

UFADBA, 12 OCB2d 6 (BCB 2019)

(Docket No. BCB-4300-18)

Summary of Decision: The Union alleged that the FDNY violated NYCCBL § 12-306(a)(1) and (4) by failing to negotiate over a new requirement that employees who volunteer for overtime must work the shift, find a replacement, or lose their ability to exchange shifts for 90 days. The Union also alleged that the FDNY failed to negotiate over a change in employees' ability to exchange shifts if they call in sick for an overtime shift. The City argued that the new requirement was intended to reduce understaffing caused by employees using sick leave on days they were scheduled to work overtime, that its actions are within its discretion, and therefore the new requirement is not a mandatory subject of bargaining. The Board found that the portion of the undisputed change relating to the distribution of overtime is a mandatory subject of bargaining but the portion relating to the City's decision to suspend mutuals is not. Accordingly, the petition was granted in part and denied in part. (*Official decision follows*).

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

**UNIFORMED FIRE ALARM DISPATCHERS
BENEVOLENT ASSOCIATION,**

Petitioner,

-and-

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

Respondents.

DECISION AND ORDER

On November 19, 2018, the Uniformed Fire Alarm Dispatchers Benevolent Association ("Union") filed a verified improper practice petition against the Fire Department of the City of New York ("FDNY") and the City of New York ("City"). The Union alleges that the FDNY

unilaterally introduced a new requirement that an employee who volunteers for overtime work the shift, find a replacement, or lose their ability to exchange shifts with another employee for 90 days, in violation of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”) § 12-306(a)(1) and (4). The Union also alleges that the FDNY failed to negotiate over a change in employees’ ability to exchange shifts if they call in sick for an overtime shift. The City argues that the new procedure is intended to reduce understaffing caused by employees using sick leave on days that they were scheduled to work overtime, that its decision is within its managerial discretion, and that the new requirement therefore does not concern a mandatory subject of bargaining. The Board finds that the portion of the undisputed change relating to the distribution of overtime is a mandatory subject of bargaining but the portion relating to the City’s decision to suspend mutuals is not. Accordingly, the petition is granted in part and denied in part.

BACKGROUND

The Union is the certified bargaining representative of all FDNY employees in the Fire Alarm Dispatcher and Supervising Fire Alarm Dispatcher, Levels I and II, titles (“Dispatchers”). The City and the Union are parties to a collective bargaining agreement that was effective through December 31, 2017, and remains in *status quo* pursuant to NYCBBL § 12-311(d).¹ Dispatchers are primarily engaged in receiving and transmitting fire and emergency alarms for incidents

¹ The Union has not alleged a violation of NYCCBL § 12-306(a)(5), which provides that it is an improper practice to “unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract” when that contract remains in *status quo* pursuant to NYCBBL § 12-311(d).

reported through the 911 system. They work tours between eight and 24 hours in facilities that operate 24 hours per day, seven days a week.

On a weekly basis, the FDNY circulates a list of vacant overtime shifts that Dispatchers can fill on a voluntary basis. The FDNY then orders Dispatchers to work the remaining shifts not filled by volunteers.

Prior to July 2018, a Dispatcher who volunteered for an overtime shift could remove their name from the list before the shift commenced with no consequence. Also, for many years, the FDNY has allowed Dispatchers to exchange tours, a process known as a “mutual.”² Prior to July 2018, a Dispatcher’s ability to use mutuals was not impacted if they called out sick for an overtime shift.

Since July 2018, if a Dispatcher calls out sick for an overtime shift, regardless of whether the shift was ordered or the employee volunteered, the Dispatcher’s ability to use mutuals is suspended for 90 days.³ In addition, the FDNY has stopped permitting Dispatchers who volunteered for an overtime shift to later remove their name from the list of overtime shifts, unless the Dispatcher finds a replacement who could work the shift. In the event the Dispatcher does not work or find a replacement, the FDNY will now suspend that Dispatcher’s ability to use mutuals

² The use of mutuals is not addressed in the parties’ collective bargaining agreement. Dispatchers seeking to exchange tours must normally request the switch at least 48 hours prior to the first mutually exchanged tour, but in the event of an emergency, they may request a mutual less than 48 hours prior to the first mutually exchanged tour.

³ The FDNY also began requiring Dispatchers to provide medical documentation if they called out sick for an overtime shift. The FDNY’s Time and Leave Manual provides that: “Medical documentation is recommended for all sick leave usage, regardless of duration, and required if the absence is more than three (3) consecutive workdays to avoid placement in steps.” (Pet., Ex. A) Regardless of whether medical documentation was provided, a Dispatcher who calls out sick for an overtime shift now loses the ability to use mutuals for 90 days. The petition does not allege the requirement to provide medical documentation as a unilateral change.

for 90 days. According to the City, these changes are intended to reduce understaffing caused by employees using sick leave on days they are scheduled to work overtime.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the FDNY violated NYCCBL § 12-306(a)(1) and (4) by making a unilateral change to a term and condition of employment, a mandatory subject of bargaining.⁴ The Union asserts that this Board has held that overtime distribution is a mandatory subject of bargaining. Also, relying primarily on decisions issued by the New York Public Employment Relations Board, it maintains that the ability to use mutuals is a mandatory subject of bargaining.

The Union argues that the NYCCBL does not state that the right to restrict mutuals or an employee's ability to retract their willingness to work overtime are reserved to the City. Neither of these issues implicate staffing or the City's right to maintain "the efficiency of governmental operations." (Rep. ¶ 18) When there is a mutual exchange, there is no staffing issue because

⁴ NYCCBL § 12-306(a) provides in pertinent part:

It shall be an improper practice for a public employer or its agents:

(1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 12-305 of this chapter;

* * *

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

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

someone is assigned to work the shift. Similarly, the FDNY can always compel the original volunteer to work the overtime shift they initially agreed to cover.

The Union requests that the Board order the FDNY to rescind the change in practice, immediately bargain in good faith, make whole any affected Dispatchers, post a notice to employees, and order other remedies the Board may deem just and proper.

City's Position

The City argues that the Union has failed to show that it made a change to a mandatory subject of bargaining. It maintains that NYCCBL § 12-307(b) gives management the right to direct its employees and determine the methods, means and personnel by which government operations are conducted.⁵ The City contends that mutuels are a privilege and not a mandatory subject of bargaining. As a result, it argues that the suspension of employees' ability to use mutuels when they call out sick on an overtime assignment is not a mandatory subject of bargaining. Similarly, the City asserts that its decision to prohibit Dispatchers from removing their names from the overtime list is also not a mandatory subject of bargaining. The City must ensure that all shifts are covered to provide adequate emergency services to the public. Therefore, the City argues that the

⁵ NYCCBL § 12-307(b) provides, in pertinent part, that.

It is the right of the city . . . to determine the standards of services to be offered by its agencies; . . . direct its employees; . . . determine the methods, means and personnel by which government operations are to be conducted; . . . Decisions of the city . . . on those matters are not within the scope of collective bargaining, but . . . questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

FDNY's actions were intended to preserve the continuity of service and fall squarely within the employer's discretion to maintain the efficiency of its operations.⁶

DISCUSSION

The Union argues that the FDNY violated NYCCBL § 12-306(a)(1) and (4) in two ways. First, it argues that the FDNY failed to negotiate over a new requirement that Dispatchers who volunteered for an overtime shift must work the shift, find a replacement, or lose their ability to exchange shifts for 90 days. The second claim is that the FDNY failed to negotiate over a change in the Dispatchers' ability to use mutuals, specifically a suspension of the use of mutuals for 90 days if a Dispatcher calls in sick for an overtime shift (scheduled or volunteer). The Board finds that the undisputed change relating to the distribution of overtime is a mandatory subject of bargaining but that the FDNY's decision to suspend mutuals in certain instances is not a mandatory subject of bargaining.

Under NYCCBL § 12-306(a)(1) and (4), it is an improper practice for a public employer "to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees." It is well established 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." *ADW/DWA*, 7 OCB2d 26, at 18 (BCB 2014), *affid.*, *Matter of City of New York v. Uniformed Firefighters Assn., Local 94 IAFF, AFL-CIO*, 2018 NY Slip Op 30453(U) (Sup. Ct. N.Y. Co. Mar. 14, 2018) (Bluth, J.)

⁶ The City also maintains that the Union has not alleged facts to show an independent NYCCBL § 12-306(a)(1) violation. We find that that the Union only alleges that NYCCBL § 12-306(a)(1) was derivatively violated by the City's failure to bargain in good faith. Therefore, we do not consider an independent NYCCBL § 12-306(a)(1) violation here.

(quoting *DC 37, L. 420*, 5 OCB2d 19, at 9 (BCB 2012)); *see also PBA*, 63 OCB 4, at 10 (BCB 1999). To establish that a unilateral change has occurred, the Union “must demonstrate that (i) the matter sought to be negotiated is, in fact, a mandatory subject and (ii) the existence of such a change from existing policy.” *DC 37, L. 436*, 4 OCB2d 31, at 13 (BCB 2011) (internal quotation marks omitted) (quoting *DC 37, 79 OCB 20*, at 9 (BCB 2007)). It is undisputed that the FDNY made the change regarding overtime procedures in the summer of 2018. Essentially, the FDNY began to require employees to either work or find a replacement for voluntary overtime shifts that they either could not or no longer desired to work.

The Board has long held that “when and how much overtime to authorize are not mandatory subjects of bargaining” because it is essential to how government operations are conducted. *See, e.g., UFA*, 9 OCB2d 19, at 9 (BCB 2016). However, “the procedures or methods for the distribution of available overtime are mandatory subjects of bargaining under the NYCCBL.” *Id.*; *see also DC 37, 67 OCB 3*, at 8-9 (BCB 2001); *Local 621, 51 OCB 34* (BCB 1993). The rationale for this distinction is that bargaining over procedures by which overtime is assigned would not interfere with the employer’s decision to schedule overtime. *See Local 621, 51 OCB 34*, at 13 (finding a demand seeking the equal distribution of overtime to be a mandatory subject of bargaining); *DC 37, 67 OCB 3*, at 7 (finding an FDNY cap on the amount of overtime individual Emergency Medical Service employees can earn to be a mandatory subject of bargaining); *see also UFA, 9 OCB2d 19*, at 9.

For example, the Board has found the implementation of overtime eligibility criteria to be a mandatory subject of bargaining when the criteria did not concern how much overtime the FDNY determined was necessary but rather how the overtime was distributed after the FDNY determined

it was necessary.⁷ See *UFA*, 9 OCB2d 19, at 9-10; see also *DC 37*, 67 OCB 3, at 7. As the Board explained in *LEEBA*, 3 OCB2d 29 (BCB 2010), there is a “distin[ction] between decisions regarding ‘when or how much overtime the [employer] deems necessary’ and ‘the system that the [employer] utilizes in distributing overtime to employees, after it has determined the need for overtime.’ The former is managerial prerogative, the latter is not.” *Id.* at 33-34 (quoting *Local 924*, 1 OCB2d 3, at 9); see also *DC 37*, 67 OCB 3, at 7.

Similarly, the change at issue here addresses the distribution of overtime after the FDNY had determined the need for overtime. It does not concern the decision to authorize overtime or how much overtime is necessary. Indeed, it is only after the FDNY has determined what overtime is needed, and specific employees have volunteered and been assigned to work overtime, that the procedural change at issue comes into play. Consequently, requiring bargaining over this procedure will not impact the FDNY’s decisions regarding when or how much overtime is necessary. We note that, in effect, the change shifted the burden of finding a replacement to work a shift from the employer to the employee. While it may be true, as the City alleges, that the intent of the change was to reduce understaffing caused by employees using sick leave on days they were scheduled to work overtime, it is clear that a material change was made to procedures employees must follow regarding overtime assignments for which they volunteered. Thus, we find that the change at issue concerns the distribution of overtime and, accordingly, that the City breached its duty to bargain over the change in the overtime procedures in violation of NYCCBL § 12-306(a)(4). When an employer violates its duty to bargain in good faith, there is also a derivative violation of NYCCBL § 12-306(a)(1). See *UFA*, 9 OCB2d 19, at 11, n. 11; *DC 37*, 8 OCB2d 11,

⁷ *UFA*, 9 OCB2d 19, concerned a change in policy that deemed employees in certain Engineer positions ineligible for overtime if, among other reasons, the employee, over a 52-week period, exceeded the Marine Engineer Division average overtime for the same period by 75 hours.

at 23 (BCB 2015); *Local 621, SEIU*, 2 OCB2d 27, at 14 (BCB 2009); *USCA*, 67 OCB 32, at 8 (BCB 2001).

We note that our conclusion does not encompass the City's decision to suspend mutuals for employees who do not follow the new procedure or for employees who call in sick on an overtime shift. In this case, in part the suspension of mutuals is an incentive to encourage compliance with a procedure for the distribution of voluntary overtime that we have found to be a mandatory subject of bargaining and a disincentive to calling out sick when scheduled to work overtime. The procedure by which employees request an exchange of tours is not directly at issue. Therefore, while we find that there is a duty to bargain over the distribution of overtime procedures, we do not find that there is a separate duty to bargain over the suspension of mutuals.⁸

Accordingly, the petition is granted in part and denied in part.

⁸ Regarding mutuals, this Board has consistently held that bargaining demands seeking to "give employees the right to reschedule work time or time off" are non-mandatory subjects of bargaining. *UFA*, 43 OCB 4, at 283 (BCB 1989), *affd.*, *Matter of Uniformed Firefighters Assn. of Greater NY v. NYC Office of Collective Bargaining*, Index No. 12338/89 (Sup. Ct., N.Y. Co. Oct. 30, 1989) (Santaella, J.), *affd.*, 163 A.D.2d 251 (1st Dept. 1990); *see also COBA*, 27 OCB 16, at 44 (BCB 1981). We do not find *COBA*, 10 OCB2d 19 (BCB 2017), to be inconsistent with our prior decisions. That case involved a claim of direct dealing, and because the parties had a contract provision governing mutuals, we did not reach the issue of whether mutuals were a mandatory subject of bargaining.

ORDER

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

ORDERED, that the verified improper practice petition, docketed as BCB-4300-18, filed by the Uniformed Fire Alarm Dispatchers Benevolent Association against the Fire Department of the City of New York and the City of New York, be, and the same hereby is, granted to the extent that it asserts that the Fire Department of the City of New York violated NYCCBL § 12-306(a)(1) and (4) by failing to negotiate over a new requirement that employees who volunteer for overtime must work the shift or find a replacement; and it is further

ORDERED, that the referenced improper practice petition be and hereby is dismissed with respect to the remaining claims; and it is further

ORDERED, that the Fire Department of the City of New York rescind its procedure requiring Dispatchers who volunteered for an overtime shift to work the shift or find a replacement until such time as it bargains over such provision in accordance with its obligations under the New York City Collective Bargaining Law; and it is further

DIRECTED, that the Fire Department of the City of New York post the attached Notice of this Decision and Order for no less than 30 days at all locations used by the New York City Fire Department for written communications with employees represented by the Union.

Dated: April 8, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLNES
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER



OFFICE OF COLLECTIVE BARGAINING

OFFICE ADDRESS

100 Gold Street
Suite 4800
New York, New York 10038

MAILING ADDRESS

Peck Slip Station
PO Box 1018
New York, New York
10038-9991

212.306.7160
www.ocb-nyc.org

IMPARTIAL MEMBERS

Susan J. Panepento, Chair
Alan R. Viani

LABOR MEMBERS

Charles G. Moerdler
Gwynne A. Wilcox

CITY MEMBERS

M. David Zurndorfer
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DEPUTY CHAIRS

Monu Singh
Steven Star

**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 12 OCB2d 6 (BCB 2019), determining an improper practice petition between the Uniformed Fire Alarm Dispatchers Benevolent Association against the Fire Department of the City of New York and 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:

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Fire Department of the City of New York
(Department)

Dated: _____ (Posted By)
(Title)