knew would be denied, which negatively impacted staffing levels.

President Variale testified that, since the strict application of the 1:12 rule in August 2018, Captains have been verbally admonished for failure to follow the 1:12 rule, but that none has received a written warning or penalty. However, Variale also said that, as of the date he testified, members at many stations where still being given annual leave if they could find another employee to substitute for them. According to Variale, "some stations are following [the 1:12 rule], some

are just using it as a guide. . . . It's still not a hard rule." (Tr. 182) When asked what stations were not following the 1:12 rule, Variale said, "I think the vast majority are not following it." (Tr. 211)

The Union presented documentary evidence of three leave requests that had been denied since August 2018, allegedly due to the 1:12 rule. An EMT's September 28, 2018 request for annual leave time from November 5 to 18, 2018, was denied with the written comment, "staffing… see me for possible partials…." (Pet. Ex. Q) On October 9, 2018, a Paramedic requested annual leave for November 23 to 25, 2018. Two of the three requested leave days were denied, with the written comment "approved for 25th only, another medic off." (Pet. Ex. T) On October 13, 2018, a Paramedic requested annual leave for November 12, 2018. The request was denied, with the written comment "1 in 12, another medic off."[8] (Pet. Ex. U)

The Union and the FDNY offered conflicting testimony concerning whether it would be possible for employees to use all their annual leave benefits if the 1:12 rule, as set forth in the August 7, 2018 emails, were strictly applied. Vice President Greco testified that, according to his calculations, it would be impossible for EMS employees at many stations to use all the annual leave they were entitled to under the Citywide and EMS Agreements. As an example, he provided annual leave calculations for the 14 paramedics at Station 35 in Brooklyn as of September 27, 2019, based on an estimate of the annual leave days each was due per year based on their date of hire.[9] Greco testified that his calculations were based on the assumption that there are 261 working

[8] The petition alleged, though the City denied, that three other requests for annual leave were also denied based on the 1:12 rule. For two of the instances in which the Union alleged annual leave was denied due to the 1:12 rule, the City produced records indicating the request for leave had been withdrawn. In the third instance, the City produced records indicating that the denied leave request was for comp time instead of annual leave.

[9] The Union introduced in evidence a seniority list of the Station 35 paramedics and a chart prepared by Greco with his calculations of the amount of annual leave owed each paramedic based on their hire date.

days in a calendar year. He testified that, without including any accumulated annual leave rolled over from previous years, he estimated that the 14 paramedics at Station 35 were collectively entitled to 265 annual leave days per year, whereas there are only 261 working days in a year. Chief Suriel, however, testified that the Union's calculation was flawed because EMS operates 365 days a year. According to Suriel, using Greco's estimates of how many days of annual leave each paramedic at Station 35 was entitled to, he was able to prepare a schedule in which he allocated each paramedic their annual leave and still have 86 days left over in the calendar year.[10]

POSITIONS OF THE PARTIES

Union's Position

The Union alleges 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") when it unilaterally changed its procedures for the use of annual leave by strictly applying the 1:12 rule starting in August 2018, thereby denying employees their ability to use their annual leave accrual.[11] Assuming *arguendo* that the Board finds that the City's actions are within

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[10] The schedule that Suriel testified to was not introduced into evidence by the City.

[11] As discussed *supra,* at 1 n.1, although the Union only alleged violations of NYCCBL § 12-306(a)(1) and (4), we deem the petition to also allege a violation of NYCCBL § 12-306(a)(5).

NYCCBL § 12-306(a)(1), (4), and (5) provide, in pertinent part, as follows:

> 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 [§] 12-305 of this chapter;

* * * *

its management rights, the Union asserts that the 1:12 rule has a practical impact on its members' annual leave benefits, which are terms and conditions of employment, and should therefore be declared within the scope of bargaining.[12]

The Union does not contest that it is the City's right to set staffing levels, but it asserts that this management right is limited by the right of employees to negotiate over the procedures for obtaining time off. According to the Union, the 1:12 rule, as enforced starting in August 2018, only affects which employees will be assigned to work a given tour, not whether there will be coverage for that tour. The Union maintains that the 1:12 rule does not affect staffing but does drastically affect members' ability to use their annual leave time: when one member's request for leave is granted, 22 other employees can be denied leave whether or not their absence would impact the FDNY's ability to keep ambulances in service.

> (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.
>
> (5) to unilaterally make any change to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract, during a period of negotiations with a public employee organization as defined in [NYCCBL § 12-311(d)].

§ 12-305 provides, in pertinent part, as follows:

> 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 . . .

[12] The Petition asserts that the 1:12 rule as set forth in the August 7, 2018 emails is a "new rule/policy that each station may only have one member on annual leave at a time for every 12 actively staffed members in that station and title. (Pet. ¶40) However, in its post-hearing brief the Union argues that the 1:12 rule existed as a discretionary staffing guideline prior to August 2018, when it became a strictly-enforced cap on annual leave.

The Union argues that the implementation of the 1:12 rule in August 2018 was a clear and unequivocal change to an established policy. While it "concedes that a version of 1:12 [rule] previously existed as a guideline for minimum staffing," the Union says that the FDNY's long-standing policy and practice was that a Captain could grant a member's annual leave request so long as his or her tour was covered by another employee through a shift swap, overtime, straight-time vacation relief, or some other mechanism. (Union Br. at 31) The Union asserts that OGP 120-02, which sets out the procedures for requesting and granting annual leave, makes no reference to the 1:12 rule and places minimal formal restrictions on Captains' discretion to grant leave so long as all ambulances are maintained in service.

According to the Union, this long-standing policy was unilaterally altered by the FDNY's August 7, 2018 emails. The Union contends that the City has not offered evidence to rebut the existence of the long-standing past practice that Captains had discretion to grant annual leave so long as an employee found coverage for their tour. The Union asserts that there is no evidence that the implementation of the 1:12 rule has had a positive effect on EMS staffing levels and that, in fact, it has negatively impacted staffing by leading to an increase in members calling out sick rather than requesting annual leave they know will be denied.

The Union argues that, if the Board finds that the City was entitled to implement the strict version of 1:12 rule that went into effect in August 2018, then it must find that the City is required by NYCCBL § 12-307(b) to bargain over its practical impact.[13] According to the Union, the 1:12

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[13] NYCCBL § 12-307(b) provides, in pertinent part, as follows:

> 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

rule renders the use of annual leave impossible for many bargaining unit members, and its implementation has already resulted in the denial of several members' requests for leave.

In response to the City's argument that this matter must be deferred to arbitration, the Union argues that the statutory violation that it has alleged does not arise out of any provision of the Citywide or EMS Agreement nor is it derived from a grievance alleging that management has acted in excess of its discretion under the Agreements. Instead, according to the Union, the 1:12 rule is a change in policy that affects all bargaining unit members and is unrelated to the Agreements. Therefore, the Union asserts that the Board should not be defer the matter to arbitration.

City's Position

The City argues that the petition must be dismissed in its entirety because the right to grant or deny requests for annual leave falls within its management rights under NYCCBL § 12-307(b) to make scheduling determinations, direct and assign its workforce, and to determine the methods, means, and personnel by which government operations are to be conducted. To the extent that the Union argues that the FDNY must address staffing shortages by incurring overtime, the City states that this runs afoul of longstanding precedent that determining when to assign overtime is a management right.

The City maintains that there has been no change in the way that the FDNY makes decisions concerning annual leave requests. It states that the grant or denial of annual leave

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> 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.

requests has always been subject to the FDNY's operational and staffing needs and that these operational needs have always incorporated the 1:12 rule. According to the City, the 1:12 rule has existed since at least 1984, when EMS was still part of the New York City Health and Hospitals Corporation, and Captains are instructed on the 1:12 rule at the EMS Academy.

The City argues that the Union is alleging a violation of the annual leave procedures set forth in OGP 120-02 and that this claim is more properly addressed through the parties' grievance procedure. The EMS Agreement allows for filing grievances over violations of written policy such as OGP 120-02. The City contends that, insofar as the Union's claims implicate an alleged violation of OGP 120-02, they require interpretation or enforcement of the EMS Agreement, matters over which the Board lacks jurisdiction. Therefore, the Board should defer to arbitration.

According to the City, the Union's claim that the 1:12 rule has a practical impact on terms and conditions of employment must be dismissed because the Union has not specified any impact on safety or workload and has failed to demonstrate that the 1:12 rule makes it impossible for members to use their annual leave.

DISCUSSION

It is well established 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) (citations omitted). To prove that a violation has occurred, a petitioner "must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy." *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011)

(internal quotation marks omitted) (quoting *DC 37*, 79 OCB 20, at 9 (BCB 2007)). We therefore first consider whether the 1:12 rule constitutes a mandatory subject of bargaining.[14]

NYCCBL § 12-307(a) provides that employees' work hours, "including but not limited to . . . time and leave benefits," constitute a mandatory subject of bargaining.[15] *See* NYCCBL § 12-307(a). We have held that procedures regarding the use of vacation leave also constitute a mandatory subject of bargaining under NYCCBL § 12-307(a). *See, e.g.*, *ADW/DWA*, 7 OCB2d 26, at 19 (BCB 2014) (change in the number of times per year that employees may request vacation time is a mandatory subject of bargaining); *COBA*, 27 OCB 16, at 116 (BCB 1981) (procedure governing preferences in the use of vacation time is a mandatory subject of bargaining); *cf.* *UFADBA*, 12 OCB2d 6, at 7-8 (BCB 2019) (procedural change regarding distribution of overtime that did not concern how much overtime the FDNY determined was necessary found to be a

[14] We reject the City's argument that this matter should be deferred to arbitration. This Board will not defer to arbitration where a Union alleges a unilateral change to a mandatory subject of bargaining in violation of the NYCCBL "which is merely evidenced by the [agreement between the parties]." *DC 37*, 1 OCB2d 21, at 10 (BCB 2008) (citing *PBA*, 73 OCB 12, at 14 (BCB 2004), *aff'd*, *Patrolmen's Benevolent Ass'n v. NYC Bd. of Collective Bargaining*, Index No. 112687/04 (Sup. Ct. N.Y. Co. August 17, 2005) (Friedman, J.), *aff'd*, 38 A.D.3d 482 (1st Dept.), *app. denied*, 9 N.Y.3d 807 (2007); *DC 37*, 79 OCB 37, at 9-10, 12-13 (BCB 2007); *Civil Serv. Bar Ass'n*, 65 OCB 9 (BCB 2000); *UFA*, 77 OCB 39, at 14-15 (BCB 2006)). We further note that the record does not reflect that a grievance has been filed concerning an alleged violation of OGP 120-02.

[15] NYCCBL § 12-307(a) provides, in relevant part, as follows:

> Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law . . .

mandatory subject of bargaining) (citations omitted). Similarly, the Public Employment Relations Board ("PERB") has held that "[i]n general, procedures applicable to employee leave requests constitute a mandatory subject of negotiations." *City of Albany*, 41 PERB ¶ 3019 (2008).

While employees have the right to negotiate over procedures for obtaining leave, this right "must be reconciled with the employer's absolute right to determine and maintain its staffing requirements" pursuant to the NYCCBL. *UFA*, 43 OCB 4, at 89 (BCB 1989), *affd.*, *UFA v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *affd.*, 163 A.D.2d 251, 558 N.Y.S.2d 72 (1st Dept. 1990); *see also CIR*, 27 OCB 10, at 23 (BCB 1981) ("[I]t is the City's management prerogative to determine the level of staffing to be provided, by means of work schedules within the limitations of the agreement on hours and leave benefits."). Similarly, PERB has held that procedures by which employees may obtain pre-approved time off are mandatory subjects of bargaining "provided that they do not interfere with the employer's predetermined staffing requirements." *City of Watertown*, 47 PERB ¶ 3015 (2014).

We find that the 1:12 rule as set forth in the August 7, 2018 emails is an annual leave procedure that constitutes a mandatory subject of bargaining under NYCCBL § 12-307(a). Contrary to the City's arguments, the 1:12 rule does not fall within its management right to determine staffing levels. The right to decide what constitutes sufficient staffing, i.e. the number of employees needed based on the requirements of the operation, is distinct from the procedures used to meet those needs. As PERB has stated, "[the] employer [has] the right to determine the number of employees it must have on duty to fulfill its mission . . . [h]owever, it [is] obligated to negotiate over methods of meeting its staffing requirements." *City of Watertown*, 47 PERB ¶ 3015 (2014) (citing *City of White Plains*, 5 PERB ¶ 3008 (1972)). The Union presented unrebutted testimony regarding the number of employees needed to staff ambulances, with specific examples

of the personnel required to maintain all ALS and BLS units at three stations during a 24-hour period. The 1:12 rule does not alter these staffing requirements, but instead establishes a procedure for determining which employees may be on annual leave (or comp time) on any day and which must work. This procedure restricts employees' use of their contractually guaranteed annual leave benefits. For example, the evidence showed that in stations that have less than 24 employees in a title, the 1:12 rule allows only one employee to be granted annual leave per day regardless of the number of tours operated per day or ambulances operated per tour. The record does not demonstrate a reasonable relationship between this restriction on employees' use of their annual leave benefits and FDNY's staffing needs. Having found that the 1:12 rule is properly categorized as an annual leave procedure and not a staffing requirement, and consistent with our case law, we conclude that it constitutes a mandatory subject of bargaining. *See ADW/DWA*, 7 OCB2d 26, at 19; *COBA*, 27 OCB 16, at 116; *see also City of Albany*, 41 PERB ¶ 3019 (2008).[16]

We now consider whether the 1:12 rule as set forth in the August 7, 2018 emails constitutes a change from existing policy. "In a claim that the promulgation of a new policy, rule, or action violates the duty to bargain in good faith, the charging party has the burden to prove that a change, in fact, occurred." *PBA*, 73 OCB 12, at 17 (citing *L. 371, SSEU*, 69 OCB 10 (BCB 2002); *Town*

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[16] The City's witnesses did not testify that overtime costs played any role in the decision to implement the 1:12 rule. However, the record shows that overtime was often incurred by replacement personnel when annual leave requests were granted. As we have previously held, decisions as to when and how much overtime is to be authorized or ordered are generally not mandatory subjects of bargaining, though procedures for the allocation of overtime are mandatorily negotiable. *See DC 37,* 67 OCB 3, at 7 (BCB 2001) (citing *UPOA*, 39 OCB 29, at 4 (BCB 1987)). Similarly, the record demonstrates that shift swaps were sometimes used to provide replacements for employees on annual leave. We note that the right to exchange shifts does not constitute a mandatory subject of bargaining. *See UFA*, 43 OCB 4, at 283 (BCB 1989), *affd., Matter of Uniformed Firefighters Assn. of Greater NY v. NYC Office 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); *City v. COBA*, 27 OCB 16, at 44-45 (BCB 1981).

of Stony Point, 26 PERB ¶ 4650 (1993)). The evidence shows that the 1:12 rule existed prior to August 2018 and was taught to Captains at the EMS Academy since at least 2010. The Union's witnesses conceded that they were familiar with the 1:12 rule but testified that they understood it to be a discretionary scheduling guideline. However, while interpretation and enforcement of the 1:12 rule may have varied, the record reflects that Captains were sent numerous emails in 2017 instructing them to follow the rule and that two captains were disciplined in 2018 for disregarding it. Therefore, we find sufficient evidence that the 1:12 rule was an existing policy that FDNY sought to clarify. *See COBA*, 69 OCB 26, at 18-19 (BCB 2002) (revision to directive that clarified the meaning of the term "timely" by defining it as five days found to not be a unilateral change to a mandatory subject of bargaining); *cf. UFT,* 7 OCB2d 12, at 21 (BCB 2014), *affd.*, *Matter of City of New York v. NYC Bd. of Collective Bargaining & United Fedn. of Teachers*, 2015 NY Slip Op 31383(U) (Sup Ct, New York County 2015) (finding that enforcement of a weekly cap on work hours listed in job specification constituted a change in existing policy where no evidence was presented of previous efforts to enforce the cap).

Also, there is insufficient evidence to conclude that the 1:12 rule was changed from a discretionary scheduling guideline to a strictly enforced cap in August 2018, as the Union contends. The testimony presented by the Union was that, despite the August 2018 emails, employees at many stations continued to be granted annual leave so long as they could find someone to substitute for them. President Variale testified that the 1:12 rule is "still not a hard rule that's been followed" and that he thought "the vast majority [of stations] are not following it." (Tr. 182, 211) For these reasons, we conclude that the Union has not met its burden of establishing that the FDNY has unilaterally changed its existing annual leave policy. *See COBA*, 69 OCB 26, at 18-19; *UFT,* 7 OCB2d 12, at 21; *see also COBA*, 11 OCB2d 17, at 15-16 (BCB 2018) (addition

of a provision regarding Use of Force screening to an Operations Order concerning criterion for awarding job assignments found to not constitute a unilateral change where the record showed no substantive change to the prior practice of considering Use of Force incidents).[17]

We now address the Union's request for impact bargaining concerning the 1:12 rule pursuant to NYCCBL § 12-307(b). The right to impact bargaining arises when the Board determines that management decisions on matters that that lie within management's rights have a practical impact on terms and conditions of employment. *See* NYCCBL § 12-307(b). The purpose of this requirement "is to provide means of cushioning, or reducing, to the extent possible, the adverse effects upon employees arising from exercises of management prerogatives." *DC 37*, 15 OCB 21, 21 (BCB 1975) *affd.*, *City of New York v. Board of Collective Bargaining*, N.Y.L.J., Mar. 18, 1976 (Sup. Ct. N.Y. Co. Mar. 15, 1976). Having found that the 1:12 rule constitutes a mandatory subject of bargaining but that the Union has not met its burden of proving a change

[17] The dissent argues that the majority erred in finding that the 1:12 Rule constituted an enforceable policy prior to August 2018, and that the FDNY therefore violated its duty to bargain by issuing email instructions in 2018 seeking to strictly enforce the 1:12 Rule. We disagree. First, the Union failed to establish a change regarding the application of the 1:12 Rule. The Union's witness testified that even after the issuance of the emails in 2018, the 1:12 Rule was not transformed from a guideline to a "hard rule" and that it was not being followed at most stations. Second, there is ample evidence in the record to support the majority's finding that the 1:12 Rule was a pre-existing policy. The dissent states that prior to August 2018 the 1:12 Rule was "at best a mere wish or expectation . . . not communicated to [employees] or unequivocally adopted in practice." We observe that the record includes evidence that the 1:12 Rule was taught at the EMS Academy and referenced in its written materials since at least 2010, that in 2017 and 2018 Captains (including the Union's witnesses) received emails directing them to comply with the 1:12 Rule, and that two Captains were issued Command Discipline in 2017 for failing to comply with the 1:12 Rule. Under these facts, we find that the 1:12 Rule was a pre-existing policy that the employer sought to clarify in August 2018. The varying testimony by the Union's witnesses as to how they applied the 1:12 Rule prior to August 2018 does not, in our opinion, support a conclusion that the 1:12 Rule did not exist as an enforceable policy. Rather, it was the inconsistent application that prompted the clarification, and as noted in the decision, clarification of an existing policy does not violate the duty to bargain. *See COBA*, 69 OCB 26, at 15, 18-19 (BCB 2002).

from existing policy, we must also dismiss the Union's claim under NYCCBL § 12-307(b) for impact bargaining.[18]

The petition is therefore denied as to all claims.

[18] The record establishes that the agreements between the parties have expired and are in *status quo* under NYCCBL § 12-311(d). While we have found that the Union has not demonstrated a change from existing policy, pursuant to our holding that the 1:12 rule constitutes a mandatory subject of bargaining, the City would be obliged to engage in negotiations regarding the 1:12 rule consistent with this decision were the Union to demand bargaining over this subject. *See* NYCCBL § 12-306(a)(4).

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 the verified improper practice petition filed by District Council 37, AFSCME, AFL-CIO and its affiliated Locals 2507 and 3621, against the City of New York and the Fire Department of the City of New York, docketed as BCB-4301-18, is hereby dismissed in its entirety.

Dated: April 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

I dissent (see attached opinion).

CHARLES G. MOERDLER
MEMBER

I concur in the dissent (see attached opinion).

PETER PEPPER
MEMBER

***DC 37, L. 2507 & 3621,* 14 OCB2d 11 (BCB 2021)** (IP) (Docket No. BCB-4301-18)
Dissenting Opinion of Charles G. Moerdler in which Peter Pepper Concurs

The majority concludes that the 1:12 rule constitutes a mandatory subject of bargaining but that the Union has not met its burden of establishing a change from "*existing polic*y."(See, Maj. Op. 21-22)[1] The emphasized words are critical. For, the conclusion that the majority opinion offers begs the threshold question: was there an enforceable existing policy prior to August 2018 and, if so, what was it? The Record as well as the recitations of the majority opinion demonstrate that prior to August 2018 there was not an extant policy or even a cognizable practice. The majority concludes otherwise and, accordingly, I dissent. [2]

Significantly, FDNY Operational Guide Procedures 120-02 (April 5, 2010), entitled "Annual Leave ("OGP-120-02"), which sets forth the procedures for the request and approval of annual leave requests (and which would be the predicate for any claim of extant written policy subsequent to the 1996 transfer of jurisdiction of EMS to the FDNY) *makes absolutely no reference to any 1:12 rule or policy, let alone its application*.[3] Hence, if there is to be any claimed prior

[1] Familiarity with the majority opinion is assumed in order to avoid needless repetition.
[2] The majority concludes that, having determined that the Union did not meet its burden of showing a change in August 2018 of extant policy under the so-called 1:12 rule, the issue next turns to an "impact" determination. The majority concludes that the Union has failed to meet its burden in that regard as well. That separate issue need not be reached to warrant reversal but is briefly dealt with herein.
[3] On or about March 17, 1996, EMS became an operational arm of the FDNY amid a storm of controversy respecting its previous administration and efficacy under the NYC Health and Hospitals Corporation. The following, taken from the Union's brief below, sets forth the relevant prior background of the so-called 1:12 "Rule":

> "When EMS was under HHC jurisdiction, HHC maintained the Administrative Field Guide, colloquially referred to as the "Green Book," which contained the policies and procedures for EMS. Administrative Guide 306-1: "Emergency Ambulance Schedule" (hereinafter "AG 306-1") governed scheduling of EMS personnel, including the policies and procedures for AL. AG 306-1 states:
>
> > Schedule annual leave well enough in advance to prevent conflicts and ensure that all personnel have an opportunity to take their annual leave without disrupting the schedule, in accordance with the 1-in-12 rule.
>
> Trial Examiner Ex. 2; City Verified Answer Ex. 9. The 1:12 rule mentioned in AG 306-1 does not define the rule as the Strict 1:12 rule unilaterally implemented by the Department in August 2018. *Id.* Following the merger, the Department withdrew the "Green Book" policies and procedures and replaced it with its own policies and procedures. The withdrawal of the "Green Book" occurred immediately following the merger. Captain Merrins participated in the first Basic Leadership-EMS ("BLEMS") course after the merger. He testified that when the class began he was issued the HHC Administrative Field Guide, but by that afternoon the Green Books were collected back by BLEMS instructors. Captain Merrins stated "we got [the Green Book] about nine o'clock in the morning, and it was taken away from us by Captain...Carl Tramatana and he

enforceable "policy" a demonstration of an unequivocal, understood and applied *practice* of some duration must be demonstrated. See, *Matter of the Improper Practice Proceeding between District Council 37, AFSCME, AFL-CIO and the City of New York and the New York City Department of Health and Mental Hygiene,* 4 OCB 2d 31 (OCB, 2011); *Matter of Chenango Forks Teachers Association, NYSUT, AFT, AFL-CIO Local 2561 -and-Chenango Forks Central School District,* 40 PERB P3012, p. 4 (PERB, 2007). See, also, *County of Nassau,* 24 PERB P3029, at 3058 (1991*).* As discussed in greater detail below, no such demonstration has been or can be made on this Record. Indeed, the contrary is evident.

The majority holds "…that the 1:12 rule is properly categorized as an annual leave procedure and not a staffing requirement, and consistent with our case law, we conclude that it constitutes a mandatory subject of bargaining. *See, ADW/DWA,* 7 OCB 2d 26, at 19; COBA, 27 OCB 16, at 116; *see also City of Albany,* 41 PERB ¶3019 (2008)[Footnote omitted]." (Maj. Op. p. 21). The majority then turns to the issue as to "…whether the 1:12 rule as set forth in the August 7, 2018 emails constitutes a change from existing policy." (*Id).* It is at this point that the majority departs from what, in my view, is sound analysis. The operative issue was whether there had been demonstrated an enforceable existing policy (one resulting from cognizable (i.e., a uniform and acknowledged) practice in view of the absence of a duly adopted written policy) prior to August 7, 2018 or was that a point in time when a cognizable "practice" was initiated that would in time warrant being viewed as a "policy" meriting that designation—i.e., a cognizable "practice" that over a sufficient period of time would "…create a reasonable expectation among the affected unit employees that the [practice] would continue" [*County of Nassau*, *supra*; *accord*, *Chenango Forks Teachers Association,* supra]. As the cited cases make clear a cognizable practice is one that, at a minimum, demonstrably evidences conduct that in time it has come to be acknowledged as such through consistent articulation and communication to those governed thereby and its uniformity in adoption and recognition establishes it as a practice that can substitute for a duly written and promulgated policy. [4]

> explained to us that we are now part of the Fire Department and we don't follow HHC guidelines, and the [Green Book] was taken away from us." (Tr. 105-106.)."

It merits emphasis that Chief Suriel, management's witness, acknowledged that the Green Book was *not* distributed in training following the FDNY takeover of EMS in 1996 (Tr. 395-396.). It was inapplicable prior history though that vintage writing was the only document containing a written 1:12 Rule. (*Id).*

[4] Language from page 6 of the majority opinion merits mention. It underscores the point that to that point in time there was ignorance even among officers of the so-called 1:12 Rule, observing that the August 7, 2018 emails articulating and illustrating the Rule was obliged to state that now "Ignorance [of the Rule]s

The majority opinion assumes (inappropriately I submit) that because there have been references to the 1:12 rule in management's limited testimony and documents pertaining to the period prior to August 7, 2018 that it had has been the subject of something resembling *consistent articulation as well as uniform conduct by way of consistent application or enforcement* such that it rose to the level of an unwritten policy or, to use the phrase cited, in *County of Nassau* and reiterated in *Chenango,* a "' "practice [that] was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." There is nothing that evidences that and the Record is otherwise. Thus, the best that the majority opinion can muster by way of support is:

> "…*while interpretation and enforcement of the 1:12 rule may have varied*, the record reflects that Captains were sent numerous emails in 2017 instructing them to follow the rule and that two captains were disciplined in 2018 for disregarding it. Therefore, we find sufficient evidence that the 1:12 rule was an existing policy that FDNY sought to clarify. "(Op. p. 22)(emphasis added).

The emphasized material acknowledges that *interpretation and enforcement* of the "policy" was by no means consistent – it, according to the majority, may have "*varied*" and that is fatal to the claim.

The Record and the majority opinion reflect that *after* the referenced 2017 emails, there still was non-conformity. We are told that two superior officers at some point in time failed to follow it; but there is nothing in this record that supports the conclusion that even a majority of the remaining superior officers were in accord as to its interpretation let alone followed it [5] Indeed, as later

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not a defense." That caution would have been unnecessary were the Rule's provisions and the need for compliance at least generally known. *Expressio unius est exclusion alterius.* See, *Kimmel v. State,* 29 N.Y. 3d 386, 394 (2017).

[5] Respectfully, the majority opinion is puzzling in that it seemingly offers a non-sequitor in response to the Union's contrary testimony and assertion that that the August 2018 emails at best then changed the 1:12 rule from a "discretionary guideline" to a prospective strict cap:

> "The testimony presented by the Union was that, despite the August 2018 emails, employees at many stations continued to be granted annual leave so long as they could find someone to substitute for them. President Variale testified that the 1:12 rule is "still not a hard rule that's been followed" and that he thought "the vast majority [of stations] are not following it." (Tr. 182, 211) For these reasons, we conclude that the Union has not met its burden of establishing that the FDNY has unilaterally changed its existing annual leave policy.

How the direct testimony of a knowledgeable witness (the credibility of whose testimony is not challenged) that even after August 2018 "… the 1:12 rule is 'still not a hard rule that's been followed " provides a reason to

appears, there is evidence to the contrary, including the testimony of those who actually participated in the process. That is not a cognizable practice amounting to an enforceable policy; it is at best a mere wish or expectation on the part of some, but not communicated to or unequivocally adopted in practice. That "varying," non-communicated policy and the actions actually taken thereunder are precisely what lend themselves to proscribed "selective enforcement." Cf., *People v. Acme Markets, Inc.,* 37 N.Y. 2d 326 (1975) and its progeny And little wonder. Given the absence of a writing distributed agency-wide, or a practice of some duration and unvarying substance, this will-o'-the-wisp was at best a loose guideline availed of by some, subject to interpretation, varying instance by instance and station by station. The point is readily demonstrated on this Record.

The Union's witnesses—field Captains actually charged with operational responsibility-- testified that the 1:12 ratio was used, at most, as a guideline for granting annual leave requests. Thus, Captain Merrins testified that when he was introduced to minimum staffing levels, it was "referred to as 1:12," (Tr. 87:3-5), but that it was "just a guideline we would follow." (Tr. 95:4-5). It was not strict department policy. Instead, the practice in place prior to August 2018 was such that EMS Station commanding officers had discretion in their schedules. (Tr. 45; Tr. 99; Tr. 155.) Their discretion was ultimately guided and circumscribed by the principle that the commanding officer's mission was to "keep the ambulances on the road."

Capt. Freitag testified that she could grant a leave request so long as "we can keep ambulances in service, whether it be with getting people to cover on overtime or if we had vacation or leave personnel to cover that spot." (Tr. 36.) There was no arbitrary cap on the number of employees who may be off on any given day. (Tr. 45; Tr. 99; Tr. 155.) Rather, the annual leave policy was mission-focused and contingent on the daily needs of the Department.

The consistent refrain among the Union's witnesses was if an employee could find coverage for their tour, they could take a day off. Capt. Freitag

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conclude that "… that the Union has not met its burden of establishing that the FDNY has unilaterally changed its existing annual leave policy" eludes me. Mr Variale's testimony directly states that even after August 2018 there was, at least at first, no uniform (or even barely uniform policy) that is being followed by "the vast majority" of stations. It remained, in sum, a fervent wish of those in management, but not an enforceable practice or policy, at least one that management demonstrated by its deeds it intended to effectuate and that the unit was adhering to. That said (in the interests of completeness) the Union has acknowledged that, at the earliest, an enforceable and extant policy began to be implemented with that August 2018 emails.

testified that she had the discretion to grant annual leave requests so long as she was "able to get the shift covered...on overtime...then I could give the member off as long as their truck was running." (Tr. 46.) So long as ambulances were in service, little, if any, consideration was given to arbitrary caps—the asserted "policy" governing the use of annual leave. By contrast, however, once -- after August 2018 -- it became clear that an agency-wide practice was to be adopted, uniformly and consistently, a change *then* began to occurr. Thus, Captain Freitag testified that "[1:12] constricted, it restricted me from being able to grant" leave requests that she previously would have granted prior to the implementation of 1:12. (Tr. 51.). It was not a change in existing policy, it was the beginning in 2018 of the adoption of a new practice and policy that in time could become a policy. See, *Matter of Chenango Forks Teachers Association, supra, County of Nassau, supra.*

Significantly, not a single station commander or knowledgeable line officer testified for the City, let alone one that testified under oath and subject to cross-examination that an unequivocal practice had been in effect, was generally known and followed by him/her prior to August 2018 that was anything more than a discretionary and varying guideline. The City did not present evidence that the 1:12 policy was "unequivocal and existed for such a period of time such that the unit employees could reasonably expect the practice to continue unchanged"—the above-cited *Nassau County* and *Chenango* standard. The Operations Guide that then and now governs annual leave scheduling does not even reference 1:12. Chief Escobar testified that 1:12 is taught at the EMS Academy, however he could not point to any written curriculum of the EMS Academy that explains the 1:12 rule.

Despite the City's contention that the 1:12 rule was the long-standing policy of the Department, the Union's witnesses testified that at the time of the institution of the strict 1:12 policy in August 2018, there was no uniform understanding of the 1:12 rule and its proper implementation. To illustrate, FDNY EMS Lieutenant Vincent Variale (the President of Local 3621) testified to what he had heard 1:12 to be:

> I've heard of 1:12 when I first started as an EMT, and I've heard of it as a Lieutenant. I've never really, there was never anything in writing that I had ever seen, and there was never really any hard rule as to what it was. I mean, everybody, some people had different definitions on how 1:12 was to be followed. Some said it was every 12 members are supposed to have vacation leave. Some said every 12 members a person gets off. Some said, you round

> up, meaning if you have 24 people, two people get off. And if you had 23 people, you could round up to give two people off, but you could round down. And it depended on the person you spoke to if you got a different explanation...Anyone from the average EMT straight up to Lieutenants, Captains, Chiefs. Everybody had a different explanation.

(Tr. 180-181.). Little wonder, therefor, that the operative August 2018 emails emphasize that "ignorance" is not to be (was no longer to be) an excuse for the compliance there called for.

Indeed, the asserted requirement for the computation of the qualifying groups of 12 further illustrates the lack of any uniformity of understanding among the officers and even management of the Rule and its application. At the several meetings where 1:12 was discussed, Department Chiefs could not definitively say that the 1:12 ratio should be rounded up or down, or whether it was per-title-per-tour or per-title-per-day. Thus, testimony respecting the several staff meetings where 1:12 was discussed, Department Chiefs could not definitively say that the 1:12 ratio should be rounded up or down, or whether it was per-title-per-tour or per-title-per-day. President Variale testified that there was similar dissension among the management personnel—including Chief Suriel—about the actual definition of 1:12:

> When we were in discussion, even the chiefs that were present couldn't agree on whether it needed to be rounded up or rounded down. So, even there, there was a little confusion as to how it's supposed to be followed or implemented. And we still don't have anything in writing showing how this policy is supposed to be implemented.

(e.g., Tr. 395-396).

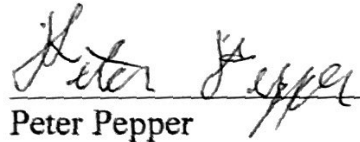
In order for a policy to be "unequivocal" *Chenango* and *Nassau County*, among other cases, make clear that there must be unambiguous communication of its terms and unequivocal understanding of the rule and its interpretation. That is not the case here. The Record does not support the conclusion that as of August 2018 there was a cognizable

practice or policy or, in fact, when, if ever, one had come into being thereafter.

The Petition should be sustained and the requested relief granted.

Feb. 4, 2021

Charles G. Moerdler



Peter Pepper