SCANNED ON 7/16/2012

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 33

Index Number : 108759/2011

UNIFORMED FIREFIGHTERS

vs

CITY OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-27
Answering Affidavits — Exhibits	28-35; 36-37
Replying Affidavits	38-39

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision and judgment annexed hereto.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/6/12

ALEXANDER W. HUNTER JR.
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

---X

Uniformed Firefighters Association, Local 94, *IAFF*, AFL-CIO,

Index No.: 108759/11

Petitioner,

Decision and Judgment

For a Judgment Pursuant to Article 78 of the C.P.L.R.

-against-

The City of New York and the New York City Board of Collective Bargaining,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

---X

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner Uniformed Firefighters Association of Greater New York, Local 94, *IAFF*, AFL-CIO ("UFA") for an order pursuant to C.P.L.R. Article 78, declaring the portion of respondent the New York City Board of Collective Bargaining's ("BCB") Interim Decision and Order ("Interim Decision"), dated June 29, 2011, which determined that respondent the City of New York ("City") was not required to negotiate its decision to reduce fire engine company staffing levels, as arbitrary and capricious, is denied and the proceeding is dismissed.

On January 31, 2011, petitioner and the Uniformed Fire Officers Association ("UFOA") filed a combined Verified Improper Practice/Scope of Bargaining Petition challenging the City's decision to reduce engine company staffing levels, effective February 1, 2011. The UFA and UFOA asserted that the City violated New York City Collective Bargaining Law ("Collective Bargaining Law") § 12-306(a)(1), (4), and (5) by unilaterally eliminating the fifth firefighter on all sixty (60) fire engine companies under the Roster Staffing Agreement between petitioner and the City. Moreover, the UFA argued that the elimination of the fifth firefighter would impact the safety of its members. The BCB ultimately determined that: 1) the Roster Staffing Agreement expired on January 31, 2011; 2) there was no requirement to negotiate in the event the City changed staffing levels; 3) firefighter staffing was a nonmandatory subject of bargaining; 4) the Roster Staffing Agreement was not incorporated into the parties' collective bargaining agreement; and 5) a hearing would be held to determine whether the staffing change would have a practical impact on safety.

Petitioner argues that the Interim Decision incorrectly held that the Roster Staffing Agreement terminated on January 31, 2011 without requiring negotiations between the parties before the City changed engine company staffing levels. The UFA contends that the BCB failed to consider paragraph "ELEVENTH" in its entirety when making its decision and focused only on the expiration date of the agreement. Petitioner further argues that the BCB failed to conduct

a hearing to determine the plain meaning of the language contained in paragraph "ELEVENTH" of the Roster Staffing Agreement. Paragraph "ELEVENTH" reads in pertinent part that "[a]fter the expiration of this Agreement, January 31, 2006, the City in view of factors including, but not limited to changes in technology, structural and non-structural fires, and respond times, may wish to change staffing levels. In the event the City plans to make such changes, the parties will negotiate to the extent required by the New York City Collective Bargaining Law. Should a difference between the parties arise, it is the intent of the parties to work expeditiously to resolve them."

Respondent BCB argues that its Interim Decision was rational, consistent with the applicable law and the evidence presented, and it was within their discretion and therefore, petitioner's application should be dismissed. Respondent BCB avers that it rationally declined to hold a hearing to deduce the plain meaning of Paragraph "ELEVENTH" because there was no issue of disputed fact warranting such a hearing.

Respondent BCB also asserts that its determination that the Roster Staffing Agreement contained a sunset provision was wholly consistent with Public Employment Relations Board and court precedent. The BCB determined that after the expiration date of the Roster Staffing Agreement, the City would bargain "to the extent required by the Collective Bargaining Law". Respondent BCB argues that this imposed no duty upon the City to negotiate. Moreover, respondent BCB argues that petitioner's interpretation of the Roster Staffing Agreement would result in a one-sided arrangement, where the City would be obligated to negotiate a term which the BCB had previously determined to be a nonmandatory subject of bargaining while petitioner's obligation to refrain from litigation or pursuing a grievance would expire. The BCB contends that its determination restores both parties to the status quo prior to the execution of the agreement.

Respondent City argues that the BCB's determination was based upon the plain meaning of the parties' agreement and its own prior precedent. Respondent City further argues that interpreting the phrase, "to negotiate to the extent required by the New York City Collective Bargaining Law...."as an absolute duty to negotiate would render the expiration date of the agreement meaningless. Had the parties intended to impose such a duty to negotiate until resolution or impasse, the parties would have explicitly included language mandating negotiations. The BCB, the agency charged with implementing the New York City Collective Bargaining Law, determined that the Roster Staffing Agreement did not impose an obligation for the City to negotiate with petitioner prior to making changes to staffing levels.

In reply, petitioner avers that respondent BCB failed to accurately interpret Paragraph "ELEVENTH" as a whole. Petitioner contends that the plain language of the entire paragraph indicates an obligation to negotiate before making any staffing level changes. The BCB's interpretation rendered the following language: "In the event the city plans to make such changes, the parties will negotiate to the extent required by the New York City Collective Bargaining Law.

Should differences between parties arise, it is the intent of the parties to work expeditiously to resolve them" meaningless.

Petitioner further argues that certain subjects falling under the scope of a managerial prerogative have been rendered mandatory by the parties' actions. Under the conversion theory in **Matter of Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. Cuevas, 276 A.D.2d 184 (3rd Dept. 2000)**, nonmandatory subjects are converted into mandatory subjects when they are incorporated into a collective bargaining agreement. Petitioner contends that the Roster Staffing Agreement was incorporated into the parties' collective bargaining agreement and consequently the Roster Staffing Agreement was converted into a mandatory subject of bargaining.

It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." **See, Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974).** "Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis." **Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985).** Therefore, this court's role is limited to whether or not respondent BCB's determination was made without a rational basis.

Civil Service Law § 200 *et seq.*, also known as the Taylor Law, requires public employers to bargain in good faith over a term or condition of employment. The Taylor Law permits municipalities to enact laws concerning labor relations as long as they substantially equivalent to the Taylor Law. **Civil Service Law § 212(1), (2).** The Collective Bargaining Law regulates the conduct of labor relations between the City and its employees and mandates the City to bargain in good faith on wages and other terms or conditions of employment. **Administrative Law § 12-307(a).** However, managerial prerogatives are specifically exempt from mandatory bargaining. **Administrative Law § 12-307(b).**

As the agency charged with implementing and interpreting the Collective Bargaining Law, the BCB is accorded deference in matters falling within its expertise. **Matter of Board of Educ. v. New York State Pub. Empl. Relations Bd., 75 NY.2d 660 (1990); Matter of Incorporated Village of Lynbrook v. New York State Public Employment Relations Bd., 48 N.Y.2d 398 (1979).** As such, the issue of whether a certain subject is bargainable should be decided by the BCB. **Leavitt v. Board of Collective Bargaining of the City of N.Y.,79 N.Y.2d 120 (1992).**

This court finds no reason to disturb the BCB's determination in its interim decision. While respondent BCB has previously determined that certain nonmandatory subjects are converted into mandatory subjects by virtue of their incorporation into a collective bargaining agreement, the conversion theory is inapplicable to sunset clauses. "A sunset clause is one which

we have held terminates a benefit at a specific time or upon a specific condition, most often expiration of the stated term of the contract. A sunsetted benefit does not form part of the status quo which an employer is obligated to maintain under either [Civil Service Law] § 209-a.1(d) or (e)." **State of New York (Governor's Office of Employee Relations), 25 PERB ¶ 3058, fn. 1 (1992).** Once the BCB determined that the Roster Staffing Agreement contained a sunset clause, it next determined to what extent the City was required to negotiate with petitioner over staffing changes. Consistent with its prior decisions, respondent BCB determined that changes in staffing levels was a nonmandatory subject of bargaining. **See, Matter of Uniform Firefighters Assn. of Greater N.Y. v. New York City Off. of Collective Bargaining, Bd. of Collective Bargaining, 163 A.D.2d 251 (1st Dept. 1990).** Therefore, under the Collective Bargaining Law, the City was under no obligation to bargain with petitioner before making staffing changes and negotiation would only be required if safety would be impacted. To that end, respondent BCB directed a hearing to be held before a Trial Examiner to establish a record upon which the BCB could determine if there would be a practical impact on safety.

Accordingly, it is hereby,

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondent BCB, having an address at ____________________, and respondent City, having an address at ____________________, do recover from petitioner, having an address at ____________________, costs and disbursements in the amount of $____________, as taxed by the Clerk, and that respondents have execution therefor.

Dated: July 6, 2012

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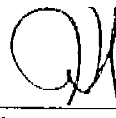

J.S.C.

ALEXANDER W. HUNTER JR

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