OFFICE OF COLLECTIVE, BARGAINING
BOARD OF COLLECTIVE BARGAINING
- - - - - - - - - - - - - - - - - -x

CITY EMPLOYEES UNION,
LOCAL 237, I.B.T.,

Petitioner DECISION NO. B-6-74

-and-

THE NEW YORK CITY HOUSING AUTHORITY, DOCKET NO. BCB-166-74

Respondent

- - - - - - - - - - - - - - - - - - -x

THE NEW YORK CITY HOUSING
AUTHORITY,

Petitioner

-and-

CITY EMPLOYEES UNION, DOCKET NO. BCB-169-74
LOCAL 237, I.B.T.,

Respondent

- - - - - - - - - - - - - - - - - - -x

DETERMINATION

City Employees Union, Local 237, I.B.T., the certified bargaining representative of employees in unique titles in the New York City Housing Authority requested bargaining for a successor contract to one covering the period 1971 to 1973, in October, 1973. The negotiations reached an impasse on December 21, 1973, and were referred to fact-finding under the procedures of §1173-7.0c of the New York City Collective Bargaining Law. Two of the Union's demands were of contested bargainability and were not fully presented to the impasse panel pending a determination by this Board.

Both parties filed petitions in these proceedings which were docketed separately. We shall decide both cases together in this decision, having considered all of the papers filed in both matters as though they were filed in a single proceeding.

Alternative Pension Benefit

The election of OCB coverage by the Housing Authority provides that the Authority "will undertake its own negotiations and engage in collective bargaining with certified unions representing employees of the Authority in unique titles on all matters, both economic and non-economic." Pursuant to the election, the Housing Authority has bargained with Local 237 on pension matters for its employees in unique titles. [1]

Paragraph 22 of the 1971-1973 contract between the parties provided:

> "Subject to such approvals as may be necessary the Authority will take appropriate steps to implement a New Career Pension Plan proposed to be established within the New York City Employees Retirement System, for the benefit of employees of the Authority in titles represented by the Union, provided, however, legislation is passed by the State Legislature pertaining to such New Career Pension Plan and enacted into law during the terms of this agreement."

[1]Local 237 represents approximately 5,628 employees in unique Housing Authority titles . It also represents approximately 1,051 employees in non-unique Housing Authority titles covered by the City-wide agreement

The State Legislature failed to enact the New Career Pension Plan. [2] Thereafter, the Legislature imposed a moratorium on pension bargaining pending the institution of coalition bargaining. Section 470 of the New York State Retirement and Social Security Law prohibits bargaining for:

> "any benefits provided by or to be provided by, a public retirement system, or payments to a fund or insurer to provide an income for retirees or payments to retirees or their beneficiaries

In its petition and supporting memorandum, Local 237 demands an alternative benefit to the unenacted NCPP retroactive to the proposed July 1971 inception date of the improved pension benefits and grounds its demand on Paragraph 22 of the expired contract. The Union argues that the Authority must make restitution" of "an amount equal in value to that of the unimplemented pension plan as of the date that the plan would have been effective." The Housing Authority argues that the demand is not bargainable as a claim based on a prior, expired contract. However, the Authority concedes that "a union demand in the nature of a pension substitute is a mandatory subject for collective bargaining . . . .

[2] A full description of the events surrounding the failure of the Legislature to enact the NCPP appears in D.C. 37 and the City of New York, Decision No. B-1-74; Paragraph 22 of the Housing Authority contract refers to the pension improvements negotiated in the City-wide agreement.

The parties' memoranda reveal agreement on the basic issue. However, there appears to be a misunderstanding as to the rationale and effect of Decision B-1-74 in which we determined the bargainability of a D.C. 37 demand for an alterative benefit to the unenacted pension benefits agreed upon in the expired City-wide contract. In that case, the City mainained that alternative benefits were not bargainable under §470 of the Retirement and Social Security Law. The Board found that the Legislature had prohibited only bargaining for improvements in pension benefits but that bargaining on an economic substitute for pension benefits was permissible. The Board's rationale was that a demand for an alternative benefit was a money demand and was therefore not prohibited. All that was barred by §470 was a demand which channeled money into improving pensions.

In B-1-74, the Union demanded the payment of $165 per annum per employee to an appropriate union fund. The Board found that this economic demand related to mandatory subjects of bargaining; but we did not find, as suggested by the parties in the instant matter, that the pension provisions of the expired contract created a fixed obligation upon the employer. The previous contract was relevant solely on the merits of the demand. In other words, the demand was found bargainable, and the Union was free to rationalize and justify the demand by a showing, inter alia, of the agreement on and loss of pension benefits in the prior contract.

We expressed no opinion in Decision No. B-1-74 on the merits of the demand, nor did we decide that the employer was obligated to pay any sum at all to compensate for unimplemented benefits. A finding that a matter is bargainable does not imply approval of a demand: the decision whether an economic demand is justified by all of the circumstances relating to a bargaining relationship is solely within the province of the impasse panel. (See "Conclusion" of Decision No. B-1-74)

Similarly, in tile instant case, we find, and the parties have conceded, that a demand for an alternative benefit is bargainable. The parties may direct their arguments concerning the justification for an alternative benefit to the impasse panel.

The parties have raised the question of the retroactivity of alternative benefits, but, again, there seems to be no real issue. Local 237 s brief demands alternative bene fits retroactive to July 1971.[3] However, its reply brief recog nizes that a finality problem might arise with respect to an alternative benefit retroactive to 1971, although no problem would attach to in futuro benefits proposed by the Union, and it suggests that the finality problem should not be anticipated but "should await the final report of the Impasse Panel." Therefore, consistent with our decision in B-1-74, we make no finding at this tine whether the recommendations of the impasse panel, if any, on the issue of an alternative benefit with respect to any period prior to January 1, 1974, are subject to the finality provisions of Local Law No. 2 of 1972.

Eight Hour Regularly Scheduled Premium Pay Work

Local 237 sought to present to the impasse panel its demand that when employees are scheduled for voluntary work on weekends or holidays at premium pay, they be allowed to work

[3] The finality provisions of the NYCCBL are not applicable to "the negotiation of any immediate successor agreement to a collective agreement which expired on or before December 31, 1970."

eight hours instead of the six hours currently scheduled for those days.

The normal work week of the Housing Caretaker, Foreman of Housing Caretakers, Maintenance Man and Supervising Housing Groundsman is forty hours from Monday to Friday. About one-third of the employees in these titles voluntarily work six hours a day on weekends and holidays at premium rates in order to provide abbreviated coverage for essential services and emergency repairs. The employees are paid premium rates for weekend and holiday work even if they have not worked a full forty-hour week. The Union demands a guaranteed eight hours of work whenever they are scheduled for weekend or holiday premium pay work: the demand is not related to hours or rates of pay for the normal work week and these are not at issue in the instant case.

The Union argues that its demand that men working on weekends and holidays be allowed to work eight rather than six hours is bargainable. Its argument is based on its contention that the Housing Authority has previously bargained about these matters and on the decision in Board of Education, Huntington v. Assoc. Teachers, 30 NY 2d 122 (1972).

The Authority contends that it has bargained only about overtime on Monday through Friday and that it has not bargained about weekend and holiday work. It is well-established Board policy that when a matter is not a mandatory subject of bargaining, the employer may choose to bargain on it during one set of negotiations without forfeiting its right not to bargain in future negotiations. [4]

[4] City of N.Y. and Social Service Employees Union Decision No. B-11-68; Assoc. of Building Inspectors and HDA, Decision No. B-4-71.

Therefore, any reliance on previous bargaining is misplaced. The Authority need bargain on the Union's demand only if the Board finds it is a mandatory subject.

The Housing Authority argues that the scheduling of weekend and holiday coverage relates to "standards of service," "that it is a matter relating to the maintenance of the efficiency of governmental operations, and to the methods, means and personnel by which the [Authority's] operations are conducted and otherwise relates to a matter with respect to the organization and technology" of the Authority. The Authority states that if pursuant to the duties, responsibilities and obligations imposed upon it by Article 18 of the State Constitution and the Public Housing Law . . . it alone is charged with the determination of providing for the health, safety and comfort of its . . . tenants. . . . . ." This argument seeks to bring the issue within §1173-4.3(b) of the NYCCBL which reserves to management the right, inter alia,"to determine the standards of services to be offered . . . maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; and exercise complete control and discretion over its organization and the technology of performing

The Union has couched its demand solely in terms of increasing the hours to be worked on weekends and holidays. The Board must rule on the bargbainability of the demand as it was presented by the Union.

In the private sector, "the length of the working day, as well as overtime, are comprehended by the words 'hours and other terms and conditions of employment' on which [the NLRA] requires an employer to bargain." Weston & Broker Co., 60 LRRM 1015 (1965). Under the NYCCBL (§1173-7.0) "hours" is a mandatory subject of bargaining. However, bargainability of this subject is limited by other statutory provisions and this Board has resolved a number of issues in this connection.

The Board of Collective Bargaining has not decided the issue presented here. We have held that, generally, overtime pay and time and leave rules are bargainable only on the City-wide level,[5] and we have decided that the establishment of shift hours is a right reserved to management.[6]

PERB has addressed itself to the general area of management rights. The Taylor Law contains no management rights clause, but on a case-by-case basis PERB has evolved a theory of reserved rights analagous to those enumerated in §1173-4.3(b) of the NYCCBL.. The PERB decisions emphasize the basic differences between the public and private sectors,[7] and are based on the rationale that many terms

---

[5] City of New York and Social Service Employees Union, Decision No. B-11-68.

[6] City of New York and D.C. 37, Decision No. B-4-69, where the Union demanded "standard shifts from 8 AM to 4 PM. 4 PM to 12 PM, and 12 PM to 8 AM" for Motor Vehicle Operators.

[7] Section 209-a.3 of the Taylor Law provides: "Application. In applying this section, fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent."

and conditions of employment which are bargainable in the private sector are reserved to management in the public sector because government must have the freedom to make policy decisions on the basis of the public welfare.

In City School District of New Rochelle, 4 PERB 3704 (1971), PERB held that negotiations on budget cuts which would eliminate one hundred forty positions from the unit were not mandatorv:

> "Decisions of a public employer with respect to the carrying out of its mission, such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees."

The Board found that the decision about the level of services offered to the public was permissive and said: "the public employer . . . must determine the manner and means by which such services are to be rendered and the extent thereof."

PERB elaborated on this theme in West Irondequoit Board of Education, 4 PERB 3725 (1971),[8] where it held that the issue of class size was not a mandatory subject of bargaining. PERB again adverted to the differences between public and private employment, emphasizing that the public employer must be answerable to the electorate for basic policy decisions: "basic decisions as to public policy should not be made

---

[8] Aff'd on rehearing, 4 PERB 3752 (1971); confirmed 346 NYS 2d 418 (1973) .

in the isolation of the negotiation table, but rather should be made by those having the direct and sole responsibility therefor. . . " The decision went on to discuss the difficulty of distinguishing between policy and the results flowing from a policy decision:

> "It should be noted that the line of demarcation between a basic policy decision and the impact of terms and conditions of employment may not always be clear. For example, a policy decision as to class size may have an impact on teaching load. At first look, class size and teaching load may seem the same, but as we see them, they are not. The first represents a determination by the public employer as to an educational policy made in the light of its resources and other needs of its constituency. This decision may have an impact on hours of work and the number of teaching periods which are clearly mandatory subjects of negotiations."

Applying the management prerogative standards enunciated in West Irondequoit, and New Rochelle in yet another case, PERB found that the subject matter involved was not a matter for management decision but was mandatorily bargainable because the underlying motivation for the action in question was reduction of cost rather than reduction of service to the public. In City School District of Oswego, 4 PERB 4654 (1971), the hearing officer explained why a reduction in the work year for the stated objective of cutting administrative costs was not a policy decision but was instead a mandatory subject of bargaining: the reduction in the work year was merely a "reduction in costs without any

change in the level of service provided to the public. PERB affirmed at 5 PERB 3023, stating: "We have reviewed the record and find it barren of any proof that the subject change was made to curtail or limit services to the public. [9]

In summary, the common thread in all of the PERB cases is that the employer must negotiate about a certain term or condition of employment unless it can be shown that a policy decision involving the basic goals and mission of the employer is involved in establishing the term or condition.

We do not believe that the broad language employed by the Court of Appeals in the Huntington decision (cited above) was intended to deprive a public employer of the managerial discretion necessary to carry out its mission. In Huntington the employer argued that certain contract provisions granting economic benefits to school teachers and providing for the arbitration of disputes concerning disciplinary action were illegal in the absence of express authorization in the Education Law granting a school board the power to agree to those provisions.

The Court framed the question before it as whether there is any fundamental conflict between the provisions of the Taylor Law and the provisions of any other statute dealing with the powers and duties of school boards." The Court held that no express grant of power to bargain about any particular subject was necessary:

[9] The Appellate Division, 3rd Dept., confirmed on July 12, 1973.

> "Under the Taylor Law, the obligation to bargain as to all terms and conditions is a broad and unqualified one and there is no reason why the mandatory provision of that act should be limited in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to a particular term or condition of employment.

Thus, the thrust of the decision was to lay to rest conclusively the old restrictive view of a public employer's lack of authority to bargain with its employees, and to make it clear that under the Taylor Law, the public employer is presumed to have all the authority necessary to enter into collective bargaining agreements. The Court did not discuss management rights and we find no basis to believe that the Court', by any indirect implication, disposed of such an important question in public employment labor relations.

We find that §1173-4.3(b) of our law, the management rights clause, is a legislative finding of what constitute the "policy decisions" of a public employer. The decisions enumerated in that section, for example, decisions as to of methods and means" and "standards of services," have been determined by the local legislature to be policy decisions rather than having been left to this Board to enumerate on a case-by-case basis as is the method under the Taylor Law.[10] It should be noted, moreover, that this legislation was the product of a tripartite study to which the community of municipal labor organizations was a party.

In the instant case, the Housing Authority asserts that the issue of the length of the working day on weekends and holidays is related to the level of services offered to tenants and to the level of governmental funding which sets the standards

---

[10] Questions concerning the practical impact that managerial decisions have on employees are within the scope of collective bargaining.

of services. We find that the number of hours to be worked on holidays and weekends is related to the "standards of services to be offered" to tenants on such days and that it concerns the "methods, means and personnel by which government operations are to be conducted." Therefore, the matter is a voluntary subject of bargaining and, in view of the employer's objection herein, may not be submitted to the impasse panel.

A number of Board decisions have dealt with various aspects of the matter of bargainability of hours. [11] Much of the Board's attention to this subject has been addressed to the issue not pertinent here of the appropriate level of bargaining of this and of related subjects of bargaining. The Board has also considered the question as to the meaning of the portion of §1173-4.2a(2) which provides that as to matters generally bargainable at the City-wide level, a unit representative, nevertheless, has the right to bargain "where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved."

---

[11] See B-11-68 cited above; NYS Nurses Assoc. and City of New York, Decision No. B-2-73. The concept of different levels of bargaining, City-wide and unit-wide, does not apply to unique titles in the Housing Authority, because the Housing Authority's election to bargain for unique titles covers all bargainable subjects. This structure is, therefore, different from the several levels of bargaining provided for in §1173-4.3a.

In Decision B-4-69, the Board held that the scheduling of hours of work is a reserved management right. We find that bargaining to require overtime work beyond the amount scheduled by the employer is a matter within the intent of §1173-4.3(b) of the NYCCBL and consistent with the concept enunciated in the above-cited decisions of PERB; that the function of government is such that bargaining in the public sector must leave management free to determine, unilaterally, the quantity and quality of a particular governmental service that can or must be provided. [12]

D E T E R M I N A T I 0 N

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

DETERMINED, that the Union demand with respect to an alternative pension benefit is within the mandatory scope of bargaining and may be submitted to the impasse panel; such issue is subject to the finality provisions of §1173-7.0c(4) for the period effective on or after January 1, 1974; however, decision is reserved by the Board whether recommendations of the impasse panel on this issue, if any, effective prior to January 1, 1974, are subject to the aforesaid finality provisions; and it is hereby

[12] Subject, of course, to the practical impact provisions of §1173-4.3(b).

DETERMINED, that the Union demand with respect to regularly scheduled premium pay work on holidays and weekends is not within the mandatory scope of bargaining and may not be submitted to the impasse panel.

DATED: New York, N.Y.
April 3, 1974

ARVID ANDERSON
C h a i r m a n

ERIC J. SCHPIERTZ
M e m b e r

VINCENT D. MCDONNELL
M e m b e r

EDWARD SILVER
M e m b e r

HARRY FRUMERMAN
M e m b e r

N.B. Impartial Member Eisenberg did not participate in this decision.