

UFA, 4 OCB2d 30 (BCB 2011)
(IP/Scope) (Docket No. BCB-2928-11)

Summary of Decision: The UFA and UFOA filed a petition alleging that the City's actions in reducing Firefighter engine company staffing levels violates the duty to bargain and to maintain the *status quo*, and creates a practical impact on the safety of their members. The City argued that the parties' staffing agreement has expired and there is no duty to bargain over the subject. The Board found that the Unions' claims of a violation of the duty to bargain and *status quo* must be dismissed, but that the Unions have alleged sufficient facts to raise a material question as to whether the City's decision to reduce engine company staffing levels creates a practical impact on the safety of Firefighters and Fire Officers, and it directs that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which the Board may determine whether there has been a practical impact on the safety of the affected employees. (**Official decision follows.**)

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

**In the Matter of the
Improper Practice/Scope of Bargaining Proceeding**

-between-

**UNIFORMED FIREFIGHTERS ASSOCIATION OF
GREATER NEW YORK, LOCAL 94, IAFF, AFL-CIO,
and UNIFORMED FIRE OFFICERS ASSOCIATION,
LOCAL 854, IAFF, AFL-CIO,**

Petitioners,

-and-

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

Respondents.

INTERIM DECISION AND ORDER

On January 31, 2011, the Uniformed Firefighters Association of Greater New York, Local

94, IAFF, AFL-CIO (“UFA”), and the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO (“UFOA”) (collectively “Petitioners” or “the Unions”), jointly filed a combined verified improper practice and scope of bargaining petition as well as a petition for injunctive relief against the City of New York (“City”) and the New York City Fire Department (“Department” or “FDNY”). The Unions challenge the City’s actions in reducing Firefighter engine company staffing levels and failing to maintain the terms of the Roster Staffing Agreement previously stipulated to by the parties. The Unions assert that the City’s unilateral actions and its refusal to negotiate over either these changes or the impact thereof on Firefighters, violate § 12-306(a), subdivisions (1), (4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). The Unions also allege, alternatively, that the City’s actions, even if within its prerogative, will result in a practical impact on the safety of Firefighters, and that the City therefore has a duty to bargain over the alleviation of that impact pursuant to NYCCBL § 12-307(b). The City argues that the Roster Staffing Agreement, as extended by the parties, has expired; that the City has no duty to bargain over its staffing decisions in the circumstances of this case; and that the Unions have failed to show that the changes implemented will have a practical impact on the Unions’ members.

On February 14, 2011, the Board of Collective Bargaining denied the Unions’ petition for injunctive relief. On February 28, 2011, the City filed its answer to the Unions’ petition. The Unions filed their reply on March 15, 2011. A conference in this matter was held before a Trial Examiner designated by the Office of Collective Bargaining (“OCB”) on March 29, 2011. The Board finds that the Unions’ claims of a violation of the duty to bargain and *status quo* must be dismissed, but that the Unions have alleged sufficient facts to raise a material question as to whether

the City's decision to reduce engine company staffing levels creates a practical impact on the safety of Firefighters and Fire Officers, and it directs that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which the Board may determine whether there has been a practical impact on the safety of the affected employees.

BACKGROUND

Prior History of Firefighter Staffing

The staffing issue raised in this case has been addressed in numerous proceedings before this Board. From the 1971-1973 contract through the 1984-1987 contract, the collective bargaining agreements between the UFA and the City contained a "minimum manning" provision that prescribed that five people would be assigned to all firefighting companies, and other specified numbers to certain other listed companies. In negotiations for a successor to the 1984-1987 contract, the City demanded that the manning provision be removed from the contract. In *UFA*, 43 OCB 4, at 232-247 (BCB 1989), *aff'd sub nom. Matter of Uniformed Firefighters Ass'n v. New York City Office of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept. 1990), a scope of bargaining decision issued in February, 1989, the Board addressed at length the parties' arguments on this issue and held that the matter of staffing was a nonmandatory subject of bargaining. Therefore, the Board held that the "minimum manning" provisions could be omitted from the successor contract without negotiations. *Id.* at 241-243. The Board also held that because the City had not yet proposed a reduction in staffing levels, the deletion of the "minimum manning" provision alone could not result in a practical impact on the safety or

workload of the firefighters at that time. *Id.* at 243-244. Thus an inquiry into the practical impact of management's decision on staffing would be necessary only if the City took affirmative steps to change the existing staffing levels. The Board also found, however, that the Union had made a sufficient showing to warrant a hearing on its claim of practical impact on the safety of firefighters in companies in which staffing had already been reduced. *Id.* at 244-247.

Accordingly, the Board ordered that hearings be held to consider whether the reduced manning levels in certain firefighting engine companies, from five-man to four-man crews, created a practical impact on the safety and/or workload of firefighters. In July 1989, the Fire Department issued a draft order setting forth its proposed roster staffing program, adaptive response policy and revised engine company tactics (hereinafter collectively referred to as the "roster staffing program") which included a broader reduction of minimum manning levels in most firefighting engine companies from five-man to four-man crews. Consequently, the scope of the question originally noticed for hearing by the Board was expanded to include the impact of all of the elements of the City's newly proposed plan. OCB appointed Professor Walter Gellhorn of Columbia University School of Law as a special Trial Examiner to conduct the hearings and to report to the Board. After the hearings were concluded, and upon review of a massive record of testimony, scores of exhibits, voluminous briefs, and Professor Gellhorn's report, in December 1989 the Board issued its decision in *UFA*, 43 OCB 70 (BCB 1989), *aff'd sub nom. Matter of Uniformed Firefighters Ass'n v. New York City Office of Collective Bargaining*, Index No. 1065 (Sup. Ct. N.Y. Co. Nov. 26, 1990). There, the Board found that the City's plan to assign four rather than five firefighters to certain engine companies, considered together with the City's roster manning program, adaptive response policy, and the revision of engine company tactics, in combination did not result in a practical impact on

firefighter safety. *Id.* at 4-7. The Board emphasized that its decision “is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future.” *Id.* at 8.

In January, 1990, the City implemented its roster staffing program. In March of that year, the UFA filed a new scope of bargaining proceeding seeking a finding that the roster staffing program *as implemented* by the Fire Department differed from that proposed by the City in the previous hearings and resulted in a practical impact on the safety and workload of firefighters. The City moved to dismiss on *res judicata* grounds. The Board, in an interim decision, *UFA*, 45 OCB 39 (BCB 1990), denied the motion, finding that while the practical impact question in the earlier proceeding focused on the elements of the plan *proposed* by the Department, the issue in the later case focused on the roster staffing plan *as actually implemented*. Thereafter the Board issued a second interim determination in October 1991, in *UFA*, 47 OCB 49 (BCB 1991), in which the Board rejected the Union's contention that allegations of an impact on safety could be determined to be a *per se* practical impact (*i.e.*, undisputed or apparent without the need of a hearing) and, instead, found that it was a matter in dispute that could be determined only after a hearing. *Id.* at 25-26. The Board then found that the Union's allegations of impact were sufficient to warrant a hearing, and it directed that such hearing be held.

OCB again designated Professor Walter Gellhorn as a special Trial Examiner. Safety impact hearings commenced anew in 1992. Professor Gellhorn died after completing extensive proceedings but before the Board issued a decision. In January of 1996, the City and the UFA agreed to resolve

the dispute by entering into a stipulation of settlement, known as the Roster Staffing Agreement. Under the Agreement, the UFA agreed to withdraw its scope of bargaining (safety impact) petition, and the Department agreed to designate 60 engine companies (known as staffing level C + 60) to be staffed with five firefighters at the outset of each tour, with the remainder of the engine companies staffed with four firefighters at the outset.¹ However, under the Agreement, if the average rate of absent firefighters during the previous 365 days is greater than 7.5% at the beginning of a month, the Commissioner of FDNY has the discretion to reduce the number of five-firefighter engines from C + 60 to C + 11 until the average is again determined the next month. The Roster Staffing Agreement, by its terms, was to expire after January 31, 2006. By further agreement of the parties, evidenced by a letter dated October 27, 2005, appended to the parties' collective bargaining agreement, the expiration of the Agreement was extended to January 31, 2011 without any change in language.

In a related matter, *UFA*, Docket No. BCB-2298-02 (INJ), filed in August 2002, the UFA sought injunctive relief to prevent the City from reducing the number of five-firefighter engine companies from the then-existing 64 companies to the 60 provided in the Roster Staffing Agreement. (The pleadings did not explain the reasons for or dates on which the additional four companies were added.) A majority of the Board voted to deny the injunctive relief petition. Pursuant to standard practice, no written opinion was issued and the parties were informed of the Board's determination by letter. Thereafter, the underlying improper practice petition was withdrawn pursuant to a

¹ Pursuant to the Note contained in subparagraph C of ¶ 3.1.1 of AUC 287, the Department order that implemented roster staffing, "Staffing level C means all Engine Companies not in Group 1 are staffed at four Firefighters." Paragraph 1.1 of that order defines Group 1 as including all Ladder Companies, Rescue Companies, Squad Companies, and Hazardous Materials Technician Units, all of which are staffed with five Firefighters at the beginning of each tour. (Unions' Exhibit X).

stipulation, and the case was closed.

Finally, the Board has determined several challenges to the arbitrability of disputes that have arisen relating to aspects of the roster staffing program. In two cases involving grievances that claimed a violation of identified written policies of FDNY, the grievances were found to be arbitrable. *UFA*, 75 OCB 19 (BCB 2005) (grievance over staffing memorandum claimed to violate written FDNY policies; held arbitrable); *UFA*, 63 OCB 25 (BCB 1999) (grievance concerning scheduling of roster staffing overtime, claimed to violate written FDNY policy; held arbitrable). In one case, a grievance claiming that a violation of a “guarantee” made in a Board case constituted a violation of the collective bargaining agreement, the grievance was found not arbitrable. *UFA*, 49 OCB 18 (BCB 1992) (grievance challenging FDNY’s implementation of roster staffing overtime, claimed to violate a letter submitted in practical impact case; held not arbitrable because no nexus to the agreement). Finally, in one case, a grievance that claimed a violation of the Roster Staffing Agreement was found not arbitrable. *UFA*, 75 OCB 18 (BCB 2005) (grievance over reduction in number of five-firefighter engine companies from 61 to 11, claimed to violate the Roster Staffing Agreement; held not arbitrable).²

Previous Changes in Staffing Under the Agreement

There currently are 194 operational engine companies in the Department. Under the Roster Staffing Agreement, 60 engine companies were staffed with a fifth firefighter at the outset of each tour (also referred to as C+60), and 134 engine companies were staffed with four firefighters at the

² Comparing and contrasting to the facts of prior Board decisions, the Board found, here, that the Roster Staffing Agreement was not incorporated into the parties’ collective bargaining agreement, and that the two documents were not “interrelated” so as to render a claimed violation of the former arbitrable under the latter’s grievance procedure. 75 OCB 18, at 11-12.

outset of each tour. The number of engine companies that were staffed at the outset with five firefighters was reduced on several occasions subsequent to the execution of the Roster Staffing Agreement in 1996. In June 2003, the number of five-firefighter engine companies was reduced to 40 pursuant to an Interim Modification to the Roster Staffing Agreement. This number gradually was restored to 60 in 2004. Additionally, in accordance with the terms of the Roster Staffing Agreement, the number of five-firefighter engine companies was reduced from 60 to 11 on several occasions (specifically, from December 2004 to February 2005, from December 2009 to February 2010, and from August to September 2010) when firefighter medical leave exceeded 7.5% for over a 365-day period.

Other Collective Bargaining Agreements During the Relevant Periods

On October 27, 2005, the City and the UFA entered into a Memorandum of Agreement for the period June 1, 2002 through July 31, 2006, followed, on July 28, 2006, by a full collective bargaining agreement for the same period, from June 1, 2002 through July 31, 2006. On March 2, 2007, the parties entered into a Memorandum of Agreement for the period from August 1, 2006 through July 31, 2008, followed, on December 11, 2007, by a full collective bargaining agreement for the same period, from August 1, 2006 through July 31, 2008. Thereafter, on November 23, 2009, the City and the UFA entered into a collective bargaining agreement for the period from August 1, 2008 through July 31, 2010.

Recent Events

On October 12, 2010, City Labor Commissioner James F. Hanley wrote to the President of the UFA, Stephen Cassidy, stating:

As you know, the January 30, 1996 Stipulation of Settlement in Case No. [BCB-]

1265-90, known as the “Roster Staffing Agreement”, as extended by our letter agreement dated October 27, 2005, expires on January 31, 2011.

Following expiration of the Roster Staffing Agreement by its terms, the City presently intends to implement a policy that provides the Fire Department the discretion to suspend the 24-hour mutual privilege to meet operational needs if the average medical leave for firefighters exceeds 7.50% for the preceding 365 day period. Medical leave will be reviewed on the first day of the month, and the suspension of 24-hour mutuals will commence on the second day of the month if the medical leave is over 7.5%. The suspension will remain in effect until the next review is conducted on the first day of the next month.

Although the City has no obligation to bargain with the UFA over its decision to implement this policy, we are willing to meet with the UFA to discuss any concerns the union may have.

On November 1, 2010, the UFA, through its counsel, wrote in response to the Hanley letter, acknowledging that, “As you stated, the [Roster Staffing Agreement] . . . expires on January 31, 2011,” and reminding the City that, pursuant to paragraph “Eleventh” of the Agreement, the parties had agreed that:

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.

On November 23, 2010, at the UFA’s request, the City and the UFA met to discuss the October 12 Hanley letter. In response to the Union’s inquiry, Commissioner Hanley stated that the City intended to discontinue the Stipulation upon its expiration on January 31, 2011; that the City would negotiate the effect of that decision to the extent set forth in paragraph “Eleventh” of the Stipulation; and that effective February 1, 2011, engine companies would start each tour with four firefighters (known as C level), while ladder, rescue and squad companies would start each tour with five firefighters.

In a letter dated December 9, 2010, counsel for the UFA wrote to the City, acknowledging Commissioner Hanley’s statements at the November 23 meeting, and continuing:

The City's position raises a number of issues which you did not address. First, please advise the UFA as to the City's position regarding the number of five-man engine companies when the Agreement expires. Second, please describe or forward the actual staffing plan that the City intends to implement as of February 1, 2011. Further, please advise the UFA of the City's position with regard to the 96 hours of overtime opportunities.

In light of these requests, the UFA believes another meeting will be necessary, and would appreciate it if you or your representative would contact me in this regard.

A further meeting between representatives of the City, the UFA, and the UFOA was held on December 22, 2010 at which these matters were discussed. Thereafter, in a follow-up letter in response, dated December 30, 2010, Commissioner Hanley reminded the UFA that the Stipulation would expire on January 31, 2011, and stated:

To the extent that the Fire Department continues to employ the roster staffing model, the City of New York expects to continue to provide the 96 hours of Roster Staffing overtime opportunities in the same manner as before.

In another letter to the UFA sent the same date, Commissioner Hanley explained that, on or after February 1, 2011,

Four (4) Hazardous Materials Technician Units shall continue to be designated as five (5) Firefighter companies and shall be staffed with five (5) Firefighters at the beginning of each tour.

All Ladder Companies, five (5) Rescue Companies and seven (7) Squad Companies shall be staffed with no fewer than five (5) Firefighters at the beginning of each tour.

All Engine Companies shall be staffed with no fewer than four (4) Firefighters at the beginning of each tour.³

On January 18, 2011, the Fire Department sent a letter to the UFA, enclosing "for your review and comments" copies of All Units Circular ("AUC") 287 and AUC 287 Addendum 1 setting

³ The staffing level set forth in the Hanley letter corresponds to what has been defined as C level; *see* note 2, *supra*.

forth the Department's guidelines and procedures for implementing the roster staffing program, effective February 1, 2011.

The City, in an affidavit from FDNY's Chief of Operations, a 31-year veteran of the Department, alleges that the adaptive response procedures and engine company tactics now in place under AUC 287 and its Addendum have not materially changed from the plans and procedures that were considered and approved by the Board in *UFA*, 43 OCB 70 (BCB 1989) and which were implemented in 1990. The City also notes that the Roster Staffing Agreement was limited to 60 engine companies and, for the last 15 years, 134 of the Departments' 194 engine companies have operated with four-firefighter staffing without difficulty and the Unions have not claimed that Firefighters in those companies were subject to increased danger or greater physical exertion. The Unions allege that operational changes as well as technological changes made in the FDNY since 2005 have made it more difficult for Firefighters to operate safely with reduced levels of staffing.

The Unions point to a number of factors:

An increase in the number of fire companies taken out of service for building inspections, training, annual medicals, and in the number of specialized units, all decreasing the number of units available for a fire response;

The use of personal protective equipment known as "Bunker Gear" together with the tools and radio that Firefighters use adds 100 to 120 pounds of weight that must be carried, and also causes added heat stress; and

Demands on Firefighters have multiplied due to their response to an increased number of Emergency Medical Service calls, natural disasters, hazardous material incidents, and acts of terrorism.

The City agrees that some conditions have changed since the date the Roster Staffing Agreement was executed, alleging the following changes that have been implemented, among others, which it contends has made firefighting more effective and safer:

- Providing new Bunker Gear
- Providing thermal imaging cameras for all Ladder Companies
- Implementing the “Fast Truck” policy
- Issuing personal safety systems to all firefighters and company officers
- Training, deployment, and use of portable fans to clear smoke
- Issuing gas meters to all Ladder Companies
- Training and establishing Hazardous Materials Unit Engine Companies
- Increasing the duration of Probationary Firefighters School from 6 to 18 weeks

POSITIONS OF THE PARTIES

Unions’ Position

The Unions contend that the City’s failure and refusal to negotiate changes to levels of Firefighter staffing is, for several reasons, a violation of the duty to bargain that is prescribed by NYCCBL § 12-306(a)(4). First, staffing affects Firefighter safety, which is a mandatory subject of bargaining. In recognition of this fact, the parties in the Roster Staffing Agreement agreed, in paragraph “Eleventh,” that in the event the City “plans to make such changes [in staffing levels], the parties will negotiate” The City’s actions, here, constitute a repudiation of that agreement, in violation of the duty to bargain.

Second, to the extent the Board held, in *UFA*, 43 OCB 4 (BCB 1989), that Firefighter staffing was a non-mandatory subject, the parties’ negotiated settlement on the issue of staffing, the Roster Staffing Agreement, has been incorporated into the parties’ collective bargaining agreement (“CBA”) and, as such, has been “converted” to a mandatory subject pursuant to the conversion theory of negotiability articulated by PERB in *City of Cohoes*, 31 PERB ¶ 3020 (1998), *aff’d sub nom Matter of Uniformed Firefighters of Cohoes v. Cuevas*, 276 A.D.2d 184 (3d Dept. 2000), *app. denied*, 96 N.Y.2d 711 (2001).

Third, the Unions submit that even if the staffing issue were not a mandatory subject of bargaining, because the Roster Staffing Agreement has been incorporated into the parties' CBA, it must be continued in effect until a new agreement is negotiated, pursuant to the provisions of the "Triborough Law," Civil Service Law § 209-a(1)(e). For all these reasons, the City's failure to bargain over changes in Firefighter staffing is violative to the duty to bargain.

The Unions reject the City's argument that the legal positions stated above are inapposite because the Roster Staffing Agreement has expired pursuant to a "sunset" provision. Unlike the cases relied upon by the City, the Roster Staffing Agreement does not state that its terms expire "by operation of the agreement and with no further action by either party;" neither does it permit the City "absolute discretion" not to continue the agreement. Rather, the Roster Staffing Agreement provides, in paragraph "Eleventh," that "After the expiration of this Agreement . . . In the event the City plans to make such changes [regarding staffing levels], the parties will negotiate" A reasonable person reading this plain language of the Roster Staffing Agreement could not conclude that the City would have "absolute discretion" to make unilateral changes in staffing. Instead, the Unions assert that the language of this paragraph provides a date for the *potential negotiation* of staffing levels, not a unilateral change as the City has done in this case.

The Unions further assert that the City's unilateral change in the roster staffing policy is inherently destructive of the UFA's and UFOA's status as bargaining representatives for Firefighters and Fire Officers, and that this interference with their effectiveness also interferes with the rights of employees in violation of NYCCBL § 12-306(a)(1).

In addition, the Unions argue that the City's decision to reduce Firefighter staffing levels creates a clear *per se* threat to the safety and well-being of UFA and UFOA members. By changing

staffing levels from five to four, the City is endangering the safety of all personnel at a fire, Firefighters as well as Fire Officers. Time is of the essence in extinguishing a fire. Fewer Firefighters on the scene means more time to extinguish the fire. The more time it takes to extinguish a fire, the faster the fire grows and the hotter the fire burns. Reduced Firefighter crews mean less “water-on-fire time,” that is, more time is required to connect and pull the hose and there are fewer Firefighters to enter the burning structure to fight the blaze. Fires today burn faster and hotter due to the flammable plastics and materials used in products and construction. If too much time passes, the window of opportunity passes and it becomes more difficult to rescue victims or stop the fire spread. The FDNY’s own regulations state that two engine companies are needed to fight fires because they recognize that three Firefighters from the first arriving engine company are insufficient to stretch and operate a first hoseline. The Unions submit that the lives of those three Firefighters should not have to depend on the arrival of a second engine company, which may be several minutes later.

The roster staffing plan being implemented now by the City differs from that proposed in the hearings held by Professor Gellhorn in 1989 in a number of respects, most significantly because under the 1989 plan the City projected that there was a high probability that the first arriving engine company would be staffed with five Firefighters, while the present plan has zero five-Firefighter engine companies. The Unions assert that the fifth Firefighter on the 60 engine companies that were so staffed (under the Roster Staffing Agreement) is critically needed to ensure safe firefighting operations and to avoid life threatening injuries.

The reduction in staffing in engine companies will also affect ladder companies, which, due to staffing shortages, in numerous instances will have to operate without an “outside vent”

Firefighter, a position that is responsible for forcing open windows to vent smoke, heat, and flammable gasses.

The reduction in staffing also will result in a significant increase in workload for Firefighters fighting interior structure fires. Each member of a five-person firefighting crew has specific tasks to perform. Reducing the number of Firefighters assigned to a fire company results in a significant increase in workload which is unreasonably excessive and burdensome. This workload increase will result in greater physical stress, overexertion, and a greater risk of cardiac arrest or stroke.

The City has a duty under the NYCCBL to bargain over the alleviation of the clear practical impact on Firefighter and Fire Officer safety and workload that will result from the changes in staffing. Alternatively, the nature of the changes at least mandates that a hearing be held on the practical impact claim in this case.

For the above reasons, the Unions submit that the petition should be granted and the City ordered to rescind the reductions in engine company staffing, and to bargain before making any future changes. Alternatively, the Unions contend that the nature of the staffing changes at least mandates that a hearing be held on the practical impact claim in this case.

City's Position

The City contends that the Unions have failed to establish any violation of the duty to bargain. The City observes, initially, that several of the Unions' theories are predicated on the contention that the roster staffing Stipulation continues either as a matter of contract or as part of the *status quo*. The City argues that those contentions are incorrect. The City points out that the Stipulation contains an express expiration or "sunset" date which, in the original, was January 31, 2006. The parties thereafter confirmed that the Stipulation had a specific expiration date when they

entered into a letter agreement that extended the expiration date to January 31, 2011. The Board already has held that the Stipulation has its own expiration date and that it is independent from and not incorporated into the parties' collective bargaining agreement. *UFA*, 75 OCB 18 (BCB 2005).

The City notes that the case law from PERB and the courts is clear that when parties have included an express expiration or "sunset" date in an agreement, that date must be given effect and the contractual obligation ceases upon expiration. The duty to bargain or to maintain the *status quo* does not require that a provision be continued beyond an express "sunset" date.

The City argues that the contention that the Stipulation, itself, compels bargaining before any change in staffing levels, is also without merit. In paragraph "Eleventh" of the Stipulation, the parties expressly agreed that, after expiration of the Stipulation, they would negotiate "to the extent required by the New York City Collective Bargaining Law." According to the City, this only means that the City will comply with whatever bargaining duties are imposed by the NYCCBL; it does not create any independent post-expiration obligation under the Stipulation.

The City notes that the Unions argue that the Stipulation continues in effect pursuant to the provisions of what they refer to as the "Triborough Law," which is Civil Service Law § 209-a(1)(e). According to the City, that law is inapplicable to disputes arising under the NYCCBL. The analog under the NYCCBL is § 12-306(a)(5), which requires the continuation of terms and conditions established in a prior contract during a "period of negotiations" as defined in § 12-311(d) of the statute. This *status quo* provision does not apply here because the City and the Unions are not in a period of negotiations as defined in the law, and the Stipulation is neither a collective bargaining agreement nor is it incorporated into the collective bargaining agreement. Moreover, even assuming *arguendo* that the case law under the "Triborough Law" were relevant, it is clear from the decisions

of PERB and the courts that the *status quo* which an employer is required to maintain under Civil Service Law § 209-a(1)(e) does not include a “sunsetting” benefit. In this regard, the Unions’ reliance on the Court of Appeals’ decision in *Matter of Professional Staff Congress v. Public Employment Relations Board*, 7 N.Y.3d 458 (2006) is misplaced, for the Court there explicitly recognized the effect a sunset clause would have on a *status quo* claim, and based its affirmance of the continuation of a contractual provision on the *absence* of a sunset provision such as the parties had included in a prior agreement.

The City contends that the Unions’ claim that the subject of Firefighter staffing has been “converted” from a non-mandatory subject, as held by the Board in *UFA*, 43 OCB 4 (BCB 1989), into a mandatory subject, pursuant to PERB’s decision in *City of Cohoes*, 31 PERB ¶ 3020 (1998), is equally incorrect. The decisions rendered under the Taylor Law make clear that the conversion theory of negotiability does not apply to provisions that have sunset.

As to the Unions’ claims of a *per se* practical impact on Firefighter safety, the City notes that the decisions of the Board explain that allegations of an impact on safety cannot be determined to constitute a *per se* practical impact (*i.e.*, undisputed or apparent without the need of a hearing) and, instead, when they concern matters that are in dispute, they can be determined only after a hearing. Moreover, there exists no duty to bargain to alleviate a practical impact until *after* the Board determines that the impact actually exists. Accordingly, the City cannot have breached a duty to bargain that has not yet arisen, and so cannot have committed an improper practice.

The City further argues that the Unions have failed to allege specific facts sufficient to support their claims of practical impact. The City alleges that the roster staffing program implemented on February 1, 2011 includes adaptive response procedures and engine company tactics

that have not materially changed from the plans and procedures that were considered and approved by the Board in *UFA*, 43 OCB 70 (BCB 1989) and which were implemented in 1990. The City also notes that the roster staffing Stipulation was limited to 60 five-Firefighter engine companies so that, for the last 15 years, 134 of the Departments' 184 engine companies have operated with four-firefighter staffing without difficulty or any allegation by the Unions that Firefighters in those companies were subject to increased danger or greater physical exertion.

Finally, the City points out that the UFOA is not a party to the roster staffing Stipulation and that it has no right to seek, or be awarded, any relief based upon that Stipulation.

The City submits that the Unions have failed to allege facts sufficient to state a claim of improper practice or to warrant a hearing on their practical impact claim, and the petition should be dismissed in its entirety.

DISCUSSION

A. Issue of whether the Roster Staffing Agreement contains a "sunset" provision

As a threshold matter, this Board will examine the question whether the Stipulation known as the Roster Staffing Agreement contains a "sunset" provision. This question is crucial because, if the Stipulation has "sunset," a number of the bases for the duty to bargain asserted by the Unions may be inapplicable.

Both the Public Employment Relations Board ("PERB") and the courts consistently have recognized that parties may include sunset provisions in their agreements, and that where they have done so, the affected provisions terminate on the occurrence of the specified date or condition. PERB has defined a "sunset" provision as follows:

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 § 209- a.1(d) or (e).

Seaford Union Free School District, 26 PERB ¶ 4596 (ALJ 1993), quoting *State of New York (Governor's Office of Employee Relations)*, 25 PERB ¶ 3058, fn. 1 (1992).

In *Waterford-Halfmoon Union Free School District*, 27 PERB ¶ 3070 (1994), PERB explained:

If the parties to a bargaining relationship want to restrict the duration of a contract term, or to otherwise condition the continuation of that contract provision, they are free to do so as a matter of law and policy. Nothing in the many cases cited by the Association or in the legislative history of § 209-a.1(e) of the Act [the “Triborough Law” provision] compels or warrants a contrary conclusion. We conclude, therefore, that parties may sunset a given term in their collective bargaining agreement.

Similarly, in *Schuylerville Central School District*, 29 PERB ¶ 3029 (1996), PERB stated:

Section 209-a.1(e) of the Act continues in effect after contract expiration only what the parties have agreed upon in their contract. If they have agreed that a term of a contract will end as of a certain date or upon a certain condition, § 209-a.1(e) does not and cannot continue in effect that which they have agreed to terminate for that would extend to a charging party something more than that which had been agreed upon. By honoring, after contract expiration, the parties' agreement to end a term of their contract, we give full effect to § 209-a.1(e) because their agreement was to terminate the benefit at contract expiration. [Footnote omitted.]

Accord, Village of Johnson City, 39 PERB ¶ 4631 (ALJ 2006); see Lefkowitz, ed., *Public Sector Labor and Employment Law* 3d Ed. (2008), Chapter 4, § 4.16. Most significantly, in a case cited by the Unions, *Professional Staff Congress v. Public Employment Relations Board*, 7 N.Y.3d 458 (2006), the Court of Appeals, reviewing a decision of PERB, noted with approval that:

PERB has long held that parties can effectively prevent certain terms of a CBA from being continued after expiration of the contract under the Triborough amendment by using language that causes the term to “sunset” or expire at the conclusion of the CBA or at some other point in time (see *Matter of Waterford Teachers Assn.*

[Waterford-Halfmoon Union Free School Dist.], 27 PERB ¶ 3070 [1994]).

Id. at 468. The court went on to observe that the parties to the case before the court,

knew how to include a sunset clause in a contractual provision that they did not wish to carry into the status quo period as they had inserted such clauses in prior agreements.

Id. It was the parties' *failure* to include such "sunset" language in the agreement at issue that led the court to find that the provision in question continued as part of the *status quo* (the sole finding for which the Unions in the instant matter cite this decision).

In the present case, the parties agree that the relevant provision of the Stipulation is paragraph "Eleventh," which provides, in its entirety:

ELEVENTH: By entering into this Stipulation of Settlement, the Union agrees to waive its right to file any litigation or grievance regarding the Department Roster Staffing program as set forth in the case docketed with the Office of Collective Bargaining as BCB-1265-90, or with regard to the practical impact of this agreement until January 31, 2006. Should a court of competent jurisdiction or any other administrative entity, except for enforcement purposes, grant the right to initiate any such litigation or grievance within that time, this agreement will terminate immediately. Should litigation or a grievance commence, this agreement or any portion thereof shall not be admissible in any court proceeding or other administrative forum. After 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 response 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 differences between the parties arise, it is the intent of the parties to work expeditiously to resolve them.

It is also undisputed that, by letter dated October 27, 2005, the parties wrote that they:

agree to extend the Roster Staffing Agreement by amending the January 31, 2006 dates set forth in the Eleventh paragraph to read January 31, 2011.

This extension was without any other change in the language of the Stipulation.

This Board must determine whether the plain language of paragraph "Eleventh," as extended,

“terminates a benefit at a specific time or upon a specific condition,” as alleged by the City, or requires that the terms continue until there are negotiations over the planned changes, as alleged by the Unions. In our view, this is not a close question. As in *Seaford Union Free School District, supra*, the commitment to maintain the stipulated staffing levels is “tethered to the specific years” of the Agreement. The pertinent part of paragraph “Eleventh” begins, “After the expiration of this Agreement, January 31, 2006” Immediately thereafter, the text of the agreement says two things may happen, one contingent on the other. First, the City “may wish to change staffing levels.” Second, “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.” We find that paragraph “Eleventh” has a meaning that is clear on its face and that it means exactly what it says: the parties’ agreed-upon engine company staffing plan, embodied in the Roster Staffing Agreement (“this Agreement”), “expires” on January 31, 2006 – subsequently extended by agreement to January 31, 2011 – and thereafter the City may wish to change the previously agreed-upon staffing levels. If the City decides (“plans”) to change staffing levels, it will bargain with the Union “to the extent required by” the NYCCBL. We do not read this latter commitment to be broader than the duty imposed by the law, itself, a matter that we will address further in this decision. Accordingly, we conclude that paragraph “Eleventh” “terminates a benefit at a specific time or upon a specific condition,” *see Seaford Union Free School District, supra*, quoting *State of New York (Governor's Office of Employee Relations), supra*, and therefore it constitutes a “sunset” provision.

We have considered and do not find persuasive the Unions’ efforts to distinguish, on their facts, the PERB decisions referenced above. While the contractual provisions differ in each case, we find that the expiration language contained here in paragraph “Eleventh” is not inconsistent with

the language at issue in those cases. We note that the Court in *Professional Staff Congress v. Public Employment Relations Board*, *supra*, 7 N.Y.3d at 468, recognized that,

where parties agree that the term will continue “for the life of this agreement,” they indicate an intent that it will not be continued after the agreement expires
[citations omitted]

Here, the Unions and the City agreed that “After the expiration of this [Roster Staffing] Agreement” on a date certain, the City could “plan” to change staffing levels, subject only to a duty to bargain “to the extent required by the New York City Collective Bargaining Law.” We hold that under this provision, the agreement to maintain the staffing levels specified in the Roster Staffing Agreement has sunset.

We disagree with our dissenting colleague’s reading of paragraph “Eleventh,” under which further negotiations become a condition precedent to any changes in staffing. We believe such a construction (a) renders meaningless the parties’ reference, twice in that paragraph, to the date January 31, 2006 (subsequently extended by further agreement to January 31, 2011), and (b) places an absolute obligation on the City to bargain, ignoring the stipulation that the City would bargain “to the extent required by the New York City Collective Bargaining Law” (and thereby displacing this Board’s role in determining what the law requires). Moreover, under the terms of paragraph “Eleventh” the Union became free to file any litigation or grievance regarding the Department Roster Staffing program, or the practical impact thereof, after the stated expiration date. A reading of that paragraph that releases the Union to act as of the expiration date but does not similarly permit the City to act after that date would evince a lack of mutuality that we do not believe could have been

intended by the parties.⁴

B. Consequences of “sunset”

Since we have determined that paragraph “Eleventh,” on its face, constitutes a “sunset” provision, then neither the Unions’ arguments under the “Triborough Law” provisions of the Taylor Law (even assuming they applied under the NYCCBL) nor under the “conversion theory of negotiability” articulated in *City of Cohoes*, 31 PERB ¶ 3020 (1998), have any applicability. The decisions cited above at pages 18-20 clearly demonstrate that both PERB and the courts have stated that the maintenance of *status quo* provisions of Civil Service Law § 209-a.1(e) do not apply to provisions of an agreement that have “sunset.” As PERB explained, to permit the discontinuance of a sunset provision of an agreement,

is entirely consistent with § 209-a.1(e), if not compelled by it. . . . To hold otherwise, and require the post-expiration continuation of a term of a contract which has ended by agreement upon the expiration of that contract, would change the terms of the parties’ agreement.

Waterford-Halfmoon Union Free School District, 27 PERB ¶ 3070, at (1994). We would reach the same conclusion under the *status quo* provisions set forth in NYCCBL § 12-306(a)(5).

Additionally, in the only PERB case found to have directly addressed the issue, it was held that the “conversion theory of negotiability” under *City of Cohoes* does not apply to “sunset”

⁴ The dissent also suggests that the Stipulation’s expiration date coincided with the term of collective bargaining agreements between the parties. We take administrative notice of the collective bargaining agreements on file with the OCB which reflect that on the date the Stipulation was executed, January 30, 1996, the collective bargaining agreement in effect between the UFA and the City, pursuant to *status quo*, had a term of October 1, 1991 through December 31, 1994. The next agreement negotiated by the parties, and made effective retroactively, had a term of January 1, 1995 through May 31, 2000. Neither of these agreements correspond to the original January 30, 1996 through January 1, 2006 term of the Stipulation. As we hold later in this decision, there is no basis to find that the Stipulation was ever incorporated into the parties’ collective bargaining agreements.

provisions of an agreement. *Port Washington Police District*, 42 PERB ¶ 4506 (ALJ 2009) (conversion theory does not apply to part of agreement that sunsets); *see also City of Hudson*, 40 PERB ¶ 4579 (ALJ 2007) (ALJ’s application of “conversion theory” was dependent on a threshold determination that noted that the provision had not sunset by its terms.). Therefore, although this Board has never had occasion to consider the “conversion theory” articulated in *City of Cohoes*, we need not address the merits of that doctrine, since, in any event, there is no authority for its application to a “sunset” provision of an agreement.

C. Engine company staffing as a mandatory subject of bargaining

We next turn our attention to the Unions’ claim that engine company staffing independently is a mandatory subject of bargaining because it affects Firefighter safety. This argument appears to blur the distinction between mandatory subjects of bargaining and practical impact bargaining, a distinction that is clearly stated in NYCCBL § 12-307, the pertinent parts of which provide:

- a. Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions, . . .
- b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, **notwithstanding the above, 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. [Emphasis added.]

This Board held, in *UFA*, 43 OCB 4, at 232-247 (BCB 1989), *aff'd sub nom. Matter of Uniformed Firefighters Ass'n v. New York City Office of Collective Bargaining*, Index No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept. 1990), that the matter of Firefighter staffing was a nonmandatory subject of bargaining. That holding is consistent with a long line of decisions by this Board and PERB. *See, e.g., LEEBA*, 3 OCB2d 29, at 46 (BCB 2010); *EMS Superior Officers Ass'n*, 75 OCB 15, at 14 (BCB 2005); *UFA*, 43 OCB 70, at 3 (BCB 1989); *UPOA*, 35 OCB 23, at 30-31 (BCB 1985); *SBA*, 23 OCB 6, at 21 (BCB 1979), *aff'd Sergeants' Benev. Ass'n v. Bd. of Coll. Barg.*, No. 11950/79 (Sup. Ct. N.Y. Co. Aug. 7, 1979); *Port Washington Police Dist.*, 33 PERB ¶ 4630 (ALJ 2006), citing *Town of Carmel*, 31 PERB 3006 (1998), *confirmed* 267 AD 2d 858 (3d Dept. 1999). Thus, decisions regarding engine company staffing are not mandatory subjects of bargaining.

However, this Board has also stated that, upon a proper showing, the issue of whether the City's staffing decisions have a practical impact on the safety of Firefighters poses a question of fact to be determined after a hearing. *Id.* 43 OCB 4, at 244-247; *UFA*, 47 OCB 49, at 25-26 (BCB 1991); *see also, UFOA*, 3 OCB2d 50, at 17-18 (BCB 2010). In non-safety cases, if the Board determines that a practical impact exists, the employer is given a reasonable opportunity to alleviate it by unilateral action. If the employer fails to alleviate the impact after a reasonable period of time, then the Board will require the parties to bargain to alleviate the impact which is alleged to be objectionable and, failing agreement, they will be permitted to submit the matter to impasse resolution. *PBA*, 51 OCB 18, at 9 (BCB 1993); *UFA*, 47 OCB 25A, at 26 (BCB 1991). If the Board

finds that there exists a practical impact on employee safety, however, we will require the parties to bargain over alleviation immediately rather than await unilateral action by management. *PBA*, 51 OCB 18, at 9 (BCB 1993). We will consider the Unions' safety practical impact claim later in this decision.

D. Issue of incorporation into the collective bargaining agreement

Next, this Board will examine the Unions' contention that the Roster Staffing Agreement was incorporated into the parties' collective bargaining agreement. On this issue, it is instructive to consider our decision in *UFA*, 75 OCB 18 (BCB 2005) (challenge to the arbitrability of a grievance over reduction in number of five-firefighter engine companies from 61 to 11, claimed to violate the Roster Staffing Agreement). There, we addressed essentially the same argument by the UFA that the Agreement was incorporated into the parties' collective bargaining agreement and consequently was encompassed by the latter's grievance procedure. After reviewing this Board's case law on the subject of when a supplemental agreement can be found to be incorporated into a collective bargaining agreement, we concluded:

Here, nothing in the Stipulation or CBA indicates that the parties intended the Stipulation to fall under the definition of "grievance." The Stipulation is not a policy or regulation **and is not otherwise incorporated into the contract**. Indeed, the parties specifically determined that the terms of the Stipulation would be effective from January 31, 1996, until January 31, 2006. During that time, two CBAs were in effect, the latter now in status quo. Unlike the situation in *Social Services Employees Union*, [9 OCB 4 (BCB 1972)], here we do not consider the Stipulation and the CBA "interrelated."

75 OCB 18, at 12 (emphasis added).

The Unions' argue that this decision is not binding in the present case because, subsequent to the Board's June 2005 ruling in the above arbitrability case, on October 27, 2005, the parties

negotiated an extension of the Roster Staffing Agreement until January 31, 2011. This extension is memorialized in a letter (quoted above at page 20) that is annexed to a Memorandum of Agreement (Unions' Exhibit Q) that was executed by the parties the same day. The Unions contend that as a consequence of the extension, the Roster Staffing Agreement was no longer a settlement of a safety impact proceeding, but it was a collectively bargained agreement that became "part and parcel" of the parties' negotiations for a successor agreement. The Unions note that there are other side letter agreements between the parties, some entered into after the date of the Board's decision in the above case, that refer to matters relating to the implementation of the roster staffing program.

However, this Board observes that, having received our decision in *UFA, 75 OCB 18*, the Unions (or at least the UFA) were on notice of the Board's finding that the Roster Staffing Agreement was not incorporated, and our rationale for that conclusion. Thereafter, the UFA and the City extended the Roster Staffing Agreement with no change in language, other than the expiration date; and entered into two Memoranda of Agreement and three subsequent comprehensive collective bargaining agreements that did not expressly incorporate the Roster Staffing Agreement or its terms by reference. We are not persuaded that the letter extending the Roster Staffing Agreement provides a basis for us to reconsider our finding in *UFA, 75 OCB 18*. In any event, were we to reconsider, we would adhere to our finding that the Roster Staffing Agreement was not incorporated into the collective bargaining agreement.

E. Claimed Independent Interference With Employee Rights

The Unions claim that the City's unilateral change in the roster staffing policy has undermined the status of the UFA's and UFOA as bargaining representatives for Firefighters and Fire Officers, and that this interference with their effectiveness also interferes with the rights of

employees in violation of NYCCBL § 12-306(a)(1). No facts are alleged to demonstrate such interference. We note that it is true that if a violation of the duty to bargain under NYCCBL § 12-306(a)(4) is found, the same acts will be held to also constitute a derivative violation of employee rights under § 12-306(a)(1). *DEA*, 2 OCB2d 9, at 13 (BCB 2009); *UFOA*, 71 OCB 6, at 10 (BCB 2003); *DC 37*, 65 OCB 36, at 13 (BCB 2000). However, this Board has never found a unilateral change, without more, to constitute an independent violation of § 12-306(a)(1). In the context of this case, whether there is a violation of the NYCCBL is dependent on whether there is breach of a duty to bargain, so the relevant inquiry is under § 12-306(a)(4), not (a)(1).

F. Issue of *per se* practical impact on safety

The Unions argue that the City's decision to reduce Firefighter staffing levels creates a *per se* threat to the safety of UFA and UFOA members. According to the Unions, given the facts they have alleged, the safety impact is clear and no hearing is necessary. We believe that Unions' argument for a finding of *per se* practical impact is misplaced.

In *UFA*, 47 OCB 25A (BCB 1991), *aff'd sub nom. Matter of Uniform Firefighters Ass'n. v. City of N.Y.*, (Sup. Ct. N.Y. Co., 12/26/90), *aff'd*, 173 A.D.2d 206 (1st Dept. 1991), *aff'd*, 79 N.Y.2d 236 (1992), this Board reviewed the law regarding practical impact and explained the distinction between a *per se* impact claim and a "regular" impact claim. After finding that the distinction had become "to some extent blurred," the Board clarified the standard for the parties, stating:

In a *per se* practical impact case, however, there is no question that the action proposed by the employer will result in a practical impact on the affected employees. Such a result is implicit in the action proposed by the employer. In a "regular" safety impact case, on the other hand, whether the employer's proposed action will have an impact on the safety of the affected employees is a matter in dispute between the parties. Unlike the *per se* practical impact situation, such a result is NOT implicit in the action proposed by the employer. Accordingly, upon a finding that sufficient

evidence has been presented by the Union to warrant further inquiry, we will order a hearing at which time the parties will be given an opportunity to present evidence in support of their positions.

47 OCB 25A, at 28-29; *see also PBA*, 51 OCB 18, at 9-10 (BCB 1993).⁵

Thus, 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. We find that in the instant case, there is a substantial factual dispute over whether the reduced levels of engine company staffing will have a practical impact on Firefighter safety, and this will require the holding of a hearing in order to adduce a record on which this Board can resolve this dispute. Therefore, the concept of a *per se* practical impact is inapplicable to this matter.

G. Sufficiency of the claim of practical impact on safety

This Board has articulated the pleading standard for a “regular” practical impact claim 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, 71 OCB 13, at (BCB 2003), citing *CEU, Local 237*, 59 OCB 4, at 5-6 (BCB 1997); *LBA*, 51 OCB 45, at 28 (BCB 1993), *enforced, Matter of Toal v. MacDonald*, 216 A.D.2d 8 (1st Dept. 1995).

Since the present or future existence of practical impact is a factual question, we must carefully evaluate and assess the parties’ pleadings, affidavits, and exhibits to determine whether a

⁵ To date, the only factual allegations found by the Board to result in a *per se* practical impact have involved employee layoffs. *See CWA, L. 1180*, 63 OCB 19, at 13 (BCB 1999); *DC 37*, 45 OCB 6, at 25-28 (BCB 1990).

sufficient basis has been alleged to warrant a hearing. We will also bear in mind that the issue a safety impact claimed to result from the City's engine company staffing decisions already has been the subject of hearings and several prior Board decisions. In this regard, we must consider what facts and circumstances are alleged to have changed since the prior proceedings.

In brief summary, the Unions' claims of a practical impact on safety are based on allegations that time is of the essence in extinguishing a fire, that reduced staffing will result in delays, less "water-on-fire time," and hotter and more serious fires. They allege that the FDNY's own regulations state that two engine companies are needed to fight fires because the FDNY recognizes that three Firefighters from the first arriving engine company are insufficient to stretch and operate a first hoseline. The Unions submit that the lives of those three Firefighters should not have to depend on the arrival of a second engine company, which may be several minutes later. They also contend that reduced staffing will cause an increase in workload that will result in greater physical stress, overexertion, and a greater risk of cardiac arrest or stroke.

According to the Unions, the roster staffing plan being implemented now by the City differs from that proposed in the hearings held by OCB in 1989 in a number of respects, most significantly because under the 1989 plan the City projected that there was a high probability that the first arriving engine company would be staffed with five Firefighters, while the present plan has zero five-Firefighter engine companies.⁶ The Unions assert that the continued availability of the fifth

⁶ We note that in the record adduced before Professor Gellhorn, of which we take administrative notice, there was testimony concerning the City's projections of engine company staffing under its 1989 plan which included:

First, as a result of based on [sic] projected manning levels for 84.4 percent of day tours and 94 percent of night tours, all of group 2, single engine companies, and some of group 3, the five-man double engine companies, will be manned with five firefighters.

Firefighter on the 60 engine companies that were so staffed (under the Roster Staffing Agreement) is critically needed to ensure safe firefighting operations and to avoid life threatening injuries. They also allege that since the time of the practical impact hearings held by the Board in 1989, conditions have become even more difficult due to an increase in the number of fire companies taken out of service for non-firefighting purposes, the use of heavy personal protective equipment, and the additional demands placed on Firefighters because of their response to an increased number of Emergency Medical Service calls, natural disasters, hazardous material incidents, and acts of terrorism.

Also in brief summary, the City argues that there will not be a practical impact on safety because the roster staffing program implemented on February 1, 2011 includes adaptive response procedures and engine company tactics that have not materially changed from the plans and procedures that were approved by the Board in 1989 and which were implemented in 1990. The City notes that the Roster Staffing Agreement was limited to only 60 engine companies and, for the last 15 years, 134 of the Departments' 194 engine companies have operated with four-firefighter staffing without difficulty or any complaint from the Unions; and that, for various periods in 2004 through 2010, the number of five-firefighter companies was reduced to 40 and even 11 without any difficulty. The City further alleges that, since the time of the Board's 1989 ruling on this matter, the City has implemented additional steps to make firefighting safer and more effective, including the use of bunker gear and personal safety systems, new equipment and technology, such as thermal imaging cameras, gas meters, and increased use of portable ventilating fans, the establishment of Hazardous

Testimony of Paul Rajendran, Director, Bureau of Operations Research, FDNY (Tr. 241). The testimony in those proceedings provided the basis for this Board's decision in *UFA*, 43 OCB 70 (BCB 1989).

Materials Unit Engine Companies, and increased training, such as increasing the duration of Probationary Firefighters School from 6 to 18 weeks.

We find that the Unions have raised a material question of fact as to whether the City's decision to reduce engine company staffing levels creates a practical impact on the safety of UFA and UFOA members. There is no doubt that the jobs of Firefighters and Fire Officers are hazardous to begin with. The question raised here is whether the City's staffing decisions have had or will have a practical impact on the safety of the employees who perform these difficult jobs. We believe this Board's ruling in *UFA*, 43 OCB 70 (BCB 1989), is not necessarily dispositive of this question. While we found, there, that the roster staffing and adaptive response program proposed by the City in 1989 would not have a practical impact on Firefighter safety, we cautioned that our decision:

. . . is based upon the configuration of elements described by the City and set forth in the record in this case and that we make no finding with respect to the practical impact that some other configuration of elements not presented here may or may not have on the safety or workload of firefighters in the future.

Id. at 8. The Board subsequently indicated that it anticipated that the program, as actually implemented, might differ, necessitating further hearings. *UFA*, 47 OCB 49, at 27 (BCB 1991).

We are satisfied that the Unions have offered sufficient specific factual allegations to support their claims both of practical impact and of changes in the "configuration of elements" that were before the Board in 1989. Clearly, the City disputes many of the Unions' allegations, and it offers allegations of countervailing facts of its own. To resolve this factual dispute, we will direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining. This hearing will give the parties the opportunity to present evidence to establish a record upon which this Board may ascertain whether a practical impact on the safety of the employees involved has

occurred. *UFOA*, 3 OCB2d 50, at 17 (BCB 2010); *EMS Superior Officers Assn.*, 75 BCB 15, at 17; *see UPOA*, 43 OCB 31, at 12-13 (BCB 1989); *UFA*, 37 OCB 43, at 9-10 (BCB 1986).

In order to avoid, to the extent possible, the re-litigation of matters already presented which formed the basis for the Board's decision in *UFA*, 43 OCB 70 (BCB 1989), we direct the parties to focus their presentations at the hearing on the questions of:

(a) how, if at all, the roster staffing program, as presently implemented, differs from that proposed by the City at the hearings held before Professor Gellhorn in 1989; and

(b) what has changed since then in the conditions and circumstances under which engine company personnel operate in responding to and fighting fires,

as these matters are alleged to demonstrate a practical impact on Firefighter and Fire Officer safety.

Finally, we address the matter of the decision of the court in *Matter of Cassidy v. Scoppetta*, 801 N.Y.S.2d 231 (Sup. Ct. Kings Co. 2005), referred to by our dissenting colleague, who contends that it is binding on this Board under principles of either collateral estoppel or judicial estoppel. First, the Unions never asserted that this decision was entitled to preclusive effect under any theory of collateral estoppel or judicial estoppel. They merely referred to it, attaching a copy (as it is an unpublished decision), as part of their recitation of the history of the roster staffing agreement. (Petition, ¶ 53, referring to Union Exhibit P.) Therefore, any claim of collateral estoppel or judicial estoppel, not having been raised in the record, is not properly before this Board.

Even if such a claim were before us, it would certainly fail. As the dissent acknowledges, the application of such an estoppel requires identity of issue. *See Buechel v. Bain*, 97 N.Y.2d 295, 303-304 (2001) (“There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action.”). We do not find that such identity of issue exists between the present case and *Cassidy*. We have discussed the issue raised in the *Cassidy* court case

in a prior Board decision. *UFA*, 75 OCB 18, at 5-6 (BCB 2005). As indicated there, the dispute in the *Cassidy* case arose out of FDNY's implementation of the provisions of the Stipulation that permit the Department to reduce staffing from the "C+60" level to the "C+11" level if it determines that the absence rate over the previous 365 days had risen above the designated rate of 7.5%. The FDNY had made such a determination and reduced Firefighter staffing levels. The Union claimed that the Stipulation had been violated and/or inequitably applied. The Union grieved the alleged violation and sought an injunction in court to maintain the *status quo* pending resolution of the grievance. In opposing the injunction, the City argued that under paragraph "Eleventh," the Union had waived the right to litigate the enforcement of the Stipulation. The court in *Cassidy* analyzed the waiver clause in the Stipulation and determined that the parties did not intend to give up "the right to argue" over the enforcement of the Stipulation "in the venue where labor disputes are usually resolved." The court accordingly granted the requested injunction "pending the resolution of the grievance." (Slip op. at 3; quoted in *UFA*, 75 OCB 18, at 6.)

There was no issue raised or decided (necessarily or otherwise) in *Cassidy* as to whether the Stipulation "sunset" on a specified date. The dispute arose in December, 2004, and was decided by the court in February, 2005, clearly during the original term of the Stipulation. There was and could be no question whether the Stipulation had expired or "sunset," as the stated expiration date then was nearly a year away. The court's decision states that it analyzed the "waiver" language, which is contained in the first sentence of paragraph "Eleventh." The court did not address the matter of the expiration date or "sunset" language contained in the fourth sentence thereof. Based upon these facts, this Board finds that the "sunset" issue considered here is not identical to the issue raised and necessarily decided in *Cassidy*. Consequently, we hold that no estoppel applies.

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 a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining for the purpose of establishing a record upon which this Board may determine whether there has been a practical impact on the safety of Firefighters and Fire Officers as a result of the City's reduction in engine company staffing; and it is further

ORDERED, that the charges of the improper practice/scope of bargaining petition filed by the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO, and the Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO , docketed as BCB-2928-11, other than the allegations of practical impact, are hereby dismissed.

Dated: June 29, 2011
New York, New York

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

PAMELA S. SILVERBLATT
MEMBER

ERNEST F. HART
MEMBER

I dissent in a separate opinion attached hereto.

CHARLES G. MOERDLER
MEMBER

I join in the dissenting opinion of Charles Moerdler.

GABRIELLE SEMEL
MEMBER

In the Matter of Uniformed Firefighters Association of Greater New York

4 OCB2d 30 (BCB 2011) (BCB Docket No. 2928-11)

DISSENT

This proceeding turns upon the construction of paragraph ELEVENTH of an agreement-stipulation known as the Roster Staffing Agreement, dated January 26, 1996, as extended by letter agreement dated January 31, 2011 (the “Roster Staffing Agreement”). Respondents (the “City”) maintain that the Agreement terminated or “sunset” by its terms on January 31, 2011 (the “Termination Date”) and that the City has no continuing obligation thereunder, much less one to bargain. The majority agrees. I do not and, accordingly, respectfully dissent from so much of the Order as dismissed the charges set forth in the Petition.

Paragraph “ELEVENTH” reads in full text as follows

ELEVENTH: By entering into this Stipulation of Settlement, the Union agrees to waive its right to file any litigation or grievance regarding the Department Roster Staffing program as set forth in the case docketed with the Office of Collective Bargaining as BCB-1265-90, or with regard to the practical impact of this agreement until January 31, 2006. Should a court of competent jurisdiction or any other administrative entity, except for enforcement purposes, grant the right to initiate any such litigation or grievance within that time, this agreement will be terminated immediately. Should litigation or a grievance commence, this agreement or any portion thereof shall not be admissible in any court proceeding or other administrative forum. After 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 response 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 differences between the parties arise, it is the intent of the parties to work expeditiously to resolve them. (Emphasis added).

The majority focuses upon the latter of the two above-emphasized sentences in paragraph “ELEVENTH,” thus taking it out of context. In full context, that portion of paragraph “ELEVENTH” explicitly imposes a conditional Termination Date obligation upon the parties, as follows:

After 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 response times, may wish to change 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 differences between the parties arise, it is the intent of the parties to work expeditiously to resolve them.

(Emphasis added).

Putting aside for the moment the question as to whether such a conditioned Termination Date, one that in any event coincides with the term of collective bargaining agreements between the parties, falls within the scope of the decisions cited by the majority as effectuating the termination or “sunset” of the parties’ obligations (especially the City’s) under the Roster Staffing Agreement, it is clear to me that the City has an obligation to negotiate or bargain with the respondent unions, or at the very least, an arbitrable issue exists respecting the parties’ intention.

Thus, the following elements are discernible upon parsing paragraph ELEVENTH:

- The Petitioner Unions waived their right *prior to the Termination Date* to litigate or grieve the Department Roster Staffing program or its practical impact (first through third sentences of paragraph ELEVENTH).
- *If*, following the Termination Date, “certain factors” (e.g., changes in technology) occurred, the City might wish to effect changes.
- In the event the City plans to make such changes, negotiation would follow.

- The parties' expressed intent, should differences arise under or in connection with paragraph ELEVENTH, was "to work expeditiously to resolve them."

In sum, therefore, two distinct sets of obligations were undertaken, one prior to the Termination Date and a second, albeit conditional one, after the Termination Date, i.e., "[I]f" following the Termination Date the City was moved make certain changes ,negotiation would follow. Thus, the parties' contemplated the possibility that "[a]fter" the Termination Date the City might unilaterally determine upon a course of conduct that would trigger a post-termination event, and the parties agreed that negotiation would follow with respect thereto. That continuum distinguishes the "sunset cases" cited by the majority for the parties undertook in the selfsame paragraph that a continuing obligation existed after the specified date. ¹

More importantly, properly parsed, the last three sentences of paragraph ELEVENTH make clear the intention of the parties that, should the City wish to effect change after the "Termination Date," a process – whether termed negotiation, bargaining or arbitration – was to follow with respect to the proposed changes and their implementation. And to the extent that that conclusion is challenged and the parties offer differing views of what intent they expressed, that dispute can only be resolved at an evidentiary hearing or as part of the arbitral process.

Accordingly, the dismissal directed by the majority cannot stand.

Indeed, that conclusion is compelled by both the reasoning and terms of the dispositive decision of the Supreme Court, Kings County, dated February 3, 2005 in Cassidy v. Scoppetta,

¹ *Cf.* Auerbach v. Klein, 19 Misc. 3d 1102A, 2008 NY Slip Op. 50474U at *15 (Sup. Ct. Suffolk Co., 2008) , aff'd 66 A.D. 3d 805 (2d Dept 2009). Since the majority's "sunset" premise fails, its ensuing conclusions based thereon, including those respecting the consequences of "sunset," must fail. Parenthetically, it merits repetition that the term of the parties' collective bargaining agreement coincided with the termination Date, further suggesting that the "sunset date" argument advanced by the majority is flawed.

Index No. 41983/04 (Douglas, J.) under either principles of collateral estoppel or judicial estoppel.²

Cassidy involved an attempt by one of the Petitioners here – the Uniformed Firefighters Association of Greater New York – to compel arbitration of essentially the same issues as here tendered and for injunctive relief pending determination of the arbitration. Petitioners prevailed and the injunctive relief requested was granted. While the dispute was ultimately resolved, the court’s decision was neither recalled nor withdrawn.

Importantly, Cassidy likewise turned on the construction of paragraph “ELEVENTH;” indeed, the Court observed that “[t]he critical question therefore, is an interpretation of the foregoing paragraph 11.” (Opinion at p. 2). Finally, as here, the City argued that under paragraph ELEVENTH of the Roster Staffing Agreement the union surrendered its relevant rights upon the Termination Date. Justice Douglas disagreed, concluding that arbitration was fairly contemplated as the vehicle to resolve any disputes arising under paragraph ELEVENTH:

I conclude that a “reasonable person” reading this document, knowing its background, could only reach the conclusion that the parties fully anticipated as one would normally expect [that] labor disputes [are] to be arbitrated.

Id. at 3.³

The cases holding that the Cassidy decision controls are legion, whether viewed under collateral estoppel or judicial estoppel principles.

² The argument may be made that the Cassidy case may later have been the subject of a settlement. Apparently, appeals were filed following this decision and orders dispensing with the need to file a bond. Those appeals were withdrawn by stipulation dated January 29, 2006, contemporaneous with the negotiation of the collective bargaining agreement. However, those events are of no practical moment since, unrecalled and not reversed, the decision stands as valid precedent.

³ An interesting question arises as to the forum for such arbitration, under the totality of these circumstances.

The doctrine of collateral estoppel precludes a party from relitigating an issue already decided against the party where the party had a fair opportunity to litigate. For the doctrine to apply, the issues raised must be identical and must have been decided in the prior action and be decisive to the present action; and the party that is precluded must have had a full and fair opportunity to contest the prior determination.

Hughes v. Farrey, 30 A.D.3d 244, 247 (1st Dep't 2006) (internal citations omitted).

The classic case on this issue is Schuylkill Fuel Corp. v. B. & C. Nieberg Realty Corp., 250 N.Y. 304 (1929). In that case, plaintiff contracted to supply coal to five defendants. Defendants failed to pay for the coal, and Plaintiff sued them. Defendants argued that liability was several, plaintiff argued it was joint. The court ruled in plaintiff's favor. Subsequently, plaintiff made another delivery to defendants and defendants again failed to pay. Plaintiff commenced an action, and defendants again pleaded that liability was several. The court concluded that collateral estoppel bound the defendants to the earlier holding on the issue of joint liability.

Schuylkill Fuel Corp. remains good law and is cited frequently in New York courts. For example, in 2010, the First Department decided BDO Seidman LLP v. Strategic Resources Corp., 70 A.D.3d 556, 560-61 (1st Dep't 2010) (citing Schuylkill Fuel Corp., 250 N.Y. at 307) reversed a Supreme Court decision denying defendant's motion to dismiss based on collateral estoppels. Plaintiff commenced a contribution action against defendant. The First Department concluded, however, that the apportionment of liability between the parties was previously decided in an arbitration involving the same parties, holding that plaintiff's demand for contribution was collaterally estopped, and granted defendant's motion to dismiss.

Thus posited, it becomes unnecessary to reach the remaining aspects of the majority opinion, even though aspects thereof present serious concerns.

I dissent insofar as the Order dismisses the Petition.

June 10, 2011

CHARLES G. MOERDLER