UFA, 16 OCB2d 7 (BCB 2023)

(IP/Scope) (Docket No. BCB-4461-21)

Summary of Decision: The UFA and UFOA claimed that the City violated § 12-306(a)(1), (4) and (5) of the NYCCBL by failing to bargain over the Mayor's order that all City employees be vaccinated by October 29, 2021. The Unions argued that the Vaccine Mandate implicates numerous mandatory subjects of bargaining and constitutes a new qualification of employment that must be bargained. They further argued that the Vaccine Mandate created a practical impact on employees' health, safety, and workload. The City argued that it had a managerial right to impose the Vaccine Mandate on employees due to the public health emergency caused by the COVID-19 pandemic. It additionally argued that the Unions' claims of practical impact are speculative and conclusory. The Board found that the Vaccine Mandate was a non-mandatory subject of bargaining and that the petition did not allege facts sufficient to warrant a hearing on practical impact. However, it found that the City had a duty to bargain over procedures related to proof of vaccination. Accordingly, the petition was granted in part and dismissed in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice and Scope of Bargaining Petition

-between-

THE UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, LOCAL 94, IAFF, AFL-CIO, and THE UNIFORMED FIRE OFFICERS ASSOCATION,

***Petitioners*,**

-and-

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

***Respondents*.**

DECISION AND ORDER

On October 27, 2021, the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO ("UFA") and the Uniformed Fire Officers Association ("UFOA")

(collectively, "Unions") filed a verified combined scope of bargaining and improper practice petition alleging that the City of New York ("City") and the Fire Department of the City of New York ("FDNY") violated § 12-306(a)(1), (4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by failing to bargain over the Mayor's order that all City employees be vaccinated by October 29, 2021 ("Vaccine Mandate").[1] The Unions argue that the Vaccine Mandate implicates numerous mandatory subjects of bargaining and constitutes a new qualification of employment that must be bargained. They further argue that the Vaccine Mandate creates a practical impact on employees' health, safety, and workload. The City argues that it has the managerial right to impose the Vaccine Mandate on employees due to the public health emergency caused by the COVID-19 pandemic. It additionally argues that the Unions' claims of practical impact should be denied because they are speculative and conclusory. The Board finds that the decision to impose the Vaccine Mandate is a non-mandatory subject of bargaining and that the Unions did not allege facts sufficient to warrant a hearing on practical impact. However, it finds that the City had a duty to bargain over procedures related to proof of vaccination. Accordingly, the petition was granted in part and dismissed in part.

BACKGROUND

On August 31, 2021, the Mayor issued Executive Order ("EO") No. 78, mandating that as of September 13, 2021, City employees and covered employees of City contractors be vaccinated against COVID-19 or submit to a weekly PCR test. Thereafter, on October 20, 2021, the Mayor

[1] On that same date, the UFA filed a petition seeking injunctive relief for the claims. On November 16, 2021, the Board denied the petition. On November 18, 2021, the UFOA requested to intervene in this matter. The City and the UFA consented to the request, which was granted.

issued EO No. 83 and announced that these employees would no longer have the option for weekly testing and would instead be required to be fully vaccinated. Specifically, employees would be required to have their first dose of a vaccine by October 29, 2021. On the same day that EO No. 83 was announced, the City's Commissioner of Health and Mental Hygiene ("Health Commissioner") issued an order similarly requiring all City employees to be vaccinated and providing further details, including that any employee who has not provided proof of having received a first dose of a vaccine by 5 p.m. on October 29th would be "excluded from the premises at which they work beginning on November 1, 2021."[2] (Pet., Ex. G)

On October 21, 2021, the FDNY issued Buckslip No. OPS-21-10-08, incorporating the Health Commissioner's order and a "FAQ on New York City Employees Vaccine Mandate" ("FAQ" or "fact sheet") issued by the City. (*Id*.) This fact sheet is a detailed description of which employees must be vaccinated, how to get vaccinated, and what counts as proof of vaccination. It provides information on paid leave time and other incentives for vaccination. It also provides that employees who fail to comply with the Vaccine Mandate will be placed on Leave Without Pay ("LWOP") and "will be terminated in accordance with procedures required by the Civil Service Law or applicable collective bargaining agreements." (*Id*.)

The City and the Unions did not engage in any bargaining prior to the announcement of the Vaccine Mandate or issuance of the policies concerning its implementation. On October 20, 2021, the same day the Vaccine Mandate was announced, OLR Commissioner Renee Campion sent letters to all affected unions stating that, although the City believed the implementation of the

[2] The Board takes administrative notice that, on February 6, 2023, the Mayor announced that the Vaccine Mandate will end on February 10, 2023, and that permanent competitive and labor class employees who were terminated for failure to comply with the Vaccine Mandate are eligible to apply for reinstatement. While this order might affect the reinstatement of bargaining unit members, we do not find it impacts the issues before the Board or our holdings.

Vaccine Mandate was a managerial prerogative, she was available to meet to bargain the impacts of the Vaccine Mandate. On October 22, 2021, the UFA sent a letter to the Commissioners of OLR and the FDNY demanding to bargain over "the decision to require mandatory vaccination of UFA members." (Pet., Ex. H)

On October 25, 2021, a group of petitioners, which included the UFA and UFOA, filed a verified improper practice petition, docketed as BCB-4458-21, alleging that the City violated NYCCBL §§ 12-306(a)(4) and 12-307 by failing to bargain over the unilaterally adopted policies the City issued as a result of the Vaccine Mandate.[3] Also beginning on October 25, 2021, the City met with numerous unions to discuss implementation of the Vaccine Mandate policies. There is no dispute that as of October 29, 2021, no agreements had been made, and the Vaccine Mandate went into effect. However, between November 4, 2021, and November 24, 2021, the City reached agreements with numerous unions on a variety of implementation issues, including the reasonable accommodation request and appeal process, LWOP terms, and separation benefits that gave unvaccinated employees on LWOP the option to extend their health benefits through June 30, 2022, in exchange for waiving their rights to challenge their resignation. The UFA and UFOA did not reach agreement with the City on implementation terms.[4]

On September 28, 2022, the Board issued a decision on the improper practice petition docketed as BCB-4458-21, finding that the City had a duty to bargain over mandatory subjects contained in the City's policies that were unilaterally adopted to implement the Vaccine Mandate

[3] The other petitioners were the New York City Municipal Labor Committee; Captains Endowment Association; Lieutenants Benevolent Association; Sergeants Benevolent Association; and Detectives' Endowment Association.

[4] The City asserts that the parties met for discussion on one occasion but were unable to reach any agreement.

and that it failed to do so. *See MLC*, 15 OCB2d 34 (BCB 2022). In particular, the decision noted that pay and leave policies and policies addressing procedures for reasonable accommodation for employees who did not comply with the Vaccine Mandate were mandatory subjects. *See id*. Consequently, the City was directed to bargain with the petitioners "over any remaining issues concerning terms and conditions of employment in implementation of the Vaccine Mandate." *Id*. at 17.

POSITIONS OF THE PARTIES

Unions' Position

The Unions assert that the City violated its duty to negotiate in good faith, in violation of NYCCBL § 12-306(a)(1), (4), and (5), when it issued the Vaccine Mandate without bargaining. With respect to the scope of bargaining portion of the petition, the Unions argue that the Vaccine Mandate implicates mandatory subjects of bargaining that were required to be negotiated prior to implementation. In particular, they assert that the requirement that employees who do not comply with the Vaccine Mandate be placed on LWOP impacts multiple "financial subjects," such as medical insurance, leave accruals, leaves of absence, vesting out or retiring, and the City's contribution to annuity fund or welfare fund contributions. (Pet. ¶ 51) They also assert that procedures for a reasonable accommodation and procedures to submit proof of vaccination are bargainable and raise issues of employees' medical privacy and confidentiality. Additionally, they contend that the Vaccine Mandate imposes new predicates for discipline, disciplinary procedures, and penalties regarding enforcement, including termination. The Unions assert that these topics are all mandatory subjects of bargaining, and they request that the Board order bargaining.

With respect to the City's decision to implement the Vaccine Mandate, the Unions contend that a federal court has already determined that the Vaccine Mandate constitutes a new qualification of employment, and Board precedent holds that a change in work qualifications for existing employees is a mandatory subject that must be bargained. (UFA Reply Memo at 11 (citing *Garland v. New York City Fire Dept.*, 574 F. Supp. 3d 120 (E.D.N.Y. 2021)) Moreover, the Unions argue that the Vaccine Mandate is not preempted from bargaining by statute or law, as argued by the City. They assert that preemption exists only where there is an explicit exclusion of a specific topic from the collective bargaining realm. The Unions contend that "the authority of the DOHMH was not a barrier to the [City's] obligation to bargain." (UFA Reply Memo at 14)

Additionally, the Unions rely on recently decided New York State Supreme Court cases finding that the Health Commissioner lacked the authority to impose a condition of employment on City employees without bargaining. (*See* UFA and UFOA November 16, 2022 Supplemental Letters (citing *PBA v. City*, Index No. 151531/2022, 2022 N.Y. Misc. LEXIS 5420 (Sup. Ct. N.Y. Co. Sept. 23, 2022) ("*PBA*"), and *Garvey v. City of New York*, Index No. 85163/2022, 2022 N.Y. Misc. LEXIS 6209 (Sup. Ct. Richmond Co. Oct. 24, 2022)("*Garvey*")) According to the Unions, only the FDNY's Commissioner has the authority to issue adverse employment consequences to its employees under NYC Charter § 487(a) and NYC Admin. Code § 15-113.[5]

The Unions also contend that the implementation of the Vaccine Mandate has created a practical impact on the safety and workload of its members. According to the Unions, the Centers for Disease Control and Prevention ("CDC") recognize that there are certain health risks associated with vaccines, such as anaphylaxis and allergic reactions, and therefore, this creates a *per se*

[5] In this regard, the Unions contend that the union in *PBA* argued that analogous provisions of the NYC Charter and Admin. Code vest the Police Commissioner with the exclusive authority over the governance, administration, and discipline of the police force.

practical impact on its members' health. The Unions additionally argue that an intrusion upon bodily integrity constitutes a *per se* practical impact. Moreover, the Unions assert that a staffing shortage caused by members who did not get the vaccine and were placed on LWOP led to an increase in working hours and an exacerbation of the already inherently dangerous environment in which members work. Additionally, they claim that working longer hours causes extreme fatigue and leads to higher injury and illness rates.[6]

Finally, the Unions assert that the City's "egregious and illegal level of failure to bargain the Vaccine Mandate sends a clear message to the members of the UFA and the UFOA that union representation is meaningless." (UFA Reply Memo at 18) Thus, the Unions contend that the City and FDNY's actions are inherently destructive of union members' rights and constitute an independent violation of NYCCBL § 12-306(a)(1).

City's Position

The City asserts that it has no obligation to bargain over the decision to issue the Vaccine Mandate due to the public health emergency caused by the COVID-19 pandemic. The City argues that UFA and UFOA members are critical to public safety and that the Vaccine Mandate "is an absolute necessity for emergency personnel to protect public health and assure the City can continue to provide necessary emergency services to its citizens." (Ans. ¶ 83) Thus, the City maintains that the Vaccine Mandate falls within the City's managerial prerogative under NYCCBL § 12-307 to "take all necessary actions to carry out its mission in emergencies" and is therefore a

[6] In support of the assertions of practical impact, the UFA cited a New York Post article from October 2021, discussing the temporary closure of 26 ladder and engine companies. It also stated that "[t]he FDNY reported that the Medical Leave Absence rate was 21.70 % as of 11/1/2021, and 19.00% as of January 3, 2022, which was above the 7.5% threshold set forth by the Roster Staffing Agreement section of the CBA requiring suspension of the 5th Firefighter on certain Engine Companies." (*See* UFA Reply Memo at 17, n. 8)

subject that is pre-balanced by the legislature. However, should the Board conduct a balancing test, the City contends that its interests outweigh those of the Unions because "there could be no stronger interest for a public employer than the safety of workers and residents during a deadly pandemic." (Ans. ¶ 78)

The City additionally asserts that there are instances where what might otherwise be negotiable terms and conditions of employment are prohibited from being bargained, such as where a statute directs that a certain action be taken by the employer and leaves no room for negotiation. Here, the City contends that the Health Commissioner's authority to require the vaccination of City workers "cannot be disputed."[7] (Ans. ¶ 95) It claims that the Vaccine Mandate "is a critical expression of public policy supported by medical and scientific data issued pursuant to the Health Commissioner's nondelegable statutory responsibilities" and it "cannot be negotiated away." (Ans. ¶ 108) Moreover, the City asserts that the law in New York is well-settled that decisions of public health officials imposing mandatory vaccine requirements are not irrational, arbitrary, or an abuse of discretion. With respect to the cases cited to by the Unions in their supplemental briefings, the City argues that *Garvey* goes against every other decision that has found the Vaccine Mandate to be a valid exercise of the Health Commissioner's powers. With

[7] In support of this assertion, the City cites to City Charter § 556(c)(2) and City Admin. Code § 17-109(b). Charter § 556 sets forth the "functions, powers and duties" of DOHMH. Subsection (c) sets forth the "supervision of matters affecting public health," and subsection (c)(2) states that DOHMH has jurisdiction to "supervise the reporting and control of communicable and chronic diseases and conditions hazardous to life and health; [and] exercise control over and supervise the abatement of nuisances affecting or likely to affect the public health."

NYC Admin. Code § 17-109 is titled "Vaccinations," and subsection (b) states that "DOHMH "may take measures, and supply agents and offer inducements and facilities for general and gratuitous vaccination, disinfection, and for the use of diphtheria antitoxin and other vaccines and antitoxins."

respect to *PBA*, it argues that that case is also at odds with multiple previous cases finding that the Vaccine Mandate was a lawful qualification of employment. Thus, it contends it has no duty to bargain over the Vaccine Mandate.

Further, the City maintains that the Board has consistently held that the duty to bargain over a practical impact does not arise until the Board finds a practical impact and determines whether the employer has taken adequate steps to alleviate the impact. Therefore, the City argues that any duty to bargain over the impact of the Vaccine Mandate does not arise until the Board has made a determination that a bargainable impact exists. Additionally, the City maintains that there is no *per se* impact on the health, safety, or workload of Union members. Contrary to the Unions' assertions, no one is forced to undergo an invasive medical procedure, and members had the option to apply for a reasonable accommodation. With respect to a claimed workforce shortage, the City contends that approximately 94% of Firefighters and 93% of Officers have been vaccinated. Moreover, the City argues that staffing shortages could occur with or without the vaccine, and unvaccinated workers are more likely to be absent from work due to infection with the virus. Although Union members have challenging and difficult job responsibilities, the City maintains that there is no evidence to demonstrate that the Vaccine Mandate poses a clear and present or future threat to their safety as compared to their normal work responsibilities. Thus, the City asserts that the Unions' speculative and conclusory assertions do not justify a hearing or a finding of practical impact.

Finally, the City contends that because it has not failed to bargain over a mandatory subject of bargaining, there is no independent violation of NYCCBL § 12-306(a)(1).

DISCUSSION

The Unions assert that the City has violated NYCCBL § 12-306(a)(4) by failing to bargain over the decision to issue the Vaccine Mandate. 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."[8] Thus, NYCCBL § 12-307(a) requires that public employers and employee organizations "bargain over matters concerning wages, hours, and working conditions, and any subject with a significant or material relationship to a condition of employment." *CEU, L. 237, IBT*, 2 OCB2d 37, at 11 (BCB 2009) (citations omitted). The Board has long held that "[a]s a unilateral change in a term and condition of employment accomplishes the same result as a refusal to bargain in good faith, it is likewise an improper practice." *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012) (citations omitted). "In order 'to establish that a unilateral change constitutes an improper practice, the petitioner must demonstrate the existence of such a change from the existing policy or practice and establish that the change as to which it seeks to negotiate is or relates to a mandatory subject of bargaining." *Doctors Council, L. 10MD, SEIU*, 9 OCB2d 2, at 10 (BCB

[8] NYCCBL § 12-306 states, in pertinent part:

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

2016) (quoting *Local 1182, CWA*, 7 OCB2d 5, at 11 (BCB 2014)) (additional citations and quotation and internal editing marks omitted).

Thus, the issue presented is whether the decision to issue the Vaccine Mandate constitutes a mandatory subject of bargaining. At the outset, we note that this Board has primary and exclusive jurisdiction to make this finding. *See* NYCCBL § 12-309(a)(2); *Matter of Levitt v. Bd. of Collective Bargaining of City of New York, Off. of Collective Bargaining*, 79 N.Y.2d 120, 128 (1992) (citing *Matter of Rensselaer City School Dist. v. Newman,* 87 A.D.2d 718 (3d Dept. 1982); *Matter of Saratoga Springs City School Dist. (New York State Pub. Employment Relations Bd.)*, 68 A.D.2d 202, 208 (3d Dept. 1979), *lv. denied*, 47 N.Y.2d 711)) (finding that "in the first instance the threshold issue whether a particular subject matter is bargainable should be decided by the impartial body with expertise in the are").

As the NYCCBL "does not expressly delineate the nature of 'working conditions' or 'conditions of employment,' [we therefore] 'determine on a case-by-case basis the extent of the parties' duty to negotiate.'" *DC 37*, 5 OCB2d 21, at 14 (BCB 2012) (quoting *DC 37*, 4 OCB2d 19, at 27 (BCB 2011), *affd.*, *Matter of Roberts, et al. v. New York City Office of Collective Bargaining, et al.*, Index No. 106268/2011 (Sup. Ct. N.Y. Co. Apr. 30, 2012) (Torres, J.), *affd.*, 113 A.D.3d 97 (1st Dept. 2013). Therefore, in some instances, to determine whether a condition of employment is a mandatory subject of bargaining, we evaluate the rights and interests of both the City and the Union concerning that specific subject and conduct a balancing test. *See e.g., Matter of Levitt v. Bd. of Collective Bargaining*, 79 N.Y.2d 120, 127. However, we have previously explained that under the NYCCBL, "'[s]ome subjects require no further analysis by this Board because they have been 'pre-balanced' by the Legislature . . . [including those] identified in NYCCBL § 12-307(b) as reserved for managerial discretion.'" *UFADBA*, 12 OCB2d

30, at 16 (BCB 2019) (quoting *CEU, L. 237, IBT*, 2 OCB2d 37, at 14-15) (citations omitted). In such cases, there is no need to conduct a balancing test.

The Unions argue that the Vaccine Mandate is a mandatory subject of bargaining because it is a newly-imposed qualification of employment. The City does not dispute the Unions' characterization of the Vaccine Mandate as a qualification of employment. In this regard, it points to the decision in *Garland v. New York City Fire Dept.*, 574 F. Supp. 3d 120 (E.D.N.Y. 2021), where the court found that "the [Health] Commissioner was within his powers to require COVID-19 vaccination as a qualification of employment for FDNY employees." *Id*. at 129; *see also We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 294 (2d Cir. 2021), *op. clarified*, 17 F.4th 368 (2d Cir. 2021), *cert. denied sub. nom.*, *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022) (noting that "[v]accination is a condition of employment in the healthcare field . . . ."). Thus, for purposes of this decision, we will consider the Vaccine Mandate to be a qualification of employment.[9]

This Board has previously found that although qualifications for initial employment or for promotion are management prerogatives that are not subject to bargaining, "[a] bargaining obligation arises when new qualifications of employment are applied to incumbent employees because they constitute new terms and conditions of employment." *DC 37*, 6 OCB2d 24, at 20. Based on this precedent, the Unions argue that, as applied to incumbent employees, the Vaccine Mandate is a new qualification of employment that must be bargained. On the other hand, the City

[9] This Board has generally defined qualifications of employment to be "preconditions, not conditions of employment. They define a level of achievement, or a special status deemed necessary for optimum on-the-job performance." *CIR*, 37 OCB 38, at 13 (1986) (quoting *West Irondequoit Bd. of Educ.*, 4 PERB ¶ 4511, *affd. in part and mod. in part*, 4 PERB ¶ 3070 (1971), *affd. on other grounds sub nom.*, *West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46 (1974)) (finding a medical license requirement for Chief Residents to be a qualification of employment); *see also DC 37*, 6 OCB2d 24, at 24, n. 17 (BCB 2013) (finding requirement that employees be physically able to wear a respirator was a qualification of employment because it mandates a level of physical fitness deemed necessary to perform duties).

argues that, unlike other qualifications, it was not required to bargain over the Vaccine Mandate because it was adopted in accordance with its managerial right under NYCCBL § 12-307(b) to "take all necessary actions to carry out its mission in emergencies." We agree with the City.

The COVID-19 pandemic presented an unforeseen and significant threat to public health and municipal operations. As we noted in *MLC*, 15 OCB2d 34 (BCB 2022), "[o]ver two years later, highly contagious mutations of the virus continue to challenge public health and health care resources worldwide." *Id*. at 16. It is in the context of this unique circumstance that we find that the imposition of the Vaccine Mandate falls within the City's right under NYCCBL § 12-307(b) to "take all necessary actions to carry out its mission in emergencies." As explained by the courts, there were undeniable emergency conditions created by the COVID-19 pandemic that required the Health Commissioner to take steps to mitigate health risks to the City workforce and public. *See, e.g., Garland v. New York City Fire Dept.*, 574 F. Supp. 3d at 128-129 (noting the "public health emergency . . . due to the Coronavirus [and] the more transmissible Delta and Omicron variants"). Moreover, the federal courts have uniformly recognized the Health Commissioner's authority to mandate the vaccination of public sector employees in the face of a public health emergency. *See Marciano v. de Blasio*, 589 F. Supp. 3d 423, 431 (S.D.N.Y. 2022) ("[A]s recent case law has made clear, the [Health] Commissioner and the Board [of Health]'s authority to issue the sort of vaccination requirement at issue here is firmly established.") (citing *Garcia v. New York City Dept. of Health & Mental Hygiene*, 31 N.Y.3d 601 (2018); *C.F. v. New York City Dept. of Health & Mental Hygiene*, 191 A.D.3d 52, 64-65 (2d Dept. 2020)*; see also Garland v. New York City Fire Dept.*, 574 F. Supp. 3d 120.

More specifically, the *Garland* court recognized that the Health Commissioner had the authority to mandate COVID-19 vaccination for FDNY employees due to the emergency

circumstances created by the pandemic as well as the nature of their job and the services they provide to the public. *See Garland v. New York City Fire Dept.*, 574 F. Supp. 3d at 129. Similarly, in upholding the authority of DOHMH and the Health Commissioner to mandate vaccination, the Southern District of New York stated that this authority applies in "full force" to COVID-19 vaccination of NYPD officers who "regularly interact with the public, whom they have sworn to protect, often in emergency situations where close contact is unavoidable." *Marciano v. de Blasio*, 589 F. Supp. 3d at 432. Thus, the court found that "[i]t is incumbent on the City to take steps that mitigate the health risks such interactions with the police pose to its residents, thus reinforcing the public trust on which effective policing relies." *Id*.

The FDNY's mission is, in short, to "protect[] the lives and property of New York City residents and visitors." (Ans. ¶ 165) Moreover, firefighters and fire officers are employed as "first responders to fires, public safety[,] and medical emergencies" (*Id*.) (citing the Fire Department Mission and Values, as indicated on its website). Thus, the FDNY's mission explicitly requires its employees to interact closely with, and provide emergency services to, the general public on a daily basis. Consequently, the decision to impose the Vaccine Mandate on FDNY employees fell within the City's express statutory authority under the NYCCBL to carry out its mission during an emergency.

In making this finding, we decline to follow our earlier case law cited by the Union in which a new qualification of employment for incumbent employees was found to be mandatorily bargainable. The Vaccine Mandate was a means to further protect the City's workforce from the virus as well as assist in achieving the broader public health goal of reducing the spread and impact of the virus. The circumstances and qualifications at issue in our other cases involving new qualifications of employment are simply not analogous to these extremely unique circumstances.

In light of this indisputable emergency, we find that a balancing test is not necessary. *See UFA*, 5 OCB2d 3, at 12-13 (BCB 2012) (declining to conduct a balancing test of the parties' interests where the FDNY's decision to implement a policy governing use of lights and sirens on vehicles was squarely within its statutory rights to "direct its employees, maintain efficient governmental operations, and determine the methods, means, and personnel by which government operations are to be conducted" under NYCCBL § 12-307(b)); *see also DC 37*, 75 OCB 13, at 9 (BCB 2005) (noting that the rights identified in NYCCBL § 12-307(b) are statutorily "pre[-]balanced," eliminating the need to weigh the competing interests of each party). However, even if we were to balance the Unions' and the City's competing rights and interests against one another we would reach the same result.

This Board has previously examined an employer's interest in maintaining the efficiency of its operations and taking necessary action during emergencies against the asserted right of employee privacy. *See DC 37*, 5 OCB2d 21 (BCB 2012). In *DC 37*, we addressed an NYPD policy that required employees to provide private information regarding their location and related contact information while on authorized leave. Balancing the interests of the City to contact its employees in the event of an emergency against employees' privacy interests, the Board found that, with respect to employees "who, in the event of an emergency, are necessary to carry out the NYPD's mission, the requirement of such employees to disclose their location during absence and provide related contact information is a non-mandatory subject of bargaining." *Id.* at 15 (citing NYCCBL § 12-307(b)).

As explained above, there is no question that the Unions' members are essential to carry out the FDNY's core mission and protect the public in the event of an emergency. Furthermore, the City has a compelling interest in ensuring the health and safety of its employees and the citizens

of New York City. The Unions maintain, however, that their right to bargain over a newly imposed qualification of employment for incumbent employees and the employees' rights to continued employment and contractual benefits are dispositive. Nevertheless, we find that under the extremely unique circumstances caused by the COVID-19 pandemic, the City's interests, and its statutory right under NYCCBL § 12-307(b) to "take all necessary actions to carry out its mission in emergencies," outweigh the Union's right to bargain over a newly imposed qualification of employment for incumbent employees.[10]

Furthermore, we are not persuaded that the cases cited to by the Union dictate a different result. In particular, the Unions rely on *PBA v. City*, Index No. 151531/2022, 2022 N.Y. Misc. LEXIS 5420 (Sup. Ct. N.Y. Co. Sept. 23, 2022), and *Garvey v. City of New York*, Index No. 85163/2022, 2022 N.Y. Misc. LEXIS 6209 (Sup. Ct. Richmond Co. Oct. 24, 2022). In *PBA*, the court found that although the Health Commissioner had the authority to issue the Vaccine Mandate, he did not have the authority to impose adverse employment actions on members of the PBA without bargaining. Similarly, in *Garvey*, the court found that the Health Commissioner lacked the authority to impose a permanent condition of employment upon City employees during a temporary state of emergency and noted that "[t]his Court believes that a new 'condition of employment' cannot be imposed upon these employees when the 'condition' did not exist when they accepted contracted employment." *Garvey v. City of New York*, Index No. 85163/2022, at 10. Additionally, the court found that the Vaccine Mandate was arbitrary and capricious because

[10] We note that this conclusion is consistent with PERB's balancing of the asserted right to bargain over a newly imposed qualification of employment against a school district's interest in fulfilling its educational mission to provide increased swimming instruction to its students. *See Clyde-Savannah Cent. Sch. Dist.*, 49 PERB ¶ 4558 (ALJ 2016). There, the ALJ found that "the enhanced health and safety aspects of the lifeguard training and certification program at issue far outweigh any detrimental effects to the working conditions of bargaining unit teachers." *Id*. at 4673.

public employees subject to it were treated differently than private employees, who were subject to a similar mandate that was adopted two months later, which included exceptions for athletes, performers, and other artists and was rescinded altogether in September 2022.[11]

As stated above, it is this Board that has the statutory authority to interpret the NYCCBL and "make a final determination as to whether a matter is within the scope of bargaining." NYCCBL § 12-309(a)(2). Thus, to the extent that the *PBA* and *Garvey* decisions opined upon whether City agencies were required to bargain over the imposition of a new qualification or condition of employment relating to the Vaccine Mandate, we are not bound by those statements. *See Matter of Levitt v. Bd. of Collective Bargaining of City of New York, Off. of Collective Bargaining*, 79 N.Y.2d 120, 128; *see also Civ. Serv. Employees Assn., Inc., Local 1000, AFSCME, AFL-CIO v. New York State (Unified Ct. Sys.)*, 73 Misc. 3d 874, 884 (Sup. Ct. Albany Co. 2021) (quotation omitted) (stating that PERB has "exclusive nondelegable jurisdiction" on matters involving an improper practice and is "accorded deference in matters falling within its area of expertise such as cases involving the issue of [a] mandatory or prohibited bargaining subject"). We further note that our ruling in this matter concerns the question of whether an employer under our jurisdiction has the duty to bargain over the Vaccine Mandate, and it is not based upon the statutory authority of the Health Commissioner. There is no dispute that the City of New York is a public employer under the NYCCBL, or that the Mayor issued E.O. 83 requiring vaccination for

[11] In *PBA*, the union members who were terminated or placed on LWOP were ordered to be reinstated. *See PBA*, 2022 N.Y. Misc. LEXIS 5420. In *Garvey*, the 16 individual petitioners were ordered to be reinstated with backpay. *See Garvey*, 2022 N.Y. Misc. LEXIS 6209. Both decisions apply only to the named petitioners, and both have been appealed by the City. Thus, their enforcement has been stayed.

all public employees on October 20, 2021.[12] Moreover, these lower court opinions are at odds with multiple other decisions, including those of the appellate division and the federal courts.

Additionally, it is not relevant to our analysis that the court in *Garvey* found that different treatment of private and public sector employees rendered the Vaccine Mandates arbitrary and capricious. Our finding involves the application and interpretation of the NYCCBL and solely relates to the question of whether the Vaccine Mandate was required to be bargained. Actions taken at a later date, and which affect employees who are not under our jurisdiction, have no bearing on this finding.

Next, we address the Unions' claims that the Vaccine Mandate created a practical impact on employees' health and safety as well as their workload. As we have previously explained, "in order to find that a *per se* practical impact exists, warranting bargaining over alleviation, the Board must be able to determine, based on the pleadings alone, and without benefit of a hearing, that a practical impact exists." *UFA*, 4 OCB2d 30, at 29 (BCB 2011). Contrary to the Unions' general assertion that vaccines pose health risks, the CDC has determined that the FDA-approved vaccines are safe and effective. *See* https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety.html. Further, employees were not forced to obtain the vaccine and to the extent that individual employees had health-related concerns about the vaccines, there was a reasonable accommodation process by which those concerns can be addressed. Thus, a *per se* impact on safety or bodily integrity cannot be found under these circumstances. *See UFA*, 4 OCB2d 30, at 29 (finding that a

[12] We find no support for the Unions' argument that provisions of the NYC Charter and Admin. Code dictate that the Fire Commissioner has the sole authority to issue adverse employment consequences to FDNY employees. Contrary to their assertion, the court in *PBA* made no findings concerning the Police Commissioner's authority under analogous provisions of the NYC Charter and Admin. Code.

per se impact on safety based on reduced staffing levels had not been established where the claimed impact was disputed by the parties and would require a hearing to make a determination).

Accordingly, we now turn to the question of whether sufficient facts have been plead to warrant a hearing on practical impact. This Board has previously explained that "[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) (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.

UFA, 5 OCB2d 3, at 14 (quoting *UFA*, 4 OCB2d 30, at 30). Other than noting that some individuals may have adverse reactions or side effects to the COVID-19 vaccine, as is the case with any vaccine, the Unions have presented no specific evidence to support the assertion that COVID-19 vaccines are unsafe. Consequently, "in the absence of specific, probative facts to support [a] contention that [the imposition of the Vaccine Mandate] will subject bargaining unit members to 'an increased safety impact, *per se* or otherwise,' we do not find a practical impact on safety or material issues of fact such that a hearing should be ordered on that issue." *COBA*, 10 OCB2d 21, at 16 (BCB 2017) (quoting *Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 14 (BCB 2012)).

Additionally, the Unions claim that the Vaccine Mandate has created a practical impact on employees' workload and safety because there has been a workforce shortage caused by the

placement on LWOP of employees who refused to vaccinate. They assert that this has led to an increase in the working hours of members who did vaccinate, which in turn can cause fatigue and lead to a higher injury rate, thereby exacerbating the already dangerous environment in which they work. In support of this assertion, the Unions cited to a New York Post article concerning the temporary closure of 26 engine and ladder companies in October 2021, as well as a statistic from an unnamed FDNY report concerning medical leave absence rates in November 2021 and January 2022.

Here too, we find that these assertions are conclusory and that the Unions have not provided sufficient factual support to demonstrate that the Vaccine Mandate has resulted in a practical impact on the workload and safety of its members. Although overtime may have increased for a period of time shortly after the Vaccine Mandate was announced, the evidence presented does not demonstrate that the Vaccine Mandate has resulted in "an unreasonably excessive or unduly burdensome workload as a regular condition of employment." *UFA*, 71 OCB 19, at 8 (BCB 2003) (quotation omitted); *see also Local 333, UMD, ILA, AFL-CIO*, 5 OCB2d 15, at 14 (finding that without any facts concerning an increase in safety risk to the employees, affidavits generally describing the "dangerous nature of the position and relate to past incidents" were insufficient to order a hearing on the safety impact from the staffing change). Moreover, there is no evidence to support the claim that the placement of employees on LWOP as a result of a failure to comply with the Vaccine Mandate was the cause of the staff shortages identified by the Union. Thus, we decline to order a hearing concerning a practical impact on workload and safety.

Finally, we address the remaining scope of bargaining claim. The Unions assert that the Vaccine Mandate has an impact on various mandatory subjects of bargaining. We note that the majority of these claims are duplicative of those addressed in *MLC*, 15 OCB2d 34 (BCB 2022)

("*MLC*"). In that case, the petitioners, which included the UFA and UFOA, did not challenge the Vaccine Mandate itself but asserted that the policies and procedures the City separately promulgated in order to implement the Vaccine Mandate concerned mandatory subjects of bargaining and constituted a unilateral change. The Board found that those policies constituted a change that affected issues of leave, wages, and procedures for a reasonable accommodation process, all of which were mandatory subjects of bargaining, and it ordered bargaining over these topics. Thus, the UFA's scope of bargaining claims regarding LWOP and its effects on other contractual economic benefits and the reasonable accommodation process have already been addressed, and the Board has ordered bargaining on those matters. *See MLC*, 15 OCB2d 34, at 17. With respect to the Unions' argument that disciplinary procedures were implicated by the Vaccine, the Board in *MLC* noted that there was no evidence that disciplinary proceedings had been initiated against any employee and, therefore, the City did not breach its duty to bargain over this subject.[13] Therefore, the scope of bargaining petition is denied as to this subject.

Finally, the topic of procedures relating to proof of vaccination was not examined in *MLC*. This Board has previously held that procedures relating to verification of residency were a mandatory subject of bargaining, even though the residency requirement itself was not. *See DOT*, 75 OCB 14, at 15 (BCB 2005). We find the same result is compelled here. Accordingly, we find that with respect to this issue, the City breached its duty to bargain in violation of NYCCBL § 12-306(a)(1), (4), and (5) and we order the City to "bargain in good faith over any remaining issues

[13] The Board also noted that the City had taken the position, as do the Unions in this instance, that the Vaccine Mandate was a qualification of employment and that the courts have found a lawful qualification or condition of employment does not implicate disciplinary procedures. *See MLC*, 15 OCB2d 34, at 13, n.8 (citing *Garland v. New York City Fire Dept.*, 574 F. Supp.3d 120, 129; *We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 293-94 (2d Cir. 2021); *Marciano v. de Blasio*, 589 F.Supp.3d 423, at 436; *New York City Mun. Labor Comm. v. City of New York*, 75 Misc. 3d 411, 415 (Sup. Ct. N.Y. Co. Apr. 21, 2022)).

concerning terms and conditions of employment in implementation of the Vaccine Mandate."[14] *MLC*, 15 OCB2d 34, at 17. As stated in *MLC*, given the passage of time and the unique circumstances created by the COVID-19 pandemic, the Board's Order does not require that the City restore the *status quo ante* in any respect. *See id*. at 16.

[14] We note that the violation of NYCCBL § 12-306(a)(1) is derivative and that "this Board has never found a unilateral change, without more, to constitute an independent violation of § 12-306(a)(1)." *UFA*, 4 OCB2d 30, at 28 (BCB 2011).

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 scope of bargaining/improper practice petition filed by the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO, and the Uniformed Fire Officers Association, against the City of New York and the Fire Department of the City of New York, docketed as BCB-4461-21, is hereby denied as to the claim that the decision to implement the Vaccine Mandate violated the NYCCBL; and it is further

ORDERED, that the verified scope of bargaining/improper practice petition is denied as to the claims concerning any alleged practical impact on safety and/or workload; and it is further

ORDERED, that the verified scope of bargaining/improper practice petition is granted as to the claim regarding procedures related to proof of vaccination; and denied in all other respects; and it is further

DIRECTED, that the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO, the Uniformed Fire Officers Association, and the City of New York and the Fire Department of the City of New York collectively bargain over any remaining issues concerning the procedures related to proof of vaccination; and it is further

ORDERED, that the Fire Department of the City of New York post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

Dated: February 10, 2023
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 dissent (see attached opinion) PETER PEPPER
MEMBER

UFA, 16 OCB2d 7 (BCB 2023)

(IP/Scope) (Docket No. BCB-4461-21)

Dissent of Charles G. Moerdler and Peter Pepper

The majority opinion aptly illustrates how the frenzy of public opinion -- driven by (well founded) medical opinion, but distorted by the excesses of politicians and others eager for the publicity that a clamoring media provides—can and here has caused even talented members of this Board to disregard basic legal principles and fundamentals.

We decline join the majority in descending the noted slippery slope and dissent.

This proceeding turns on a supposed order of the Commissioner of the New York City Fire Department ("FDNY") effectuating and implementing an order of the City's Commissioner of Health and Mental Hygiene "("Health Commissioner") requiring all City employees be vaccinated. At issue in these proceeding are the resultant employment consequences, specifically whether a City-asserted "managerial prerogative" exists or arose pursuant to NYCCBL§ 12-307b, validly creating or warranting an enforceable "managerial prerogative" limiting or eliminating the City's duty to bargain concerning the vaccine mandate issued by the then Health Commissioner.[1] The majority focuses its opinion on the existence or nature of that duty, ignoring a fundamental jurisdictional and factual pre-requisite – a valid and enforceable *Order executed by the Fire Commissioner*. As later appears, this record is bereft of any showing that there ever was a valid Order. Indeed, since the Board and staff were expressly asked by an undersigned Member at the Board's February 2, 2023 meeting if there was one and none signed by or emanating from the Fire Commissioner could be produced the inference clearly follows that none exists or existed. In its absence, the majority opinion is at best academic and the majorities proposed Order lacks sound basis, with the consequences later detailed. [2]

The essential facts upon which the decision herein must be based are indisputable on this Record (which is all that can properly concern us). Thus, two fundamental facts must be established since

[1] The issue whether any such "prerogative validly exists under the Taylor Law, with which provisions of the NYCCBL must be harmonized so that that the latter does exceed the provisions of the former, has been the subject of question and challenge for almost two decades. See, Uniformed Firefighters Association v. City of New York et ano, BCB-2648-07 (Dissenting Op.) and prior cases there cited at p. 1. In the context of this case, the issue need not be reached—though it remains the view of its author – because even under the City's flawed view there is a fundamental predicate here that admittedly has not been met. Thus, we here assume, *arguendo,* that such a prerogative was validly stated without accepting that notion. There are other issues we likewise need not reach, such as the appropriateness of mandate enforcement against those who risk their lives for the protection of New Yorkers –its Firefighters –but inexcusably exempt chosen celebrities. Finally, to be clear, we do not quarrel with the appropriateness of the mandate -- only with the flawed, but essential, process evidenced on this Record.

[2] That baseless assumption was not only at the root of the Majority Opinion herein ("Maj. Op. ") but also burdened several litigations, although as noted in the instant Majority Opinion the UFA expressly invoked the City Charter 487(a) requirement that the Fire Commissioner was the "sole" person authorized to act in these circumstances and that he omitted to act here. (See, Maj. Op. at p. 6).

they are a pre-requisite to the City's position that a "managerial prerogative" existed and was validly exercised.

The first – a valid determination that a public health crisis existed requiring specific action in the public interest -- was aptly addressed by a pre-eminent jurist, U.S. District Judge Jed S. Rakoff:

> In late 2020, the first COVID-19 vaccine — developed by Pfizer and BioNTech — was granted emergency use authorization by the Food and Drug Administration ("FDA"). See ECF 1-1 ("Complaint") ¶ 126. Subsequently, on August 23, 2021, the FDA granted full approval to the Pfizer-BioNTech vaccine for individuals 16 years of age and older…. In a press release announcing the vaccine's approval, the FDA stated that the vaccine had proven "91% effective in preventing COVID-19 disease" in clinical trials…. The following week, Mayor de Blasio issued Executive Order No. 78, requiring that, beginning September 13, 2021, City employees and covered City contractors either be vaccinated against COVID-19 or be tested for COVID-19 on a weekly basis. See Order at 3.
>
> Pursuant to his prior declaration of a public health emergency, [Department of Health] Commissioner Chokshi, on October 20, 2021, issued an order (the "Department's Order" or the "Order") requiring COVID-19 vaccinations for City employees and certain City contractors. See id. In setting out the justification for the Order, Commissioner Chokshi noted, among other things, that, that the U.S. Centers for Disease Control and Prevention ("CDC") "has stated that vaccination is an effective tool to prevent the spread of COVID-19 and the development of new variants, and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated." Id. at 2…. The Board [of Health] ratified the Department's Order by a unanimous vote on November 1, 2021. ECF No. 28-2 at 22.
>
> The Order set a deadline of 5:00 p.m. on October 29, 2021 by which time City employees "must provide proof to the agency or office where they work that either (1) they have been fully vaccinated against COVID-19; or (2) they have received a single dose COVID-19 vaccine, even if two weeks have not passed since they received the vaccine; or (3) they have received the first dose of a two-dose COVID-19 vaccine." See id. at 5. Further, under the Order, any City employee who has not provided the above-described proof must be excluded from their assigned work location beginning on November 1, 2021. See id. at 4. [3]

Marciano v. DeBlasio, 589 F. Supp. 3d 423, 427 (SDNY, 2022) (Footnote citations omitted). See, *Kane v. di Blasio,* 19 F. 4th 152, 164 (2d Cir.2021). That determination was sound on the public health issue; but it did not address the touchstone second and currently determinative issue. [4]

The second required determination is that a valid FDNY Order existed applying the Health Department strictures to employees of the FDNY. See, *Garland v. New York City Fire Department*,

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[3] The Health Department Order did not, nor could it, specifically address the issues herein.

[4] To be clear, the writers do not here quarrel with either the Health Department medical opinion-- only with the flawed, but essential, processes evidenced on this Record.

574 F. Supp. 120, 128-29 (EDNY 2021*)*. Two distinct statutory provisos are applicable. Thus, Section 15-113 of the New York City Administrative Code provides:

> "*The [Fire] commissioner* shall have power, in his or her discretion on conviction of a member of the force of … neglect of duty, or violation of rules, *or neglect or disobedience of orders ... or any conduct injurious to the public* peace or *welfare ... or other breach of discipline*, to punish the offending party by reprimand, forfeiture and withholding of pay for a specified time, or dismissal from the force; …. (Emphasis added)

Cf., Kane v. Walsh, 295 N.Y. 198, 206 (1946)(violations of Fire Commissioner's Orders and related Departmental Rules is enforceable).[5]

Of more direct relevance here, since this is not a disciplinary proceeding, is Section 487 of the New York City Charter, which has for decades provided:

> a. *The commissioner* shall have *sole and exclusive power* and perform all duties for the government, discipline, management, maintenance and direction of the fire department and the premises and property in the custody thereof …. (Emphasis added)

See, *Von Essen. New York City Civil Service Commission,* 4 N.Y. 3d 220 (2005); *Pedalino v. Giuliani,* 165 Misc. 2d 324 (Sup. Ct. Richmond Co., 1995); *Application of Aron Manor Nursing Home*, 35 Misc 2d 1044 (Sup. Ct. N.Y. Co. 1962). See also, *Roberts v. New York City Office of Collective Bargaining,*113 A.D.3d 97 (1st Dept. 2013).

Thus, the next issue is whether a Fire Commissioner's Order issued here. The Record before this Board does not include any copy of any writing evidencing or even suggesting that a valid Order, *signed by the Commissioner*, was issued on or about October 21, 2021 (or even during the former Mayoral Administration) applying the Health Department strictures to employees of the FDNY, as suggested in the majority opinion (p.3). [6] To repeat, the majority and the staff of this Board were expressly asked at the Board's February 2, 2023 meeting if there was in the Record any Order signed by or emanating from the Fire Commissioner and, if so, they were asked to produce it. *None could be or was produced. Thus,* the inference clearly follows that none exists or existed.

Indeed, all that is or can be offered is an *unsigned* Clerical routing slip—termed a Buckslip – to Borough Commanders and "SOC-Special Operations Command," that does not identify what it attaches, other than to state that the Subject relates to "COVID Vaccine Mandate Update." There now was attached to the *unsigned* routing slip an *unsigned* memorandum stated to be in the name

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[5] The suggestion in *Garland, supra* at 128, that NYC Admin. Code Sections 15-114 (relating by its terms to resignations and absences) may or not apply or is authority for the foregoing quotation is, respectfully, inaccurate.

[6] Indeed, there is no evidence in the Record that *the Fire Commissioner* expressly authorized anyone to issue such an order in his name, assuming, *arguendo,* that authority to delegate could even be implied from the explicit provisions of the New York City Charter Section 487. And, considering the consequences of breach of such an order to those incredibly courageous men and women who each and every day put their lives, as well as the fortunes and futures of their families, on the line, the least they should receive is a direct order from their Commissioner.

of the Department's "Chief of Operations" —not the *Fire Commissioner* –referring to a de Blasio announcement, attaching the Health Department Order and *offering a $500 payment, plus a $100 gift card if they receive a first vaccination.* Manifestly, whatever value can be attached to the routing slip it is not a document, much less an Order, executed or issued by the Fire Commissioner. Indeed, that the majority is forced to rely on a routing slip says it all.

There is not slightest indication in the routing slip or in its attachments that the City's asserted "management prerogative" was or would be exercised *by the Fire Commissioner.*

Stated otherwise, but to the same effect, advertently or otherwise it appears that the Fire Commissioner did not exercise his supposed "management prerogative." Accordingly, there is no basis in this Record for the City's operative assertions or the Majority Opinion. To credit them as being the requisite Fire Commissioner's Order violates not only Section 487-a of the City Charter but insults intelligence.

It remains only to note that the Majority's outcome-oriented Opinion declines, to credit two apt Supreme Court decisions, *PBA v. City of New York*, Index No.151531/2022, (N.Y. Co., Sept. 23, 2022) (the "*PBA*" case) and *Garvey v. City of New York*, Index No 85163/2022 (Richmond Co. Oct 24, 2022). Significantly, the Majority provides no sound reason for its cavalier determination to decline to follow them (and the fact that the City has appealed is no such reason, presuming as it does (based on some Ouija Board or psychic skill possessed by the Majority Members) that reversal will necessarily follow). That cavalier declination to follow precedent has recently come into judicial vogue, though utterly devoid of legal merit and likely to foster disrespect for judicial processes. Indeed, if disregard of unwelcome but not validly distinguishable precedent were to become sound practice, why would that not warrant like disregard of any decision at all that can muster a majority, including, for example, the exclusive jurisdiction thesis and cases cited at page 11 of the majority opinion.

The majority opinion is devoid of legal merit given the absence in this Record of an executed order of the one person authorized under City Charter Section 487 to execute it, the Fire Commissioner. The majority made clear that they could not produce one (and could only produce a routing slip from a subordinate) and that ends the inquiry.[7]

Accordingly, Petitioners' Improper Practice Petition should in all respects be granted, the public posting of this decision should be directed and the City and the Fire Department should be directed to Cease and Desist from any further violation of § 123-306(a))1), (4) and (5) of the NYCCBL.

February 6, 2023

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER

[7] We need not speculate whether a pre-authorized order of the Fire Commissioner addressing the exercise of the supposed "managerial prerogative" would have sufficed since none was produced as being in the Record and none is claimed.

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NOTICE
TO
ALL EMPLOYEES
PURSUANT TO
THE DECISION AND ORDER OF THE
BOARD OF COLLECTIVE BARGAINING
OF THE CITY OF NEW YORK
and in order to effectuate the policies of the
NEW YORK CITY
COLLECTIVE BARGAINING LAW

We hereby notify:

That the Board of Collective Bargaining has issued 16 OCB2d 7 (BCB 2023), determining an improper practice petition between the Uniformed Firefighters Association of Greater New York, Local 94, IAFF-AFL-CIO, the Uniformed Fire Officers Association and the City of New York, and the Fire Department of the City of New York.

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 scope of bargaining/improper practice petition is hereby denied as to the claim that the decision to implement the Vaccine Mandate violated the NYCCBL; and it is further

ORDERED, that the verified scope of bargaining/improper practice petition is denied as to the claims concerning any alleged practical impact on safety and/or workload; and it is further

ORDERED, that the verified scope of bargaining/improper practice petition is granted as to the claim regarding procedures related to proof of vaccination; and denied in all other respects; and it is further

DIRECTED, that the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO, the Uniformed Fire Officers Association, the City of New York, and the Fire Department of the City of New York collectively bargain over any remaining issues concerning the procedures related to proof of vaccination.

ORDERED, that the Fire Department of the City of New York post or distribute the Notice of Decision and Order in the manner that it customarily communicates information to employees. If posted, the notice must remain for a minimum of thirty days.

The Fire Department of the City of New York
(Department)

Dated: _____ (Posted By)

(Title)