SSEU, L. 371, 15 OCB2d 18 (BCB 2022)

(IP) (Docket No. BCB-4467-21)

Summary of Decision: The Union claimed that the City and ACS violated NYCCBL §§ 12-306(a)(4) and 12-307(a) when ACS unilaterally implemented staffing and scheduling changes affecting the Youth Development Specialist employees assigned to the Family Court detention rooms. The City argued that the scheduling and staffing changes were a non-mandatory subject of bargaining and that the petition should be dismissed because the Union made no specific factual allegations of a practical impact. The Board found that the changes did not concern a mandatory subject of bargaining and that the petition did not allege facts sufficient to warrant a hearing on practical impact and dismissed the petition in its entirety. **(*Official decision follows*.)**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

SOCIAL SERVICE EMPLOYEES UNION, LOCAL 371,

Petitioner,

- and-

CITY OF NEW YORK and NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, DIVISION OF YOUTH AND FAMILY JUSTICE,

Respondents.

DECISION AND ORDER

On November 23, 2021, Social Service Employees Union Local 371 ("Union" or " Local 371"), filed a verified improper practice petition against the City of New York ("City") and the Administration for Children's Services ("ACS"). The Union claims that ACS violated §§ 12-306(a)(4) and 12-307(a) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") when it unilaterally implemented staffing and scheduling changes

affecting the Youth Development Specialists ("YD Specialists") in the Court Services Unit assigned to work at the Family Court detention rooms. The Union also alleges that the City refused to bargain in good faith over the practical impact of these changes and that the staffing changes have had the practical impact of an increased workload for YD Specialists. The City argues that ACS exercised its right to assign staff and that it did not fail to negotiate over a mandatory subject of bargaining because, absent express contract language stating otherwise, scheduling and staffing changes are not a mandatory subject of bargaining. The City further argues that any claim of practical impact is premature and that the Union made no specific factual allegations of a practical impact. The Board finds that ACS's staffing and scheduling changes are not mandatory subjects of bargaining. Further, it finds that the pleadings did not allege facts sufficient to warrant a hearing on practical impact. Accordingly, the petition is dismissed.

BACKGROUND

ACS is responsible for protecting and promoting the safety and well-being of the City's children and families by providing services in welfare, juvenile justice, and early care and education. ACS administers juvenile detention centers which are operated by the Division of Youth and Family Justice ("DYFJ"). These juvenile detention centers house youths who are detained under specific circumstances set by New York statute. When juvenile detainees make appearances in Family Court, they are held in Family Court detention rooms as needed. These Family Court detention rooms are operated by the Court Services Unit of the DYFJ.

Local 371 represents YD Specialists. These employees are assigned to the Court Services Unit are among the personnel who staff the Family Court detention rooms and "are responsible for, among other things, as part of an interdisciplinary team to provide safety, security and intervention for youths in juvenile detention facilities and other ACS operated programs and facilities." (Ans. ¶ 17) YD Specialists are responsible for managing and supervising youths while the youths are present in the Family Court detention rooms. YD Specialists assigned to the Court Services Unit also provide supervision and transportation of these youths to various appointments. Some YD Specialists are assigned exclusively to Family Court detention rooms and do not travel. YD Specialists are supervised by Associate Youth Development Specialists ("Associate YD Specialists") and are trained to handle all situations that Associate YD Specialists are trained to handle.[1]

The issues in this case concern only the YD Specialists assigned exclusively to the Family Court detention rooms. In March of 2020, the Family Court buildings closed due to the COVID-19 pandemic. The buildings began to reopen on October 4, 2021. Prior to the onset of the pandemic, the typical staffing of the Family Court detention rooms consisted of one Associate YD Specialist and three or four YD Specialists. Female YD Specialists were assigned to supervise the female residents in the detention rooms, and male YD Specialists were assigned to supervise the male residents in the detention rooms. Also prior to the onset of the pandemic,

[1] According to the YD Specialists' job description, their duties include but are not limited to: 1) addressing conflicts with crisis intervention methods such as verbal de-escalation, reframing strategies, and physical de-escalation techniques, using the least amount of physical intervention necessary; 2) serving as part of a rapid response team to respond to emergency situations; 3) intervening in volatile situations; 4) facilitating and engaging youth in all activities; 5) accompanying youth to court appearances; 6) ensuring youth safety in vehicles and court detention rooms; and 7) applying mechanical restraints during transport, in court detention rooms, and in emergency situations as necessary.

the hours of work of the YD Specialists assigned to the Family Court detention rooms were Monday through Friday, from 7:00 am to 3:15 pm, or from 11:00 am to 7:15 pm.

On August 26, 2021, ACS emailed the Union with the details of proposed schedule and staffing level changes for the staff assigned to the Family Court detention rooms. The draft schedule proposed a shift from 8:00 am to 5:00 pm, including 45 minutes of mandatory overtime at the end of the shift. The proposed staffing change was to reduce the number of YD Specialists to two - one male and one female. The Union replied on August 27, 2021, that it had no issue with the proposed staffing and scheduling changes. Later, the Union objected to the proposed mandatory overtime, and following a labor-management meeting on September 24, 2021, ACS agreed to implement a new schedule beginning at 8:45 am and ending at 5:00 pm, with no mandatory overtime. The staffing and scheduling changes were implemented on October 4, 2021. The implementation of the new schedule for affected YD Specialists did not alter the total number of hours worked per shift (or week) when compared to the previous schedule. The new schedule does not require that any YD Specialists work mandatory overtime.

The Union alleged that the implemented scheduling and staffing changes have resulted in a practical impact on YD Specialists. In October and November 2021, a Union member reported to the Union that the staffing and scheduling changes had an impact on YD Specialists' safety, because YD Specialists are being left alone to supervise both male and female youths in violation of policy. In addition, the changes were causing disruptions to the personal lives of YD Specialists, such as suffering from fatigue after driving for the entire shift, YD Specialists and other staff are frequently being reassigned to cover unstaffed positions, and an instance where a youth detainee's attorney and NYPD Detectives were forced to wait several hours at Family Court because of the limited coverage of YD Specialists.

The Union alleges that as a result of the staffing changes, YD Specialists are now responsible for responding to new emergency situations and that the staffing changes were implemented without providing YD Specialists any further training on how to respond to these emergencies, which were previously handled by Associate YD Specialists. During the March 7, 2022 conference, the Trial Examiner requested that the Union provide examples of these new emergency duties. Per the Trial Examiner's request, the Union provided the following examples of alleged new duties: (1) providing guidance and oversight when juveniles act inappropriately; (2) providing guidance and instructions when juveniles resist required personal searches and interfere with the managing of secured doors; (4) enforcing uniform compliance by staff; (5) enforcing no-sleeping policy by staff; (6) ensuring compliance with anti-child abuse policies; (7) deciding on immediate care needs for juveniles when sudden illness/injury arises; determining level of care required; authorizing the use of mechanical restraints when appropriate based upon aggressive conduct of juveniles; (8) dealing with disruptions which occur in the event of incidents arising during the movement of juveniles in and out of secured areas; (9) coordinating with Court Service Base supervisors to determine and provide coverage needs due to high juvenile counts or aggressive tone of juveniles and determining the need for additional staffing to deal with same; and (10) determining to decline to accept juveniles with injury back to location, instructing instead that he/she be escorted to hospital emergency room and providing discharge paperwork upon returning to the facility.

The City asserted that the majority of tasks listed by the Union were handled by YD Specialists. Specifically, the City alleges that YD Specialists have always been responsible for: responding to emergencies that occur in the detention rooms, providing guidance and oversight to juveniles who act out, providing guidance and instruction to youths who resist searches,

deciding on immediate care for juveniles in instances of sudden illness or injury, and dealing with disruptions stemming from the movement of juveniles in and out of secured areas. According to the City, all the other tasks listed by the Union continue to be performed by Associate YD Specialists, not YD Specialists.[2]

POSITIONS OF THE PARTIES

Union's Position

The Union argues that ACS unilaterally implemented staffing and shift schedule changes for YD Specialists assigned to Family Court detention rooms, which are terms and conditions of employment, in violation of NYCCBL §§ 12-306(a)(4) and 12-307(a).[3] Further, the Union contends that ACS refused to bargain in good faith regarding the impact of these changes, which have created additional duties and have disrupted the "personal life schedules" of the affected YD Specialists by requiring them to make alternative arrangements to cover personal and family emergencies. (Pet. ¶ 14) The Union relies upon member complaints that the staffing and scheduling changes have caused: staffing shortages; delays in transporting youth to and from the detention rooms, and concerns about potentially unsafe conditions for YD Specialists.

Further, the Union argues that as a result of the alleged new duties, YD Specialists are

[2] The City objected to the Board's consideration of the contents of the Union's response to this request.

[3] NYCCBL § 12-306(a)(4) establishes that it is an improper practice "for a public employer or its agents . . . . 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(a) provides, in relevant part, that "public employers and certified or designated employee organizations shall have the duty to bargain in good faith on . . . hours "(including but not limited to overtime and time and leave benefits) . . . ."

required to respond to a wider array of emergency situations. The Union avers that ACS has not provided YD Specialists with the necessary training and support for YD Specialists to be prepared to respond to these emergency situations.

The Union argues that as a result of ACS' failure to bargain, the Board should order ACS to reinstate the staffing levels and hours of work to pre-change conditions until the conclusion of good faith bargaining with the Union and order Respondents to cease and desist from engaging in such violations of the NYCCBL in the future.

City's Position

The City argues that the Union has failed to allege facts sufficient to support an improper practice claim, as ACS properly exercised its management prerogative to enact staffing changes and did not fail to negotiate over a mandatory subject of bargaining. Further, the City notes that absent express contractual language to the contrary, management has the discretion to determine the start and end times of a shift. Moreover, ACS corresponded with the Union via email concerning the proposed staffing change and ACS subsequently withdrew its initial schedule that included mandatory overtime because the Union objected to that change.

As to the Union's claims regarding practical impact, the City argues that there is no duty to bargain over practical impact prior to a determination from the Board that an impact exists. The City avers that in the instant petition, the Union has not brought forth any specific details that would constitute an unreasonably excessive or unduly burdensome workload of YD Specialists assigned to the Family Court detention rooms. To the contrary, the Union's allegations are vague and non-specific. In addition, the City objected to the Trial Examiner's request that the Union provide examples of the alleged new duties that YD Specialists have been required to perform following the implementation of the staffing reduction. Without waiving this objection, the City

responded by noting that the Union's examples were either pre-existing duties of YD Specialists or are the supervisory responsibilities performed by Associate YD Specialists. The City referred to the job specifications for both YD Specialists and Associate YD Specialists to support its claim that the duties cited by Union were either pre-existing or were the responsibility of Associate YD Specialists.

The City characterizes the Union's claim that YD Specialists' "personal life schedules" have been impacted because of the scheduling change as conclusory and speculative. The City argues that even if true, any claimed impact on the personal lives of YD Specialists is a result of the overall staff shortage crisis at ACS, which has nothing to do with the challenged management action here. In addition, the Board has not yet found that the scheduling change has had any practical impact on YD Specialists. Thus, the Union's improper practice claim, which is based on an allegation of a practical impact, is premature and without merit and must be dismissed.

DISCUSSION

For the reasons set forth below, we find that the at-issue staffing and scheduling changes are not mandatory subjects of bargaining. Further, Petitioner has not alleged sufficient specific facts to warrant a hearing on its claim of practical impact.[4]

NYCCBL § 12-306(a)(4) makes it an improper practice for a public employer or its agents "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." It is the City's managerial right to determine the level of staffing that will be provided. *See CIR*, 27 OCB 10, at 23 (BCB

[4] Although a scope of bargaining petition is the proper procedural mechanism through which to assert a claim of practical impact, the Board has exercised its discretion to consider scope claims as alleged in an improper practice petition and does so here. *See, e.g., Deputy Sheriffs Ass'n.*, 14 OCB2d 9 (BCB 2021); *Local 1182, CWA*, 5 OCB2d 41 (BCB 2012); *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15 (BCB 2012); *NYSNA*, 71 OCB 23 (BCB 2003); *SBA*, 41 OCB 56 (BCB 1988).

1981). Likewise, the scheduling of work is generally not a mandatory subject of bargaining. *See UFT, L. 2*, 4 OCB2d 54, at 12 (BCB 2011) (quoting *DC 37, L. 2021*, 51 OCB 36, at 15 (BCB 1993)) (stating that "management has the unilateral right to assign work in the way that it deems necessary to maintain the efficiency of governmental operations"); *Local 237, CEU*, 13 OCB 6, at 15 (BCB 1974) (holding that the decision to schedule work on weekends and holidays is not a mandatory subject of bargaining); *UFT*, 3 OCB2d 44, at 8 (BCB 2010). Hours are a mandatory subject of bargaining, and "while the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total numbers of hours employees work per day or per week." *UFT*, 3 OCB2d 44, at 8 (quoting *UFOA*, 1 OCB2d 17, at 10 (BCB 2008) (quotation marks and citations omitted). The City may take unilateral action in these areas unless the parties themselves have limited that right in their collective bargaining agreement. *See UFA*, 77 OCB 39, at 14-15 (BCB 2006*); SSEU, L. 721*, 43 OCB 59, at 22 (BCB 1989).

Here, ACS shifted the work schedule's start and end times without altering the total number of hours employees were required to work each day or week. In addition, it reduced the number of YD Specialists present in the Family Court detention rooms, an action that squarely falls within its discretion to determine assignments and/or staffing. Accordingly, to the extent Petitioner is asserting that the City violated NYCCBL § 12-306(a)(4) by unilaterally changing staffing levels and work schedules, we dismiss such claims. There is no evidence on the record that the parties have negotiated an agreement limiting management's discretion to establish the start and end times of employee's shift or staffing. Accordingly, we find that ACS' actions in this matter were not subject to bargaining on that basis and move to the Union's claim of practical impact.

Notwithstanding ACS' discretion to adjust staffing levels and determine the beginning and

end of shift times, if this discretion is exercised "in a manner that has an adverse effect on terms or conditions of employment and thus results in a practical impact, the duty to bargain may arise over the alleviation of that impact." *Local 1182, CWA*, 5 OCB2d 41, at 8 (BCB 2012) (quoting *NYSNA*, 71 OCB 23, at 11 (BCB 2003)). However, "there is no duty to bargain – and therefore no violation of NYCCBL § 12-306(a)(4) by way of refusal to bargain – arising out of a claim of practical impact until the Board has first found that a practical impact exists as a result of the exercise of a management prerogative pursuant to NYCCBL § 12-307(b)." *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 13 (citing *Local 1180, CWA*, 43 OCB 47, at 17 (BCB 1989)). Moreover, "[a] petitioner urging the Board to find such an impact must present more than conclusory statements of a practical impact in order to require the employer to bargain or, indeed, in order to warrant a hearing to present further evidence." *COBA*, 10 OCB2d 21, at 14 (BCB 2017) (quoting *CEU, L. 237, IBT*, 2 OCB2d 37, at 18 (BCB 2009)) (internal quotation marks omitted). The Board has articulated the pleading standard that must be met to warrant a hearing on practical impact, as follows:

> We have interpreted the language of NYCCBL § 12-307(b) to require initially that a union offer allegations of specific facts in support of its claim of practical impact. Conclusory statements or vague or non-specific allegations are not sufficient to prove practical impact or to warrant a hearing into whether a practical impact exists.[5]

UFA, 5 OCB2d 3, at 14 (BCB 2012) (citations omitted)

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[5] While the City argues that the Union's practical impact claims are premature, the staffing and schedule changes were implemented prior to the filing of the Union's petition, and we consider whether its claims of impact are sufficient to warrant a hearing. *See NYSNA*, 71 OCB 23, at 12.

A duty to bargain arises in a case in which the exercise of a management right is shown to create an "unreasonably excessive or unduly burdensome workload as a regular condition of employment." *Local 1549,* 69 OCB 37, at 9 (BCB 2002); *see also New Rochelle Hous. Auth.,* 21 PERB ¶ 3154 (1988). A union claiming a practical impact on workload must allege specific details of that impact. *See Local 1549,* 69 OCB 37 at 9; *DC* 37, 45 OCB 9 at 36-37 (BCB 1990). Merely alleging more difficult duties or higher-level work is insufficient to establish unreasonably excessive or unduly burdensome workload. *See Local 1549,* 69 OCB 37, at 9-10; *see also ADW/DWA,* 69 OCB 16 (BCB 2002) (union failed to demonstrate an unduly burdensome workload where it did not provide evidence that that the assignment of new duties resulted in, among other consequences, any forced overtime or a failure to meet deadlines)*; UFA,* 73 OCB 2 at 8 (BCB 2004) (denying petition alleging workload impact where there was no specific evidence that job duties were more difficult to perform, such as evidence of forced overtime or a related penalty). We have also held that a "petitioner does not demonstrate a practical impact merely by enumerating additional duties assigned to employees or by noting a new assignment of duties covered in the job specifications." *COBA,* 10 OCB2d 21 at 14 (internal quotation marks and citations omitted); s*ee also UFA,* 71 OCB 19, at 8-13 (BCB 2003); *SBA*, 41 OCB 56, at 17 (BCB 1988). Thus, 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,* 5 OCB2d 15, at 15 (citing *UFA,* 77 OCB 39 at 15-17); *see also UFA,* 73 OCB 2, at 7-8; *ADW/DWA*, 69 OCB 16, at 8; *PPOA,* 17 OCB 2, at 15-16 (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).

Regarding the scheduling change, the Union has not alleged that any YD Specialist has faced discipline for being unable to complete the work assigned. *See Local 333,* 5 OCB2d 15, at 15-16; *see also COBA,* 10 OCB2d 21 at 17-18 (denying petition without a hearing where "record is devoid of any probative evidence to support a claim of a practical impact of a disciplinary nature and no new basis for discipline has been alleged"). Accordingly, we find that the Union has alleged insufficient facts to demonstrate that the scheduling change resulted in a practical impact on the workload of YD Specialists.

Further, as to the change in staffing levels, the Union alleges that the change has had the practical impact of increasing the workload of YD Specialists, because they now are required to perform additional duties for which they have not been trained. We take administrative notice of the job specifications for the titles of YD Specialists and Associate YD Specialists and find that the new duties alleged by the Union are generally consistent with the job description for the titles of YD Specialist and relate to the essential functions of the positions. *See UFA, L. 94 & UFOA, L. 854*, 13 OCB2d 9, at 30 (BCB 2020); *UFA*, 47 OCB 61, at 10 (BCB 1991).[6] Moreover, there is no claim that the YD Specialists are now required to work more than their regular hours or are unable to complete their assignments as a result of the staffing reductions. Accordingly, we do not find that the Union alleged sufficient facts to show that the change in staffing levels has created

[6] Our ruling does not reach the issue of whether the alleged new duties are substantially different from those set forth in the job specification, the standard applicable in a contractual out-of-title claim. The Board has no jurisdiction to adjudicate such a claim. Such out-of-title claims are appropriately pursued in the contractual grievance process or in litigation for an alleged violation of the New York State Civil Service Law. Accordingly, our findings with respect to the Union's rights under the NYCCBL should not bear upon the ultimate determination in any future out-of-title proceeding.

a workload impact requiring bargaining.

Moreover, the Union has alleged only general and conclusory statements in support of the remainder of its impact claims, and it has therefore failed to satisfy the Board's pleading standard. The Union's claims that the staffing reduction has affected the "personal life schedules" of YD Specialists was limited to the assertion that unnamed employees had to make alternative arrangements to cover personal and family emergencies. (Pet. ¶ 14) This bare assertion is an insufficient proffer to support a claim that the staffing reduction has impacted employee's personal lives, or otherwise had a practical impact on YD Specialist terms or conditions of employment. *See Local 1182, CWA*, 5 OCB2d 41, at 10; *COBA*, 63 OCB 26 at 13 (BCB 1999); *CEU, L. 237,* 2 OCB2d 37 at 17-18 (practical impact, a factual question, cannot be determined when a union does not provide sufficient facts). Thus, the Union's claims are likewise insufficient to warrant a hearing because they fail to articulate any other practical impact with specificity. *See Deputy Sheriffs Ass'n*, 14 OCB2d 9 at 11; *COBA*, 10 OCB2d 21, at 14-16.[7]

[7] Because there is no time limit on filing a scope petition, the findings here do not limit the Union's ability to seek impact bargaining in the future. *See Local 333, UMD, ILA,* 5 OCB2d 15 at 15-16.

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 improper practice petition, docketed as BCB-4467-21, filed by the Social Services Employees Union, Local 371, against the City of New York and New York City Administration for Children's Services, Division of Youth and Family Justice, is dismissed in its entirety.

Dated: June 1, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

CHARLES G. MOERDLER
MEMBER