LEEBA, 2 OCB2d 29 (BCB 2009)

(IP) (Docket No. BCB-2556-06);
(IP) (Docket No. BCB-2559-06);
(IP) (Docket No. BCB-2593-07)

Summary of Decision: The City and the Union each allege that during the course of negotiations for a new collective bargaining agreement for Environmental Police Officers, the other party committed improper practices by, *inter alia,* bargaining in bad faith. After an interim decision in the matter, *LEEBA*, 79 OCB 18 (BCB 2007), determining scope of bargaining issues in anticipation that the parties would be able to reach an agreement, the Board held a hearing on the remaining question of whether either party had indeed failed to bargain in good faith. As no agreement has been reached, the Board made its final determination of the bad faith bargaining claims. As to the City's petitions, the Board found that even if we were to consider only the Union's own description of its actions, there would be ample evidence that the Union did not bargain in good faith. We dismissed the Union's petition, as any evidence adduced in support of the claim of City misconduct did not rise to the level of failing to bargain in good faith. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

CITY OF NEW YORK,

Petitioner,

- and -

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Respondent.

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

- and -

CITY OF NEW YORK,

Respondent.

DECISION AND ORDER

The City of New York ("City") and the Law Enforcement Employees Benevolent Association ("Union" or "LEEBA") each allege that during the course of negotiations for a new collective bargaining agreement for Environmental Police Officers ("EPOs"), the other party committed improper practices by bargaining in bad faith, among other things. After an interim decision in the matter, *LEEBA,* 79 OCB 18 (BCB 2007), determining scope of bargaining issues in anticipation that the parties would be able to reach an agreement, the Board held a hearing on the remaining question of whether either party had indeed failed to bargain in good faith. As no agreement has been reached, the Board now makes its final determination of the bad faith bargaining claims. As to the City's petitions, the Board finds that even if we were to consider only the Union's own description of its actions, there would be ample evidence that the Union did not bargain in good faith. We dismiss the Union's petition, as any evidence adduced in support of the claim of City misconduct did not rise to the level of failing to bargain in good faith.

PROCEDURAL HISTORY

On June 22, 2006, the City filed a verified improper practice petition against the Union, which was docketed as BCB-2556-06. The City alleges that the Union violated § 12-306(b)(2) and (c)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") in several ways during the course of negotiations for a new collective bargaining agreement.[1] The City claims that the Union failed to bargain in good faith when it insisted upon obtaining collectively all of the terms and conditions contained in the collective bargaining agreement between the Patrolmen's Benevolent Association ("PBA") and the City, insisted on bargaining over non-mandatory and prohibited subjects, unilaterally declared impasse, insisted on preconditions for future collective bargaining, refused to respond to the City's bargaining proposals, and refused to negotiate further with the City after only two bargaining sessions. On July 10, 2006, the Union filed its verified answer to the petition and a cross-petition, alleging that the City's failure to consider EPOs as police officers and to grant them the same

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[1] NYCCBL § 12-306 provide, in pertinent parts:

> b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:
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> * * *
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> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.
>
> * * *
>
> c. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
>
> (1) to approach the negotiations with a sincere resolve to reach an agreement;
>
> * * *
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays . . .

collective bargaining agreement as other uniformed members of the City work force, among other things, violated the spirit and intent of the NYCCBL.

On July 21, 2006, the Union filed a "Petition to Resolve Unfair Labor Practice and for Injunctive Relief" against the City, docketed as BCB-2559-06. The Union alleges that the City has violated the spirit and intent of NYCCBL §§ 12-305, 12-306, and 12-307 alleging the same set of facts as those involved in BCB-2556-06. In its answer, the City maintained that it had not violated the NYCCBL because many of the subjects over which the Union had unilaterally declared impasse were non-mandatory subjects, and that the Union had insisted on bargaining over prohibited subjects such as retirement benefits.

On January 19, 2007, the City filed another verified improper practice petition against the Union, docketed as BCB-2593-07, claiming that, after the City had filed BCB-2556-06, the Union further violated NYCCBL § 12-306(b)(2) because although bargaining had commenced anew in late 2006 and early 2007, it then failed because the Union placed preconditions on the resumption of collective bargaining. After both parties submitted their positions on the issue of consolidation of the three petitions, the Board consolidated them.

On May 3, 2007, the Board issued an interim decision in this matter, *LEEBA*, 79 OCB 18 (BCB 2007) ("Interim Decision"), directing that a hearing be held on the remaining question of whether either party failed to bargain in good faith, and encouraging the parties to return to the bargaining table utilizing the scope of bargaining rulings contained in the Interim Decision to guide them until a final determination could be made. The parties continued to bargain without success, and, on December 1, 2008, the City asked for the improper practice proceedings to recommence. Six days of hearing were held from May through August 2009.

THE INTERIM DECISION

In the Interim Decision, the Board dismissed those claims that were untimely, involving matters beyond our jurisdiction, or matters too vague and unspecific to render a determination; determined that the Union did not show that the provisions of NYCCBL § 12-307(a)(4) apply to EPOs because they are not defined as "police officers" in the Administrative Code; determined that, since EPOs are classified as Rule X employees in the Miscellaneous Service, and thus are excluded from the Career and Salary Plan, the subjects otherwise covered by § 12-307(a)(2) may be negotiated at the unit level; and determined the negotiability of several subjects raised in bargaining, among other things.[2] In the Interim Decision, the Board specifically stated, "[T]his Board intends this Interim Decision to provide the parties involved with guidance on several issues in controversy in order to facilitate their return to bargaining." 79 OCB 18, at 14.

One of the Union's primary contentions was that pensions and retirement issues are mandatory subjects of bargaining. In the Interim Decision, the Board clearly explained the well-established statutory *prohibition* on bargaining over pensions and retirement. We stated that despite a reference to pensions in the NYCCBL, the superseding provisions of New York State Retirement and Social Security Law ("RSSL"), Article 12, § 470, impose a moratorium on pension bargaining and specifically prohibit changes negotiated between any public employer and public employee with

[2] In its petition, the Union claimed that the City entered into a contractual agreement with a security company to allow employees of that company to perform EPO job functions. In the Interim Decision, the Board dismissed those claims, without prejudice to re-file, because the Union's legal arguments regarding the matter were completely devoid of dates and other pertinent information, and it made the assertions "upon information and belief." 79 OCB 18, at 23. The Union did not re-file a further petition addressing this claim but continually attempted to introduce evidence at the hearing regarding the truth of that claim, even though it was directed repeatedly that such claims were outside the scope of the hearing.

respect to any benefit provided by a public retirement system. Furthermore, we also noted the Taylor Law prohibition on bargaining over pensions and retirement under N.Y. Civil Service Law § 201(4), and the fact that the Board and the courts have recognized that these statutes supersede the reference in the NYCCBL and that pension and retirement are now prohibited subjects as well. 79 OCB 18, at 19-21. In concluding our lengthy discussion of this topic, we stated: "Therefore, it is well-established that pensions and retirement are a prohibited subject of bargaining, *and the parties may not negotiate over this subject*." 79 OCB 18, at 21 (emphasis added).

With respect to the Union's insistence on "unlimited sick leave" as provided for in the Patrolmen's Benevolent Association ("PBA") collective bargaining agreement, we noted that, while sick leave is a mandatory subject of bargaining, there is no automatic entitlement to a benefit exactly as negotiated by another union. 79 OCB 18, at 21-22. We also held that the Union's assertion that the two-year probationary period for EPOs is a mandatory subject of bargaining was incorrect, as probationary periods are the subject of statutory discretion vested in the local civil service commission. 79 OCB 18, at 22. Finally, the Board ordered that a hearing be held on a remaining question of fact–whether either party had indeed failed to bargain in good faith–and urged the parties to return to bargaining until a final determination could be reached.

DISCUSSION

As the extensive facts and detailed allegations of both parties were laid out in the Interim Decision, we do not repeat their substance here. *See LEEBA,* 79 OCB 18. Taking all of the parties' arguments, the testimony, and the evidence into consideration, we find that, despite the Board's best efforts to guide the parties in the Interim Decision, the Union ignored the Board's scope of

bargaining rulings and failed to bargain in good faith. We dismiss the Union's petition, as any evidence adduced in support of the claim of City misconduct did not rise to the level of failing to bargain in good faith.

The NYCCBL sets forth the good-faith bargaining requirement at § 12-306(a)(4) and (b)(2), with provisions for both employers and unions.[3] While the Board has long held that refusing to bargain over mandatory subjects of bargaining is a *per se* violation of the NYCCBL, *see, e.g., Uniformed Sanitation Chiefs Ass'n*, 67 OCB 32 (BCB 2001), the Board has not been required to examine, in great detail, whether the actual conduct of the parties during negotiation violates the requirement to bargain in good faith.

The New York State Public Employment Relations Board ("PERB") has described generally what it means for a party to bargain in good faith during the course of negotiations:

> [T]he duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention. Objectively, intent can be determined only by the actor's word and deeds; and where there is a variance between the two, experience would dictate that greater reliance be place on the latter. Thus, whether one had approached the

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[3] § 12-306. Improper Practices; good faith bargaining. a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:

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

§ 12-306. Improper Practices; good faith bargaining. b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:

(2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer.

> negotiating table with a sincere desire to reach agreement can only be determined by this overall conduct in this regard. This determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct. *Matter of Erie Co. Water Auth*., 35 PERB 4560 (2002); *accord Matter of Town of New Windsor*, 32 PERB 4519 (1999) (both citing *Town of Southampton*, 2 PERB 3011, at 3274 (1969)).

Additionally, the federal courts have addressed the standard of behavior required of parties in bargaining for almost sixty years, and in greater detail than either this Board or PERB. *See, e.g, Penello v. Int'l Union, United Mine Workers of Am.*, 88 F. Supp. 935, 939 (D.C.D.C. 1950); *accord, Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054 (2d Cir. 1995). Like the NYCCBL and the Taylor Law, the National Labor Relations Act (29 U.S.C.A § 158, as amended) ("NLRA") places two requirements on parties engaged in collective bargaining: conferring about mandatory bargaining subjects (set forth at 29 U.S.C.A § 158(a)(5) for employers and at § 158(b)(3) for unions) ("§ 8(a)(5)" and "§ 8(b)(3)" respectively) and that such conferring be done in good faith (set forth at 29 U.S.C.A § 158(d)) ("§ 8(d)").

Under the NLRA, the United States Supreme Court has held that good faith bargaining requires a "desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 485 (1960); *see also Cont'l Ins. Co. v. NLRB*, 495 F.2d 44, 48 (2d Cir. 1974) (holding that the NLRA good faith requirement requires parties to demonstrate a "serious intent to adjust differences and reach an acceptable common ground"). Accordingly, the desire to agree must accompany generally honest claims at bargaining. *NLRB v. Truitt Mfg. Co.*, 351 US 149, 155 (1956).

Courts evaluating the parties' conduct must make "reasoned inferences" as to the parties' subjective state of mind, with such inferences drawn from the court record. *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 46 (5th Cir. 1974) (citing *Truitt*, 351 US at 155). In other words,

determining good faith requires evaluating the "totality of a party's conduct," *Glomac Plastics, Inc. v. NLRB*, 592 F.2d 94, 98 (2d Cir. 1979), by considering the entire circumstances surrounding bargaining. *NLRB v. Billion Motors*, 700 F.2d 454, 456 (8th Cir. 1983). This approach requires the use of circumstantial evidence, such as surrounding events and comments, as indicia of the subjective intent motivating conduct at the bargaining table. *NLRB v. Patent Trader*, 415 F.2d 190, 197 (2d Cir. 1969), *aff'd as modified*, 426 F.2d 791 (2d. Cir. 1970) (*en banc*).

In instances where a party engages in repeated misconduct, with no one incident egregious enough alone to constitute *per se* bad faith, courts follow a cumulative approach to evaluating what constitutes bargaining in bad faith, described in *Glomac* (discussed *supra,* finding bad faith from viewing indicia of misconduct in aggregate, where no *per se* violation can be found). *Glomac,* 592 F.2d 94. Conduct contributing to such a finding may include taking an unnecessarily adamant bargaining stance or refusing to make counterproposals. *See Bryant & Stratton Bus. Inst., Inc. v. NLRB*, 140 F.3d 169 (2d Cir. 1998) (holding that meaningful bargaining usually requires counterproposals as evidence of willingness to compromise);[4] *cf., NLRB v. Hi-Tech Cable Corp*., 128 F.3d 271, 278 (5th Cir. 1997) (holding that adamant insistence on a sincerely held bargaining position is *not* bad faith, where the employer otherwise engages the union in a dialogue). In *Billion,* the Eighth Circuit affirmed the NLRB finding of bad faith, based on a variety of factors, including: the company negotiator's lack of preparation at negotiations, his failure to attend a scheduled session, the premature announcement of impasse, offers of sham wage proposals and the offer of a

[4] In *Bryant & Stratton*, the court held that the employer acted in bad faith where it grudgingly made itself available only one day per month, for short, hurried meetings, was consistently unwilling to offer counterproposals, was frequently unprepared for negotiations, and often took bargaining positions that were inconsistent with statements it made at the negotiations. *Bryant & Stratton*, 140 F.3d 169.

new method of wage computation. *Billion*, 700 F.2d at 454-458.

The requirement of good faith bargaining applies to both unions and employers. Like employer misconduct, innocuous union misconduct can evidence bad faith, when viewed in aggregate. *See, e.g., Graphic Arts Int'l Union, Local 280 v. NLRB*, 596 F.2d 904 (9th Cir. 1979) (finding that a union exhibited bad faith by its repeated insistence that its original proposals not be changed, the lack of authority of its bargaining representatives, its cavalier attitude toward bargaining, suggestions that bargaining be conducted by phone, and its cancellation of some meetings and tardiness to others).

Applying the law regarding good faith bargaining as enunciated by both PERB and the Courts to the instant matter, and considering the Union's own description of its actions, we are provided ample evidence that the Union did not bargain in good faith. Although the record is replete with numerous instances in which the Union could be appropriately deemed to have failed to bargain in good faith, for purposes of this decision, we limit our discussion to several of the most clear examples which demonstrate the Union's intentions. Most significantly, the Union's repeated insistence that the City bargain over the subject of pensions and retirement throughout the negotiations, even after the Interim Decision placed the Union on notice that these demands involve subjects which are prohibited. The Union's attempts to mandate bargaining over these issues alone would be sufficient for this Board to find that, *per se*, the Union bargained in bad faith.

The Union asserts that it continually attempted to bargain over pensions and retirement from the inception of bargaining. Therefore, we find that it has flouted the bargaining prescriptions of applicable law and the precedents of this Board and the courts establishing the prohibition of bargaining over those subjects. To demonstrate the Union's general recalcitrance during the course

of bargaining, and particularly this subject, the Union acknowledges that it attempted to bargain over pensions and retirement after the Interim Decision was issued, a decision which took great pains to elucidate that bargaining over those specific subjects was prohibited. At the hearing in this matter, the Union immediately in its opening statement and throughout the testimony of its witnesses, proclaimed that it had attempted to bargain over those subjects during the course of negotiations, and that the subjects should not be prohibited. (Tr. 11-12, 106, 121, 346, 375, 376, 467-8).

This course of conduct stretched back almost two years: the Union President testified regarding a conversation he had with the Commissioner of Labor Relations in late 2007, when the parties were still bargaining, and after the issuance of the Interim Decision. He stated, "I am looking for a contract that is best suited for my members–line of duty, pension. [The Commissioner] did bring up the pension, and he said that they couldn't bargain on the pension. I explained to him that I did see the letter from the state saying that the City was not to bargain on pensions. But I also told him, 'Other civil services have gotten 25-year pensions, why can't you deal with us?'" (Tr. 346). That the Union knew that pensions and retirement are prohibited subjects, yet persistently attempted to bargain over them on multiple occasions throughout the course of bargaining is clear indicia of the Union's unwillingness or inability to understand the nature of bargaining and achieve an agreement for their membership, who have been without a contract for years.[5] The uncontested evidence shows that this type of bargaining conduct has been the hallmark of the Union's actions throughout the bargaining process. As a result, this Board finds that evidence is lacking that the Union desires to reach an ultimate agreement when it insists upon violating the duty to bargain by

[5] We also have credible and unrebutted testimony that the Union attempted to bargain over pensions and retirement with the City at a bargaining session on October 22, 2007. (Tr. 122-124). We note that this also post-dated the issuance of the Interim Decision.

continually pressuring the City to negotiate over prohibited subjects.

In examining the totality of the other relevant circumstances, we also find that the Union failed to bargain in good faith as to other issues. The record shows that the Union has taken inflexible bargaining stances, insisting that EPOs require, in all respects, an exact replica of a "police contract," as agreed to by unions representing uniformed members of the New York City Police Department ("NYPD"), in an unwavering manner, over the course of several years of bargaining.[6] This failure to consider reasonable compromise is another example of the Union's unreasonable rigidity during the long course of bargaining.

At the inception of bargaining, the Union President stated, regarding their expectations for bargaining and what the City would propose: "So we were expecting a police contract." (Tr. 370). In line with that statement, and according to credible testimony by a City negotiator regarding the very first bargaining session on November 29, 2005, the following exchange occurred:

> Q: Did [the City's attorney] speak at all during this meeting?
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> A: Yes. She had some discussion with [the Union's attorney] about the meaning of the Board decision putting the Environmental Police Officers into a separate bargaining unit and what the meaning of that was. [The City attorney] reiterated what I had been saying, which is that a contract had to be bargained and proposals had to be exchanged and considered. They would have to do that regardless of whatever their understanding of the decision was. The Union asked for a caucus, and when we came back, they said [the Union's attorney] had proposals for bargaining, which were the terms and conditions that applied to the New York City Police Officers. That those terms and conditions they could see gradually rolling in over a four-year period, but that they wanted everything in the police officers' contract. So I said that, you know, if they wanted to make proposals on things that were in the police officers' contract, that they submit those proposals specific to their bargaining unit and give me their written proposals for their bargaining unit.

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[6] The Union offered to phase in the "police contract" over a period of time, but still insisted on the same provisions, or some sort of "parity" with the NYPD. (Tr. 371-372).

Q: Did the Union at any time during the meeting present written proposals?

A: [The Union's attorney] handed me the police officers' contract, and said, "Here are our written proposals."

Q: Was that at the end of the meetings?

A: Yes, pretty much.

(Tr. 104-105).[7]

Further statements by the Union President during subsequent negotiations show the Union's continued inability to engage in any back-and-forth exchanges regarding its desired contract. Referring to a June 2006 proposal by the City, the Union President made the statement: "I didn't like the contract in the first place. It wasn't a police contract." (Tr. 311).[8] Then, around the time of one of the final bargaining sessions, the Union President stated: "Actually, I wrote a letter before the last meeting, and said that we would come back to [the] table, if the City was willing to negotiate a police contract. When they referred out to us again and said they were willing to come to the table, I really thought that they were going to offer a police contract. Because the letter states for itself, if you are willing to negotiate a police contract, LEEBA is willing to come back to the table." (Tr. 357). The letter the Union President refers to, dated June 19, 2008, stated:

This letter is to re-confirm [LEEBA's] position regarding the status of negotiations between the City of New York and LEEBA.

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[7] We also credit the lead City negotiator's testimony that, at that first session, the Union's attorney stated that there was no point in bargaining any further if the City was not prepared to grant them a "police contract," and because of City's refusal, the Union immediately declared an impasse in bargaining. (Tr. 103).

[8] The lead City negotiator credibly testified that a bargaining session was scheduled for June 12, 2006, but after the City submitted its proposals, the Union told her that it would not attend the scheduled bargaining session because the City did not offer them a "police contract." (Tr. 111).

> LEEBA's position is and always will be that it is available for negotiations if the City of New York changes its position and is willing to negotiate a Police Contract.

(Joint Ex. 23).

The Union President made cursory statements that the Union considered, in earnest, the proposals that the City prepared. (Tr. 311).[9] However, statements such as those quoted above, repeated throughout all phases of the bargaining process, and the Union's actions, made it evident that what the Union seeks and the position it refuses to move off of is nothing short of an exact duplicate of contracts such as the PBA collective bargaining agreement. We find that the Union crossed the line demarcated by the U.S. Court of Appeals for the Fifth Circuit, in relation to a union's insistence on certain terms:

> By detecting a lack of good faith in [a party's] conduct, the Board is not . . . indirectly attempting to impose actual terms on the parties (citation omitted), nor is the Board seeking to interdict merely a particularly vigorous instance of hard bargaining. [A party] can properly insist, and adamantly so, on a bargaining position without contravening statutory requirements. [Citation omitted.] But there comes a point when hard bargaining ends and obstructionist intransigence begins.

NLRB v. Big Three Industries, 497 F.2d, at 47 (5th Cir. 1974); *see Queen Mary Restaurants*, 560 F.2d 403, 407, 411 (9th Cir. 1977); *Public Service Co. of Oklahoma v. N.L.R.B.*, 318 F.3d 1173, 1177-1178 (10th Cir. 2003). Here, as in *Public Service Co.*, LEEBA both persistently adhered to illegal demands, and rigidly adhered throughout negotiations to a battery of contract proposals which would subvert the employer's ability to bargain effectively, in this case requiring it to blanketly agree

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[9] Several detailed proposals were made by the City, which contained a number of different costings. The City also proposed technical meetings to assist the Union's understanding of certain economic subjects and made experts in certain areas, such as a DEP payroll manager, available during bargaining sessions. Additionally, we note that despite the difficulties surrounding bargaining, it was often the City who reached out to the Union in an attempt to reach an agreement.

to the sum and substance of another union's contract as a precondition for bargaining taking place at all. 318 F.3d at 1177-1178. As in *Public Service Co.*, such conduct "demonstrate[s] that the Union "could not seriously have expected meaningful collective bargaining," and supports a conclusion inferring bad faith from this conduct. *Id*.; citing *Capitol Steel & Iron Co. v. N.L.R.B*., 89 F.3d 692, 696 (10th Cir.1996) (explaining an employer may violate its duty to bargain in good faith if its conduct "reflects a design to undermine the union in its role as the employees' sole bargaining representative"); *Borden, Inc. v. NLRB*, 19 F.3d 502, 512 (10th Cir, 1994) (noting "rigid adherence to disadvantageous proposals may provide a basis for inferring bad faith" (emphasis in original)); *Colorado-Ute Elec. Ass'n. v. N.L.R.B.*, 939 F.2d 1392, 1405 (10th Cir.1991) (noting that maintaining a "rigid position throughout negotiations . . . could potentially be the basis for a finding of bad faith" (quotation marks omitted)).

The Union has made it very clear through numerous proceedings that the EPOs perform difficult, police-like functions. The City does not dispute this, as evidenced through the bargaining history and the testimony of its witnesses, particularly the Commissioner of Labor Relations. (Tr. 68). Furthermore, this Board and the Board of Certification have very plainly recognized that fact. In the Board of Certification decision granting EPOs a separate bargaining unit, the Board went into great detail about how a separate bargaining unit was warranted because these employees' "primary function is law enforcement." *LEEBA*, 76 OCB 3, at 19. However, what LEEBA patently refuses to acknowledge or be cognizant of, is the fact that unions such as the PBA achieved gains in their agreements by engaging in the necessary back-and-forth discussion of substantive issues and reasonable proposals over time. That back-and-forth is the hallmark of good faith bargaining, not a repeated and unwavering insistence on only what the Union deems to be a "police contract."

Moreover, despite the fact that the Union has represented EPOs since October 20, 2005, the record shows that it is still not well-versed in the meaning of certain common bargaining terms and civil service status terms pertinent to the employees it represents. In *Graphic Arts Int'l Union, Local 280*, 596 F.2d 904, part of the Court's finding that the NLRB acted properly in finding that the union had bargained in bad faith was an "intransigent, insincere, and cavalier attitude toward the negotiations." 596 F.2d 904, at 907. In the instant matter, the Union's cavalier attitude towards negotiations was shown through its seeking to bargain over demands the Board had clearly informed it were not mandatory subjects of collective bargaining. This attitude was also shown by its lack of knowledge regarding those terms–which materially affect the employees in question–and the public-sector bargaining process, nearly four years and numerous bargaining sessions after the Union was certified as representative.

The same Union representative who participated in the bargaining evinced confusion over these terms in its papers, during the questioning of witnesses at this hearing, and in the Union's closing brief. As just a few examples, it was apparent that the Union attorney and/or the President of the Union were not familiar with, or evinced confusion over common bargaining terms such as "prohibited" and "mandatory" subjects of bargaining, had little understanding of the EPOs' civil service classification, what the term "promotion" means in the context of the civil service, how "pattern" bargaining might affect EPOs, and the basic workings of the City's budget. (Tr. 57-65, 68-71, 136-138, 177-181, 232-235, 244-246, 278-280, Union Brief, at 1-23). Although it would not be reasonable to expect a lay person or a person inexperienced in the area of labor law to understand some of this terminology and its impact on the bargaining process, four years into their representation of EPOs, the Union's representatives do not understand these terms, which have an

immeasurable impact on the course of bargaining and their membership.

Throughout the proceedings, and despite the Board's guidance on this subject in the Interim Decision, the Union has failed to understand that just because EPOs are designated as "police officers" under the Criminal Procedure Law, that designation does not automatically bestow upon them "uniform" or "police" status under the N.Y. City Administrative Code or change their classification with the City from "miscellaneous service" (which it currently is) to the "police service" (which it is not), or automatically entitle them to a "police contract." The entirety of the Union's arguments in its initial pleadings, the presentation of its case at hearing and its brief, all of which are or were exceedingly difficult to comprehend, are further indicators of the Union's confusion. It is evident from all of the above that the same confusion made itself apparent at the bargaining table, and, thus, hindered bargaining.

Although the City's behavior at points was not beyond reproach, in that one of the City's negotiators had an admitted verbal outburst directed toward the Union well into the course of bargaining, we find that, in this situation, and considering all of the circumstances, a single outburst by a single negotiator well into negotiations does not rise to the level of bargaining in bad faith. Additionally, the Union claims that the City's negotiators, on numerous occasions, would attend a bargaining session and then state that they were unable to bargain because DEP representatives were not present. Although this Board credits the Union's testimony that this is what it believed occurred, taking into account the totality of the circumstances surrounding this matter, and the behavior of both of the parties during the scope of these proceedings, we find that the Union's perception does not accurately reflect what actually transpired.

Finally, the Union again raises allegations of violations of statutes, such as the Fair Labor

Standards Act and 42 U.S.C. § 1983, which are not our own. We refer the Union to the Interim Decision, in which we explained that this Board cannot determine, let alone remedy, violations of statutes that are not our own. For the same reasons, we must again dismiss claims under statutes other than the NYCCBL. Accordingly, we dismiss the Union's petition in its entirety and grant the City's petitions in their entirety.

Although we find that the Union breached its duty to bargain in good faith, since a representation petition, docketed as RU-1260-09, was filed by a different union seeking to represent these same EPOs on June 10, 2009, and an election has been ordered by the Board of Certification in *Council 82*, 2 OCB2d 22 (BOC 2009) in that matter, at this time we hold in abeyance an order directing the parties back to the bargaining table to bargain in good faith, pending determination of the representation proceeding. *See Deer Park Sch. Bus Drivers' Union*, 22 PERB ¶ 3014, at 3037 (1989), *confirmed on other grounds, Bd. of Educ. Of Deer Park Union Free Sch. Dist. v. New York State Public Employment Relations Bd.,* 561 N.Y.S.2d 810 (2d Dept 1990), *lv. denied,* 77 N.Y.2d 805 (1991); *County of Rockland*, 10 PERB ¶ 3098, at 3170 (1977).

ORDER

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

ORDERED, that the improper practice petitions docketed as BCB-2556-06 and BCB 2593-07, be and the same hereby are, granted as to all claims arising under NYCCBL § 12-306(b)(2) and (c)(1) and (3), and it is further

DETERMINED, that this Board's Order directing the Union to bargain in good faith is held in abeyance, pending final determination of the representation proceeding docketed as RU-1260-09, concerning the titles currently certified to LEEBA, and it is further

ORDERED, that the improper practice petition docketed as BCB-2559-06, be and the same hereby is, dismissed in its entirety.

Dated: New York, New York
September 24, 2009

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

GABRIELLE SEMEL
MEMBER

I concur as to the result.

CHARLES G. MOERDLER
MEMBER