LEEBA, 3 OCB2d 29 (BCB 2010)

(Scope) (Docket No. BCB-2835-10)

Summary of Decision: The City petitioned for a determination that certain bargaining proposals submitted by LEEBA were outside the scope of mandatory bargaining under the NYCCBL and, therefore, could not be submitted to an impasse panel. LEEBA argued that each of its proposals concerned mandatory subjects of bargaining. The Board found that several proposals were mandatory subjects, several proposals were non-mandatory subjects, certain proposals were bargainable in part and not bargainable in part, and two proposals involved a prohibited subject of bargaining. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the
Scope of Bargaining Proceeding

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On February 24, 2010, the City of New York, appearing by its Office of Labor Relations ("City"), filed a scope of bargaining petition. The petition seeks a determination on whether certain demands proposed by the Law Enforcement Employees Benevolent Association ("Union" or "LEEBA") which have not been resolved in negotiations between the parties, are mandatory subjects of bargaining within the meaning of Section 12-307 of the New York City Collective Bargaining

Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"). On March 4, 2010, the Union filed an answer to the City's petition. No reply has been filed.

BACKGROUND

In October 2005, LEEBA was certified to represent City employees in the title Environmental Police Officer ("EPOs").[1] EPOs are responsible for protecting the watershed areas, water supply systems and installations maintained by the Department of Environmental Protection of the City of New York ("DEP"). Furthermore, EPOs enforce the City's Watershed Rules and Regulations. According to the EPO job specification, of which the Board takes administrative notice, EPOs are classified in the Miscellaneous Service under Rule X of the Personnel Rules and Regulations of the City of New York. Those employees who are classified under Rule X are not included in the Career and Salary Plan. Rules of the City of New York, Title 55, Appendix A, Rule X.

Following LEEBA's certification, the Union and the City began negotiations for an initial collective bargaining agreement.[2] The parties met to negotiate at least six times between the commencement of bargaining and October 2008. On November 9, 2009, LEEBA filed a Request for the Appointment of an Impasse Panel ("Impasse Request"). The Office of Collective Bargaining ("OCB") brought the parties together for two mediation sessions held in January 2010. The Board of Collective Bargaining, on January 25, 2010, declared that an impasse exists between the parties

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[1] *LEEBA*, 76 OCB 5 (BOC 2005). These employees previously were represented by Local 300, Service Employees International Union as part of another bargaining unit, and were covered by a 2002-2005 unit collective bargaining agreement as well as a Supplemental Agreement pertaining only to EPOs, effective until the date of LEEBA's certification.

[2] The parties disagree as to whether negotiations began in October or November, 2005.

and directed the commencement of impasse proceedings.

During the course of negotiations, and prior to the Board's declaration of impasse, both parties filed improper practice petitions relating to the conduct of the negotiations. Each party asserted that the other had engaged in bad faith bargaining. The charges raised included the City's claim that LEEBA was insisting on negotiating nonmandatory and prohibited subjects of bargaining, and LEEBA's assertion that the City was refusing to bargain over mandatory subjects. The Board has issued three decisions addressing and disposing of these claims: *LEEBA*, 79 OCB 18 (BCB 2007) (interim decision, including negotiability rulings); *LEEBA*, 2 OCB2d 29 (BCB 2009) (final decision after hearings on bad faith bargaining claims); and *LEEBA*, 2 OCB2d 43 (BCB 2009) (Supplemental Order directing bargaining in good faith). Having been previously discussed at length in the cited decisions, these claims, and the Board's rulings thereon, will not be repeated here. However, to the extent the Board's prior rulings relate to the scope of bargaining questions raised in the present case, they will be set forth at the appropriate points in the Discussion herein.

RELEVANT STATUTORY PROVISIONS

Section 12-307 of the NYCCBL provides as follows:

> Scope of collective bargaining; management rights.
> 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) and working conditions, except that:
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> (1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for in said section;

(2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;

(3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department;

(4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved;

(5) matters involving pensions for employees other than those in the uniformed forces referred to in paragraph four hereof, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as representing bargaining units which include more than fifty per cent of all employees included in the pension system involved.

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 employees, such as questions of workload or manning, are within the scope of collective bargaining.

Section 12-309 of the NYCCBL provides, in pertinent part, as follows:

> a. Board of collective bargaining. The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
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> * * *
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> (2) on the request of a public employer or public employee organization to make a final determination as to whether a matter is within the scope of collective bargaining;

Section 12-311(c)(3)(c) of the NYCCBL provides, in relevant part, that:

> The report of an impasse panel shall be confined to matters within the scope of collective bargaining.

PRELIMINARY ISSUES

The scope of mandatory collective bargaining is defined in NYCCBL §12-307. Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *See, e.g., EMS Superior Officers Ass'n*, 75 OCB 15, at 5 (BCB 2005); *DC 37*, 73 OCB 7, at 15 (BCB 2004). Pursuant to NYCCBL § 12-311(c)(3)(c), demands which are not mandatory subjects of negotiation may not be considered by an impasse panel unless submitted to the panel by the mutual agreement of the parties. *See EMS Superior Officers Ass'n,* 75 OCB 15, at 5 (BCB 2005); *PBA*, 59 OCB 24, at 3-4 (BCB 1997); *DC 37*, 7 OCB 16, at 9 (BCB 1971). However, as the Court of Appeals has recognized:

> Although terms and conditions of employment (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principal, the practical task of assigning a particular matter to one category or the other is often far more difficult. Indeed, in many instances a matter may partake of both categories, requiring a balancing of the interests involved [citation omitted]. No litmus test has yet been devised that automatically identifies a term or condition of employment, or a management prerogative, or establishes whether a particular subject should be placed into the first category or the second.

Matter of Levitt v. Bd. of Coll. Barg., 79 N.Y. 2d 120, 127 (1992); *see DC 37*, 75 OCB 8, at 7 (BCB 2005).

In a scope of bargaining proceeding pursuant to NYCCBL §12-309(a)(2), this Board's task is to apply the language of NYCCBL §12-307 as well as relevant precedent to each of the disputed demands in order to determine whether and to what extent the demand is within the scope of bargaining.

In cases in which a demand has a dual character, we have followed a practice of advising the parties of those elements of a demand which are mandatory subjects and of those elements which are nonmandatory subjects of bargaining. *DIA,* 79 OCB 13, at 6-7 (BCB 2007); *UFA*, 43 OCB 4, at 15-16 (BCB 1989), *aff'd, Unif. Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept 1990). This practice is consistent with our authority under NYCCBL §12-309(a)(2), to determine whether a matter is within the scope of mandatory collective bargaining. We view our function in implementing this authority as one of informing the parties rather than penalizing them for refusing to bargain over disputed demands.

We will discuss below the Union proposals or demands which have been challenged by the City, the positions of the parties, and our decision on the bargainability of each demand. The Impasse Request submitted by LEEBA identified 11 subjects on which the parties had failed to reach agreement. The City has noted that the Union, in the course of bargaining, submitted a letter, dated February 4, 2006, in which it listed 30 bargaining proposals, some of which overlap with those identified in the Impasse Request. The City's scope of bargaining petition addresses certain subjects or proposals drawn from both the Impasse Request and the February 4, 2006, letter. LEEBA

acknowledges that the statement of issues in its Impasse Request was intended as a summary and not a complete listing of the issues in dispute, and it asserts that the impasse panel should be allowed to hear all of the issues. (Answer, ¶18.) Accordingly, the Board will consider *seriatim* all of the objections contained in the scope of bargaining petition. Where it appears that an issue identified in the Impasse Request and challenged by the City overlaps or relates to a proposal listed in the February 4, 2006, letter, we will discuss them together.

We wish to repeat that a finding that a matter is bargainable does not constitute an expression of any view on the merits of a demand. *DIA,* 79 OCB 13, at 7 (BCB 2007); *PBA*, 59 OCB 24, at 8, n. 6 (BCB 1997); *PBA*, 51 OCB 34, at 6 (BCB 1993); *UFA* 49 OCB 42, at 17 (BCB 1992).

THE DEMANDS

I. Issues Raised in LEEBA's Request for Impasse

IMPASSE REQUEST ISSUE NO. 1: Police Status

City's Position

The City argues that "police status" is a non-mandatory subject of bargaining. The Board has already held, in the two prior decisions on the improper practice petitions arising out of the bargaining in this case, that although EPOs are designated "police officers" under the Criminal Procedure Law, that designation does not automatically grant them "uniformed" or "police" status under the New York City Administrative Code, place them in the "police service" classification, or entitle them to a "police contract." Moreover, the Board expressly held, in *LEEBA*, 79 OCB 18, at 18-19 (BCB 2007), that EPOs are not police within the meaning of the Administrative Code. Further, it is the City's managerial right to classify titles; and the Department of Citywide

Administrative Services has classified EPOs in the "Miscellaneous Services," not the "Police Service." Therefore, this demand is not a mandatory subject.

Union's Position

LEEBA argues that the Criminal Procedure Law, which is a state law, preempts the New York City Administrative Code and compels the City to accept the designation of EPOs as police officers. The Union further asserts that an impasse panel is capable of determining whether EPOs are police officers.

DISCUSSION

Since this issue is identified by the Union only by the cryptic phrase "police status," it is unclear for what purposes the Union seeks to bargain this matter. Clearly, EPOs are included within the definition of the term "police officer" set forth in § 1.20.34(o) of the Criminal Procedure Law ("CPL"). The City already has acknowledged as much, and this Board has so found. *LEEBA*, 79 OCB 18, at 18 (BCB 2007). However, the inclusion in the definition of "police officer" is for law enforcement purposes under the CPL and is not dispositive of the EPOs' status for purposes of collective bargaining under the Taylor Law and the NYCCBL. The definitions contained in CPL § 1.20 "are applicable to this chapter," meaning Chapter 11-A of the Consolidated Laws of New York, *i.e.*, the CPL. There is absolutely no indication in the CPL that that statute was intended to regulate or control the employment and/or collective bargaining rights under other statutes for employees who are defined as "police officers." Thus, we find no basis for LEEBA's conclusory assertion of "preemption."

The so-called "police" level of bargaining under the NYCCBL is defined in NYCCBL § 12-307(a)(4), which provides for a qualified union to bargain:

> [A]ll matters, including but not limited to pensions, overtime, and time and leave rules which affect employees in the uniformed police . . . services, or any other police officer as defined by subdivision thirty-four of section 1.20 of the criminal procedure law who is also defined as a police officer in this code, shall be negotiated with the certified employee organizations representing the employees involved.

As we explained in great detail in the Interim Decision in the *LEEBA* improper practice matters, EPOs do not qualify for bargaining under this section, as they are not classified in the uniformed police service and are not defined as police officers in the Administrative Code. *LEEBA*, 79 OCB 18, at 17-19 (BCB 2007). Our findings and rationale are set forth at length in that decision and will not be repeated here.

However, this issue is really of little consequence. The breadth of LEEBA's authority to bargain for the EPOs is unimpaired by the fact that they fail to qualify for the "police" level of bargaining. We found in the Interim Decision that EPOs are classified as Rule X employees in the Miscellaneous Service and that, by definition, Rule X excludes them from the Career and Salary Plan. We concluded that, since EPOs are not included in the Career and Salary Plan, the Citywide level of bargaining provisions of NYCCBL § 12-307(a)(2) do not apply to them. *LEEBA*, 79 OCB 18, at 19 (BCB 2007). Therefore, all mandatorily bargainable issues relating to EPOs may be negotiated at the unit level. Consequently, the scope of bargaining for the unit of EPOs is as broad as if they were included in the "police" level.[3]

In conclusion, we find that the issue of "police status" is a matter determined by law, that EPOs are "police officers" for law enforcement purposes under the CPL, but that their police officer

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[3] We note that the subject matters that are mandatorily bargainable do not differ depending on whether or not an employee is a "police officer." A "police officer" has no greater or lesser bargaining rights than any other category of employee. What may differ under the NYCCBL, but does not in the circumstances of this case, is the level (unit or Citywide) at which the subjects may be bargained.

status is of no consequence to the scope of bargaining for EPOs. Accordingly, we hold that the issue of "police status" is not a mandatory subject of bargaining and may not be submitted to the impasse panel.

IMPASSE REQUEST ISSUE NO. 2: On duty injury protection

City's Position

The City contends that this issue is vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. Therefore, this issue is not mandatorily bargainable.

Union's Position

The Union states that this demand seeks protection with full pay for on-duty injuries to EPOs. This matter is addressed in General Municipal Law ("GML") § 207 and was intended to bind "lower jurisdictions."

DISCUSSION

We have held consistently that where the circumstances surrounding a demand adequately put the employer on notice of the union's intent, a demand will not be found to be so vague as to require its exclusion from bargaining or to preclude its submission to an impasse panel. *DIA,* 79 OCB 13, at 8-9 (BCB 2007); *PBA*, 59 OCB 24, at 31 (BCB 1997); *Local 621, S.E.I.U.*, 51 OCB 34, at 15-16 (BCB 1993). Here, we note that LEEBA's February 4, 2006, letter contains a proposal for "Unlimited Sick Leave." This proposal, by its terms, includes a provision for leave with pay for "any incapacity due to illness, injury or mental or physical defect which is service connected . . . ." Recognizing the Union's position that its statement in the Impasse Request was intended as a summary of its proposals that had not been agreed to, we are satisfied that the issue identified above, together with the proposal in the letter quoted above, is sufficiently specific to place the City on

notice of the Union's specific intent.

We already have ruled in the dispute between these parties that the subject of a sick leave benefit is mandatorily bargainable under NYCCBL § 12-307(a). *LEEBA*, 79 OCB 18, at 22 (BCB 2007), citing *DC 37*, 77 OCB 34 (BCB 2006); *COBA*, 69 OCB 26 (BCB 2002). In *LEEBA*, we also acknowledged that GML § 207 provides for unlimited sick leave for line-of-duty injuries, but stated that it is not for this Board to determine the applicability of that statute. *Id.,* 79 OCB 18, at 21.

To the extent that LEEBA's demand for leave with full pay for on-duty injuries may parallel provisions of law, we have stated that:

> It is well-settled that the requirement of good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment.

EMS Superior Officers Ass'n, 75 OCB 15, at 9 (BCB 2005); *PBA*, 39 OCB 41, at 7 (BCB 1987), *aff'd sub nom. Caruso v. Anderson*, No. 25827/87 (Sup. Ct. N.Y. Co. Feb. 19, 1988), *aff'd*, 150 A.D.2d 994 (1st Dept. 1989). If a demand that relates to a matter covered by statute also concerns wages, hours, working conditions, or any other mandatory subject of bargaining, the demand is within the scope of mandatory collective bargaining unless: (a) it would require a contravention of law; or, (b) the subject has been pre-empted by statute; or, (c) it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion. *See EMS Superior Officers Ass'n*, 75 OCB 15, at 9-10 (BCB 2005); *PBA,* 59 OCB 24, at 41 (BCB 1997); *UFA*, 43 OCB 4, at 7-9 (BCB 1989).

In the present case, it has not been alleged that a grant of paid leave for on-duty injuries would contravene any law, that the subject has been pre-empted by statute, or that it would offend public policy. Accordingly, this demand is a mandatory subject of bargaining. However, to the

extent the circumstances surrounding this proposal include the third paragraph of the Union's February 4, 2006, letter proposal for "Unlimited Sick Leave," we find that the proposal stated in that one paragraph is so vague and ambiguous as to potentially encompass non-mandatory subjects.[4]

IMPASSE REQUEST ISSUE NO. 3: Pay for Overtime

City's Position

The City contends that this issue is vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. Therefore, this issue is not mandatorily bargainable

Union's Position

The Union refers to the "Supplemental Agreement" and asserts that it references the Fair Labor Standards Act ("FLSA") and addresses EPO overtime compensation.[5] LEEBA argues that the City "apparently" applied for and received an exemption from the overtime pay provisions of § 201 of the FLSA, and that in order to justify the exemption, the City had to recognize the law enforcement status of EPOs. Therefore, the City should be estopped from denying that status in this case.

DISCUSSION

While the phrase "Pay for Overtime" in the Impasse Request is unenlightening, we take

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[4] This paragraph provides, *inter alia*, that: "Any Departmental Orders in connection with or dealing with sick leave shall only be issued after consultation and agreement with LEEBA." We find this language to be so broad as to intrude on the City's right to monitor the use of sick leave to avoid its abuse. *DC 37*, 77 OCB 34, at 15 (BCB 2006); *COBA*, 69 OCB 26, at 7 (BCB 2002).

[5] The Union does not specify which Supplemental Agreement. For purposes of this decision, the Board presumes that LEEBA intends to refer to the Supplemental Agreement covering EPOs that was negotiated by the prior certified representative, Local 300, Service Employees International Union, that was effective until the date of LEEBA's certification in October 2005. No copy of the Supplemental Agreement has been provided in this proceeding.

notice that a proposal for "Overtime Pay" is set forth in detail in the Union's February 4, 2006, letter. The proposal states:

> If a DEP Police Officer is called upon to perform duty service in excess of 40 hours during any work week, he shall be compensated with overtime pay at the rate of 1 ½ times his normal hourly pay scale for his grade and longevity. Said overtime pay shall be paid no later than 30 days after the end of the week in which said service was performed. Such cash payments or compensatory time shall be computed on the basis of completed fifteen (15) minute segments.

The letter also contains a related proposal entitled "Compensation for Overtime" which provides that an employee required to work overtime be given the option of receiving payment in either cash or compensatory time. We find that the issue identified in the Impasse Request, together with the two proposals in the letter identified above, are sufficiently specific to place the City on notice of the Union's specific intent.

Clearly, the duty to bargain over wages includes the duty to bargain over employee compensation for overtime, including cash or compensatory time. *CEA*, 75 OCB 16, at 9 (BCB 2005); *COBA,* 63 OCB 26, at 9 (BCB 1999); *UFA*, 43 OCB 4, at 36 (BCB 1989); *cf*, *DIA,* 79 OCB 13, at 16 (BCB 2007) (compensation for overtime is bargainable, but the decision whether and when to assign overtime belongs to management). Therefore, this demand is a mandatory subject of bargaining.[6]

IMPASSE REQUEST ISSUE NO. 4: Retirement Age and Years of Service

City's Position

As the Board has already ruled, retirement is a prohibited subject of bargaining. The moratorium on pension bargaining imposed by Retirement and Social Security Law ("RSSL") § 470

[6] LEEBA's argument relating to an exemption from the FLSA, is not relevant to the negotiability of this demand.

supersedes the reference to "pensions" in NYCCBL § 12-307(a). This fact has been recognized by the Board as well as the courts. Moreover, pensions and retirement have also been made a prohibited subject pursuant to § 201(4) of the Taylor Law. Accordingly, this demand is a prohibited subject and is outside the scope of bargaining.

Union's Position

LEEBA disputes that the pension moratorium under State law preempts retirement negotiations in New York City. In addition, the Taylor Law pension moratorium is not at issue in this case. The only issues here are public safety and occupational qualifications.

The Union argues that there is a bona fide occupational qualification that dictates that police officers be permitted to retire for biological reasons and to protect the public safety. The U.S. Supreme Court has recognized that a bona fide occupational qualification may require an earlier retirement age. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982). LEEBA has established in previous cases that EPOs protect New York State residents from terrorist attack, and there are physical limitations on full strenuous duty that must be considered by the impasse panel.

DISCUSSION

It is difficult to comprehend why the issue of retirement and pension bargaining continues to be a matter in dispute between the parties. This Board ruled unequivocally in the earlier proceeding between these parties, *LEEBA*, 79 OCB 18, at 19-21 (BCB 2007), that retirement and pensions are a prohibited subject of bargaining. The authorities on which we relied in reaching that conclusion were explained in detail in that decision and will not be repeated here. It should suffice to note that the same conclusion has been reached by the courts in addressing bargaining under the NYCCBL. *City of New York v. MacDonald*, No. 45920/92 (Sup. Ct. N.Y. Co. June 23, 1993), *aff'd,*

213 A.D.2d 287 (1st Dept. 1995), *appeal dismissed,* 86 N.Y.2d 773 (1995).

Moreover, more recently we found that LEEBA was guilty of bargaining in bad faith, based upon,

> 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.

LEEBA, 2 OCB2d 29, at 10.

There, we found that LEEBA had flouted the bargaining prescriptions of applicable law and the precedents of this Board and the courts establishing the prohibition of bargaining over those subjects. We observed,

> 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.

Id. at 10-11.

It is manifest that the Union's demands relating to retirement and pensions are prohibited subjects of bargaining that may not be submitted to the impasse panel.[7]

IMPASSE REQUEST ISSUE NO. 5: Compensation

City's Position

The City contends that this issue is vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. Therefore, this issue is not mandatorily bargainable. The term compensation may be interpreted to mean any number of things; the City has no way of

[7] In the face of the case law and the clear statutory scheme in New York, the Union's arguments regarding early retirement as a "bona fide occupational qualification" are unavailing.

knowing what aspects of compensation the Union is referring to.

Union's Position

LEEBA argues that the City's petition acknowledges that the Union's February 4, 2006 letter contained contract proposals which it "set forth in greater detail," but the City then contradicts that acknowledgment by claiming that the Union's proposal is vague and ambiguous. The Union submits that if the City were to pay EPOs a decent wage and reasonable benefits, it would cut down the attrition rate and save the City the cost to constantly train new recruits.

DISCUSSION

As the City notes, the term "Compensation" in the Impasse Request may be interpreted to mean any number of things. However, we take notice that a number of more specific proposals set forth in the Union's February 4, 2006, letter involve matters that indisputably fall within the generally understood meaning of that term. A proposal for "Rates of Pay" lists specific salaries for new recruits, for EPOs completing six months of service, and for those commencing their second year of service. There is also a proposal for "Longevity Pay" in a specified percentage starting with the third year of service and increasing every year thereafter. There are a number of other economic demands calling for specified amounts of "Night Differential Pay" for work performed during certain hours; "Specialty Pay" for work on specific squads and units; a percentage amount as "Promotion Pay" for EPOs "promoted" (assigned) to service as Detectives, Sergeants, and/or Lieutenants; and payment of a specific sum as a "Uniform Maintenance Allowance." We find that the issue of "Compensation" identified in the Impasse Request, together with the several specific proposals in the letter identified above, are more than sufficient to place the City on notice of the Union's intent on this subject.

Pursuant to NYCCBL § 12-307(a), "wages," statutorily defined as:

> including but not limited to wage rates, pensions [now superseded], health and welfare benefits, uniform allowances and shift premiums . . . ,

are mandatory subjects of bargaining. This Board has held that the term "wages" also includes "direct and immediate economic benefits flowing from the employment relationship." *DC 37*, 3 OCB2d 5, at 8 (BCB 2010); *Local 621, SEIU,* 2 OCB2d 27, at 10 (BCB 2009). We have stated that wages constitute perhaps the quintessential mandatory subject of bargaining. *SSEU, Local 371*, 1 OCB2d 20, at 10 (BCB 2008); *UFOA*, 1 OCB2d 17, at 9-10 (citing cases); *Bellmore Union Free Sch. Dist.*, 34 PERB ¶ 3009 at 3017 (2001); *see also*, Lefkowitz, ed., *Public Sector Labor Law* 3d Ed. (2008) at 612 ("At this stage of Taylor Law development, no citation is required to support the statement that salary levels . . . are a mandatory subject of bargaining").

For these reasons, we find LEEBA's "Compensation" proposals as outlined herein to be mandatorily bargainable.

IMPASSE REQUEST ISSUE NO. 6: Pregnancy and light duty assignments

City's Position

The City contends that a demand for bargaining over light duty assignments interferes with the employer's prerogatives with respect to scheduling, staffing levels, and assignment of personnel. These are management rights under the NYCCBL. Therefore, this demand is a non-mandatory subject of bargaining. To the extent that some aspects of this demand might be bargainable, PERB has held that a single demand consisting of various parts, some of which are mandatory and some of which are non-mandatory, is non-mandatory in its entirety. Finally, this demand as written in the Impasse Request is vague and ambiguous. For all these reasons, this demand is not bargainable.

Union's Position

LEEBA asserts that this issue involves a matter of public safety, because EPOs are required to perform strenuous police duties to protect the public against terrorist attack and pollution of the watershed. Pregnant EPOs currently perform the same strenuous duties as all other EPOs, and a physical limitation of full strenuous duty must be considered. The prior cases relied upon by the City in support of its managerial prerogative claims are not relevant because the present case involves different facts. Moreover, in over four years of bargaining the City has never offered a counterproposal on this issue.

DECISION

We note initially that the issue stated as "pregnancy and light duty assignments" in the Impasse Request is expanded upon in the Union's February 4, 2006 letter, which states a proposal, under the heading "Paid Maternity Leave," for:

> Six months paid maternity leave and three months light duty time shall be provided to female officers to deliver and care for newborn children.

We find that this issue, as identified in the Impasse Request, and explained in the proposal in the letter quoted above, is sufficiently specific to place the City on notice of the Union's intent on this subject.

This Board, in an early case, held that the matter of maternity benefits for employees was a mandatory subject of bargaining. *DC 37*, 11 OCB 6, at 2 (BCB 1973). We noted in that case, however, that the parties had not argued the effect of the Fair Employment Title of the Civil Rights Act or other anti-discrimination laws on the duty to bargain on maternity benefits; therefore, the Board stated, it did not address that issue. *Id.* at 2-3. Shortly thereafter, the Court of Appeals

addressed the interplay between the anti-discrimination statutes and the duty to bargain under the Taylor Law.

In *Union Free Sch. Dist. No. 6 v. New York State Human Rights Appeal Bd.*, 35 N.Y.2d 371 (1974), the issue presented was whether under the Human Rights Law (Executive Law, art. 15) pregnancy and childbirth may be treated differently in an employment relationship from other instances of physical or medical impairment or disability, merely because the personnel policy in question was the product of bilateral negotiations under the Taylor Law. The negotiated personnel policy involved in that case singled out childbirth among other physical conditions for special treatment in fixing terms of compensation and for return to employment thereafter. The Court held that the personnel policy was no less violative of the Human Rights Law because it had been negotiated. *Id.* at 378. The Court adopted the reasoning of the Appellate Division decision in the case, which observed that under the duty of fair representation, a union,

> . . . must neither discriminate racially in the making of an agreement nor in the performance of a nondiscriminatory agreement. We think that the obligation of the agent is equally as broad in refraining from entering into labor contracts which discriminate on account of sex. The same statute and the same public policy apply to both racial and sexual discrimination (Executive Law, ss 290, 296).

Union Free Sch. Dist. No. 6, 43 A.D.2d 31, at 35 (2d Dept. 1973). The Appellate Division concluded that the union consequently was disabled from entering into the collective bargaining contract containing discriminatory provisions concerning maternity leave. The Court of Appeals agreed and affirmed. 35 N.Y.2d 371, at 379 (1974).

More recently, PERB considered a similar situation involving a demand for a preferential benefit for employees on maternity leave. In *City of White Plains*, 33 PERB ¶ 3051 (2000), PERB held that a demand that would treat pregnancy and childbirth leave differently from other types of

leave was a non-mandatory subject, citing the court's decision in *Union Free Sch. Dist. No. 6, supra*.

On the basis of these subsequent decisions, with which we agree, we hold that LEEBA's proposal to provide six months of paid maternity leave for female EPOs, a benefit that differs from the amount of paid leave granted to other employees, is discriminatory in violation of public policy and, therefore, is a non-mandatory subject of bargaining.

We next consider that part of the Union's proposal that calls for "three months light duty time" for female EPOs in connection with pregnancy and childbirth. It is well established that the City has the managerial prerogative, pursuant to NYCCBL § 12-307(b), unilaterally to determine the job assignments of its employees and that its decisions on such matters are not within the scope of collective bargaining. DC 37, 63 OCB 34, at17 (BCB 1999); *UFA*, 3 OCB 7 (BCB 1969). This Board has held that the assignments given to employees unable to perform full-duty is a determination regarding necessary levels of staffing, and the City has the right to establish and alter such staffing practices. *DC 37,* 73 OCB 7, at 19 (BCB 2004); *DC 37,* 63 OCB 34, at 18 (BCB 1999); *see Town of Carmel,* 31 PERB ¶ 3006, 3009 (1998), *aff'd sub nom. Town of Carmel Police Benevolent Ass'n v. Public Empl. Rel. Bd.,* 267 A.D.2d 858 (3d Dept. 1999).

Thus, apart from the question of the discriminatory applicability of this proposal, we hold that a demand to require the assignment of certain employees to "light duty" positions is a non-mandatory subject of bargaining.

IMPASSE REQUEST ISSUE NO. 7: Use of Private Guards to do Police Work

City's Position

The City observes preliminarily that LEEBA's claim that the City has entered into a contractual agreement with a private security company to perform the work of EPOs was dismissed

by the Board in the related improper practice proceeding on the grounds that it was conclusory and "completely devoid of dates or other pertinent information. *LEEBA*, 79 OCB 18, at 23 (BCB 2007).

The City argues that the decision to eliminate jobs and curtail services is a management prerogative. Assuming, arguendo, that the Union is seeking to bargain over an alleged contracting-out of unit work, this would be bargainable only if the Union showed that the work in question had been performed exclusively by unit members. Here, LEEBA has failed to establish that a transfer of work even occurred, let alone that the work had been performed exclusively by unit members. Finally, this proposal, too, as written in the Impasse Request is vague and ambiguous. For all these reasons, this demand is not bargainable.

Union's Position

The Union submits that this is an issue of public safety. The State's environmental protection laws direct that the water supply for 11 million people be protected by police. LEEBA asserts that the City has negotiated several contracts to use FJC Security Guards and has paid the company over $30 million on each contract. The City maintains possession of the contracts. Further, the City knows that these private guards have not been trained to protect the water supply. These issues of public safety are waiting to be decided.

DISCUSSION

This issue, as identified in the Impasse Request, is not further clarified in the Union's February 4, 2006 letter. The Union's answer to the petition on this issue is unresponsive and merely attempts to recast this scope of bargaining question as an issue of public safety. If the latter is correct, then the Union is in the wrong forum.

We find this proposal to be vague, ambiguous, and lacking in sufficient detail to inform the

City of the Union's specific intent. Even if this Board and the City could surmise what provisions LEEBA was seeking to bargain regarding the use of private guards, we would find this proposal to be a non-mandatory subject.

Generally, management has the right to determine the "methods, means and personnel by which government operations are to be conducted." See NYCCBL § 12-307(b); *IUOE,* 77 OCB 2, at 12 (BCB 2006); *USA, Local 831*, 39 OCB 6, at 10 (BCB 1987); *see also State University of New York (Stony Brook),* 33 PERB ¶ 3035 (2000). In *IUOE, supra*, this Board adopted the standard established by PERB in *Niagra Frontier Transportation Authority*, 18 PERB ¶ 3083 (1985) for determining whether a management decision to transfer unit work to non-unit employees is bargainable. 77 OCB 2, at 13-14. Under this standard, in order to render bargainable a management decision to transfer unit work, a union must show: (1) that the work in question had been performed by unit employees exclusively, and (2) that the reassigned tasks are substantially similar to those previously performed by unit employees. *IUOE*, 77 OCB 2, at 14; *Niagra Frontier Transportation Authority*, 18 PERB ¶ 3083, at 3182. If the union fails to establish that its unit members exclusively performed the work in question, it has no right to bargain over the transfer of work. *IUOE*, 77 OCB 2, at 16-18; *USA*, 45 OCB 68, at 22 (BCB 1990); DC 37, 45 OCB 6, at 24-25 (BCB 1990).

In the present case, LEEBA has not alleged that EPOs exclusively have performed the work in question. In fact, the Union's reference to the City having entered into "several contracts" with FJC Security Guards suggests that this relationship has been continuing for some period of time. LEEBA also has not alleged that the work performed under contract by the private guards is "substantially similar" to work previously performed by EPOs. LEEBA has not described in any manner the work it believes is performed by the private guards (other than to allege that they have

not been "trained to protect the water supply") nor has it attempted to compare or contrast that work with the work of EPOs, and it has not alleged that any EPO has been replaced or laid off as a result of the alleged use of the private guards. As we noted in an earlier case between these same parties, the Union's allegations concerning the alleged contacting-out are completely devoid of dates and other pertinent information. *LEEBA,* 79 OCB 18, at 23 (BCB 2007). No additional information has been provided in the present case, other than the name of the alleged contractor, FJC Security Guards.

We find that LEEBA has entirely failed to address, let alone satisfy, the standard articulated in *IUOE*, *supra*, and *Niagra Frontier Transportation Authority*, *supra*, to justify bargaining over a decision to contract-out unit work. Accordingly, even if this proposal were not vague, ambiguous, and lacking in detail, we would find it to be a non-mandatory subject of bargaining.

IMPASSE REQUEST ISSUE NO. 8: Competitive Promotion Process without Favoritism

City's Position

To the extent this proposal concerns procedures for promotion to positions outside the unit, the rules, regulations and definitions that govern such promotions are within the exclusive authority of the Department of Citywide Administrative Services ("DCAS") pursuant to § 814(a)(2) of the City Charter and are non-mandatory subjects of bargaining. Moreover, qualifications and criteria for promotions have been held by PERB to be non-mandatory subjects. Finally, to the extent this proposal seeks to dictate the standards by which intra-unit promotions are made, it is also a non-mandatory subject.

Union's Position

The Union states that the New York State Constitution and the "Supplemental Agreement"

both address competitive civil service promotions, which must be based on merit, fitness, and competitive examination. LEEBA argues that the City, in objecting to this proposal, is attempting to impose standards for conducting impasse panel proceedings and attempting to control the evidence presented to the impasse panel. The Union asserts that limiting impasse panel deliberations is akin to denial of due process.

DISCUSSION

Preliminarily, we note that it is unclear to what "promotion process' the Union intends its proposal to apply. In our most recent decision between these parties, we found that the Union's representatives were not familiar with, or evinced confusion over, what the term "promotion" means in the context of the civil service. *LEEBA*, 2 OCB2d 29, at 16. Understandably, the City has addressed this proposal as though it applied alternatively to promotions out of the unit as well as to intra-unit promotions. In this regard, we note that the only civil service title certified in the unit represented by LEEBA is EPO.[8] Accordingly, since presently there is no other title in the unit, in a civil service sense there can be no intra-unit promotions. To the extent the Union may intend its proposal to apply to the assignment of EPOs to unofficial "office titles" used by DEP within the unit, we will consider this proposal with regard to such assignments as well as actual promotions.

We have found that deciding whether some types of experience are more valuable than others in preparing employees for particular job assignments or for promotion is the type of judgment reserved to the City by NYCCBL § 12-307(b).[9] *CSBA, Local 237*, 65 OCB 9, at 12-13 (BCB 2000);

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[8] *LEEBA*, 76 OCB 5 (BOC 2005).

[9] NYCCBL § 12-307(b) provides, in pertinent part, that is the right of the City to, "determine the standards of selection for employment, . . . [and] determine the methods, means and personnel by which government operations are to be conducted . . . . "

UFA, 43 OCB 4, at 155-156 (BCB 1989); *PBA*, 39 OCB 24, at 6 (BCB 1987), *aff'd, Caruso v. Anderson*, 138 Misc.2d 719 (N.Y. Co. 1987), *aff'd,* 145 A.D.2d 1004 (1st Dept. 1988), *lv. denied,* 73 N.Y.2d 709(1989).

This Board also has held that procedures for the conduct of promotional examinations for the selection and promotion of personnel involve matters governed by the Civil Service Law and the rules and regulations of the Civil Service Commission (in this context, the predecessor of DCAS); and that the City's exercise of its prerogatives in compliance with those rules and regulations is not mandatorily bargainable. *UFA*, 43 OCB 4, at 139 (BCB 1989); *DC 37*, 7 OCB 16, at 8-9 (BCB 1971). We have noted that a union's concern about avoiding alleged "cronyism and favoritism" was insufficient to require bargaining in this area that has been placed within management's discretion. *PBA*, 39 OCB 24, at 6 (BCB 1987).

As we explained earlier, *supra* at 11, this Board has held that if a demand that relates to a matter covered by statute also concerns wages, hours, working conditions, or any other mandatory subject of bargaining, the demand is within the scope of mandatory collective bargaining unless: (a) it would require a contravention of law; or, (b) the subject has been pre-empted by statute; or, (c) it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion. *See EMS Superior Officers Ass'n*, 75 OCB 15, at 9-10 (BCB 2005); *PBA*, 59 OCB 24, at 41 (BCB 1997); *UFA*, 43 OCB 4, at 7-9 (BCB 1989). Such a demand is not "redundant," for inclusion of a benefit in the collective bargaining agreement makes the benefit enforceable through the agreement's grievance and arbitration provisions. The ability to enforce an alleged violation of a benefit granted both by law and by contract through the grievance and arbitration process involves a right which supplements the statutory benefit and is not merely

redundant. *UFA*, 43 OCB 4, at 9.

The City has not alleged that a demand seeking agreement to comply with the applicable law regarding civil service promotions would contravene any law, that the subject has been pre-empted by statute, or that it would offend public policy. Therefore, we find that to the extent the Union's proposal merely seeks the City's agreement to comply with the applicable provisions of the State Constitution, the Civil Service Law, and the formal rules and regulations promulgated by DCAS, it is a mandatory subject of bargaining. However, to the extent the proposal seeks to create and impose any new procedures regarding the assignment of employees to jobs within the bargaining unit, or any procedures regarding promotions out of the unit, it infringes on the statutory rights of the City and is a non-mandatory subject.

IMPASSE REQUEST ISSUE NO. 9: Command Discipline Policy with Union Input

City's Position

The City contends that this proposal is vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. The term "command discipline" encompasses various aspects, some of which may be mandatory subjects and some of which are non-mandatory. While subjects that affect wages, hours and working conditions are mandatorily bargainable, this proposal, as written, does not inform the Board what aspects the Union seek to bargain.

Union's Position

The Union argues that inconsistent command discipline affects public safety. Further, command discipline policy must be uniform in a para-military organization.

LEEBA contends that the City and DEP constantly issue commands to EPOs to respond to calls in local jurisdictions outside New York City. These commands range from domestic violence

to drug sales, robbery and arson to murder. The City is aware of the wage and benefit disparities that exist between the EPOs and the police that serve other counties where EPOs perform their work. As a result, EPOs have the highest rate of attrition of any organized labor force employed by the City.

DISCUSSION

We note initially that the issue stated as "Command Discipline Policy with Union Input" in the Impasse Request is expanded upon in the Union's February 4, 2006 letter, which contains a proposal, labeled "Command Discipline Policy and Procedures," that states:

> Employer hereby agrees to establish, with the agreement of LEEBA, a command discipline and grievance policy that will be adhered to by both parties in the administration of discipline and processing of employee grievances.

We agree with the City that this proposal, even as expanded, is vague and unspecific, as it says nothing about the content of the proposed policy. Nevertheless, consistent with this Board's policy of advising the parties of those elements of a demand which are mandatory subjects and of those elements which are nonmandatory subjects of bargaining, we will discuss the potential parameters of this proposal.[10]

This Board has long held that, while it is an employer's prerogative to take disciplinary action, the procedures necessary for the administration of discipline are mandatorily negotiable. *Municipal Highway Inspectors Local Union 1042*, 2 OCB 12, at 8 (BCB 2009); *DC 37,* 79 BCB 37, at 10 (BCB 2007); *DC 37,* 65 OCB 36, at 9 (BCB 2000). As we stated in *DC 37,* 65 OCB 36 (BCB 2000):

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[10] We find that LEEBA's answer regarding this proposal is non-responsive to the City's objection, and it will not be discussed in our analysis.

> NYCCBL § 12-306(b) reserves to management the right to take disciplinary action against its employees. But the management prerogative provision of the NYCCBL was not intended to cover the entire area of discipline. In our view, it is not the intent of the NYCCBL to prohibit bargaining on the methods, means and procedures which may be used in effectuating disciplinary action.

Id. at 9 citing *DC 37,* 11 OCB 3, at 8-11 (BCB 1973).

We also have held specifically that management's right to take disciplinary action does not affect the right of a union to bargain over procedures for review and appeals of disciplinary actions. *DC 37*, 67 OCB 25, at 6-7 (BCB 2001); *DC 37,* 11 OCB 3, at 9-11 (BCB 1973).

Based on these principles, if LEEBA's proposal were intended to seek agreement on specific procedures for the implementation, review and appeal of disciplinary action taken against EPOs, it would be mandatorily bargainable. Four years after it raised this issue, LEEBA still has not alleged or proposed what those procedures should be. At this late stage of the bargaining process, we find this proposal to be so vague and lacking in detail as to be a non-mandatory subject.

IMPASSE REQUEST ISSUE NO. 10: Set-up of Labor Relations Committee

City's Position

The City contends that this proposal is vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. While the City recognizes that a labor-management committee to deal with subjects that affect wages, hours and working conditions would be mandatorily bargainable, this proposal does not contain sufficient specificity to insure that the scope of the committee would not intrude into matters within the City's statutory managerial discretion pursuant to NYCCBL § 12-307(b).

Union's Position

The Union alleges that every Citywide agreement has a provision for a labor relations

committee. It asserts that the City is feigning a lack of understanding of what the term "labor relations committee" means. LEEBA submits that its February 4, 2006 letter is sufficiently specific to inform the City of the details of the Union's proposal. The City has never made a written counter proposal to clarify the issues involved here.

DISCUSSION

Preliminarily, we note that, contrary to LEEBA's position, there is no provision of the Union's February 4, 2006 letter that addresses the matter of a "labor relations committee." Accordingly, we consider this issue on the basis of the bare statement in the Impasse Request.

This Board has held that a demand which seeks to create a committee,

> to meet periodically for the purpose of discussing matters of mutual concern is a mandatory subject of bargaining, to the extent that the matters to be considered by the committee are terms and conditions of employment.

PBA, 59 OCB 24, at 32-33 (BCB 1997); *UFA*, 43 OCB 4, at 219 (BCB 1989); *see also, UFA,* 49 OCB 45, at 13 (BCB 1992). However, to the extent the subjects to be considered by such a committee overlap matters of management prerogative, the demand would be nonmandatory. *PBA*, 59 OCB 24, at 34-35 (BCB 1997).

Our policy is consistent with that of PERB, which has long held that a demand seeking to establish a joint labor management committee empowered to address mandatory matters is a mandatory subject of negotiation. However, to the extent the stated jurisdiction of such a committee goes beyond terms and conditions of employment, the demand would be nonmandatory. *See, e.g., Fairview Fire District,* 12 PERB ¶ 3083 (1979); *Somers Central School District*, 9 PERB ¶ 3014 (1976); *City of Albany*, 7 PERB ¶ 3079 (1974).

LEEBA is correct that many collective bargaining agreements in the City provide for labor

management committees. However, where an objection is stated, as here, the party seeking the committee should identify the subjects which it proposes would be submissible to the committee. The Union has failed to do this. The City, and this Board, are left to guess what matters could be brought before the proposed "labor relations committee." Accordingly, we hold generally that a demand for a labor management committee is mandatorily bargainable. In the circumstances of this case, however, the City is only required to bargain over, and the impasse panel only need consider, this demand if the Union identifies mandatory subjects of bargaining that would be presented to the labor management committee.

II. Proposals Stated in LEEBA's February 4, 2006 Letter

LETTER PROPOSAL NO. 1: Probationary Period

> **The probationary period for a DEP Police Officer shall commence on the date of hire and continue for a period of twelve (12) months.**

City's Position

Probationary periods are the subject of statutory discretion given to the local civil service commission pursuant to Civil Service Law § 63. This is a non-mandatory subject because it infringes upon the exercise of that discretion.

Union's Position

LEEBA now withdraws its proposal because subsequent to the proposal having been made, the City agreed to a longer probationary period for police officers employed by the New York City Police Department, which the Union asserts is patterned after the requirement for EPOs.

DISCUSSION

The proposal having been withdrawn by the Union, the dispute as to this issue is moot and

will not be decided by this Board.[11]

LETTER PROPOSAL NO. 2: 40-Hour Work Week

> **Each work week shall commence at 0001 Sunday morning and continue until midnight on Saturday night. During each work week, DEP Police Officers shall be required to perform 40 hours of on-duty service for the employer.**

City's Position

While the total number of hours in a work week is a mandatory subject, the definition of the work week as to its beginning time and ending time is not. To the extent that some aspects of this demand might be bargainable, PERB has held that a demand consisting of various parts, some of which are mandatory and some of which are non-mandatory, which is presented as a single entity, is non-mandatory in its entirety.

Union's Position

The Union has always been ready, willing and able to negotiate a definition of a work week, but the City has refused to do so. PERB's policy on mixed demand is irrelevant because PERB has held that it does not have jurisdiction over EPOs. The City obtained an exemption from the FLSA which only applies to law enforcement employees and firefighters.

DISCUSSION

It is well established that while the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, it must bargain over the total numbers of hours employees work per day or per week. *See UFOA,* 1 OCB2d 17, at 10 (BCB 2008); *DC 37*, 75 OCB 10, at 8 (BCB 2005); *PBA*, 15 OCB 5, at 17 (BCB 1975); and its companion case, *PBA*, 15

[11] We note that this Board has already ruled in a prior case between these parties that the subject of probationary periods is a non-mandatory subject. *LEEBA*, 79 OCB 18, at 22 (BCB 2007).

OCB 24, at 16-17, 19 (BCB 1975), *aff'd, Patrolmen's Benevolent Ass'n v. Bd. of Coll. Barg.*, N.Y.L.J., Jan. 2, 1976, at 6 (S. Ct. N.Y. Co.). Further, this Board has held that the duty to bargain over hours includes the duty to bargain over "swings," or time off between tours. *DC 37,* 75 OCB 10, at 9 (BCB 2005); *see FADBA*, 55 OCB 1, at 10-11 (BCB 1995); *PBA*, 15 OCB 24, at 19-20.

The City acknowledges that the Union's proposal is bargainable in part, but it argues that the non-mandatory aspects render the entire proposal non-bargainable. As discussed earlier, *supra* at 6, in cases in which a demand has a dual character we have followed a practice of advising the parties of those elements of a demand which are mandatory subjects and of those elements which are nonmandatory subjects of bargaining. *See DIA,* 79 OCB 13, at 6-7 (BCB 2007); *UFA*, 43 OCB 4, at 15-16 (BCB 1989). Here, we find that to the extent this proposal seeks a 40-hour work week, it is a mandatory subject of bargaining. To the extent that it attempts to establish starting and finishing times, it infringes on the City's prerogatives to schedule its employees, and it is a non-mandatory subject.

LETTER PROPOSAL NO. 3: Spirit and Intent

> **In order to preserve the intent and spirit of the overtime provisions, there shall be no rescheduling of days off and/or tours of duty.**

City's Position

This proposal would require the City to waive its right to schedule tours of duty and/or relinquish its prerogative to schedule overtime according to the needs of the agency. Both scheduling and assignment of overtime have been recognized by the Board and PERB as management rights. Therefore, it is a non-mandatory subject of bargaining.

Union's Position

An impasse panel is required to decide the significance of the City's reclassification of EPOs from Rule XI to Rule X. There is a question whether this nullified the prior Rule XI agreement. The Board ruled that the 2006 agreement negotiated by Local 300, SEIU, did not apply to EPOs. No collective bargaining agreement exists for EPOs under Rule X. Therefore, the City's continued use of the term "mandatory" in references to bargaining is without basis, because all terms and conditions of an initial agreement are "mandatory." Thus, LEEBA is entitled to seek to have overtime defined in the agreement, replacing the arbitrary standard now used by DEP.

DISCUSSION

As stated above, is well established that the City possesses the managerial prerogative to determine staffing levels and schedules, including starting and finishing times. *See UFOA,* 1 OCB2d 17, at 10 (BCB 2008); *DC 37*, 75 OCB 10, at 8 (BCB 2005); *PBA*, 15 OCB 5, at 17 (BCB 1975); and its companion case, *PBA*, 15 OCB 24, at 16-17, 19 (BCB 1975), *aff'd, Patrolmen's Benev. Ass'n v. Bd. of Coll. Barg.*, N.Y.L.J., Jan. 2, 1976, at 6 (S. Ct. N.Y. Co.).

Regarding the matter of overtime, this Board often has stated the general proposition that:

> the scheduling and assignment of overtime falls within the City's management right to determine the methods, means and personnel by which government operations are to be conducted. The decision as to when and how much overtime is to be authorized or ordered is outside the scope of the City's obligation to bargain collectively.

Local 924, DC 37, 1 OCB2d 3, at 9 (BCB 2008); *DC 37*, 67 OCB 3, at 6-7 (BCB 2001); *see also UPOA*, 67 OCB 48 (BCB 2001); *UPOA*, 39 OCB 29 (BCB 1987).

The Board in *Local 924* and in *FDNY*, however, went on to distinguish between decisions regarding "when or how much overtime the Department deems necessary" and "the system that the

Department utilizes in distributing overtime to employees, after it has determined the need for overtime." The former is managerial prerogative, the latter is not. *Local 924,* 1 OCB2d 3, at 9; *DC 37*, 67 OCB 3, at 7.

Finally, this Board has held that the City may reschedule shifts to meet its needs. *PBA*, 73 OCB 12, at 21, citing *COBA*, 27 OCB 16, at 44 (BCB 1981).

Viewing LEEBA's proposal within this framework, we find that the proposal, on its face, purports to limit the City's right to schedule EPOs, including the rescheduling of shifts deemed necessary by DEP, and therefore it is a non-mandatory subject of bargaining. However, to the extent the proposal, albeit inartfully, seeks procedures for the equitable distribution of such overtime as the City deems necessary, it is a mandatory subject.

LETTER PROPOSAL NO. 4: Recall to Duty

> **If called back to duty after leaving a tour of duty, the officer shall be guaranteed a minimum of four (4) hours overtime pay.**

LETTER PROPOSAL NO. 5: Court Duty

> **Where an officer is required to perform Court duty or be a witness in any proceeding for his employer, and where said duty is outside the normal tour, the officer shall be guaranteed a minimum of four (4) hours overtime pay.**

City's Position

Assignment of overtime is a management prerogative. These proposals, by requiring a minimum of four hours of overtime, would interfere with the City's right to determine whether and when to assign overtime, and how much overtime is necessary to perform the work. Call-backs and Court appearances outside the regularly scheduled tours of duty are overtime, as to which the Union may bargain the rate of compensation; but the assignment to this work and the amount of

compensation are non-mandatory subjects.

Union's Position

The Union seeks to define the terms and conditions for overtime assignments for police work, a legitimate collective bargaining goal, and to remove the former provisions on this subject that were negotiated when EPOs were classified under Rule XI. The precedents relied on by the City are not rationally related to the present case because they did not involve the issue of a contract for Rule X employees.

DISCUSSION

We find that there is a dual character to this proposal by LEEBA. It is clear that a union is free to demand bargaining over the rate of compensation to be paid when overtime work is performed; but, the decision whether and when to assign overtime belongs to management. *DIA,* 79 OCB 13, at 16-17 (BCB 2007); *FADBA,* 55 OCB 1, at 12 (BCB 1995). If, as the City suggests, LEEBA's proposal is read as requiring the City to assign at least four hours of work on every occasion that it calls an off-duty EPO back to work, it would interfere with the employer's right to determine when or how much overtime it deems necessary. *Local 924, DC 37,* 1 OCB2d 3, at 9 (BCB 2008); *FDNY*, 67 OCB 3, at 7 (BCB 2001). Such a requirement also would interfere with the City's prerogative to determine staffing levels and schedules. *See UFOA,* 1 OCB2d 17, at 10 (BCB 2008); *DC 37*, 75 OCB 10, at 8 (BCB 2005); *PBA*, 15 OCB 5, at 17 (BCB 1975); *cf. Village of Buchanan*, 29 PERB ¶ 3061 (1996) (demand for guaranteed tour for officers called in as "floaters" held non-bargainable as it interferes with the right to determine levels of staffing). Therefore, if this were the intent of the Union's proposal, it would be a non-mandatory subject.

However, contrary to the City's suggestion, it seems clear that LEEBA intends this proposal

as a demand for payment in an amount equal to at least four hours at the overtime rate whenever an off-duty EPO is recalled to work. We find that this is a demand for compensation that is mandatorily bargainable. See *ADW/DWA*, 3 OCB2d 8, at 13 (BCB 2010); *CEA*, 75 OCB 16, at 9 (BCB 2005); *City of Newburgh*, 30 PERB ¶ 3007 (1997) (demand for minimum call-in pay held bargainable as wages; it does not affect staffing, as employees can be released as soon as the need is satisfied, but will receive the specified amount of pay); *Town of East Hampton*, 42 PERB ¶ 4534 (ALJ 2009) (same). Accordingly, the compensation aspect of the Union's proposal is a mandatory subject.

LETTER PROPOSAL NO. 6: Paid Maternity Leave

This proposal has been discussed, *supra* at 18-20, in connection with the Impasse Request issue on "Pregnancy and light duty assignments." For the reasons stated there, it is a non-mandatory subject of bargaining.

LETTER PROPOSAL NO. 7: Recognition of LEEBA: Union Recognition and Unit Designation

> **The City of New York hereby recognizes LEEBA as the sole and exclusive collective bargaining representative for the unit consisting of DEP Police Officers, detectives, sergeants and lieutenants.**
>
> **Except where otherwise provided for herein, the purpose of the Agreement, the terms "employee" or "Police Officer" shall be interchangeable and relate solely to employees in the unit DEP Police Officers designated 70811.**
>
> **All employees covered by this Agreement shall be free to become and remain members of LEEBA.**
>
> **LEEBA, the Union, shall have the exclusive right to the check-off and transmittal of dues in behalf of each employee in the unit in accord with Executive Orders in place for the City of New York. The City hereby agrees to the procedures for Orderly Payroll Check-off of Union Dues and any executive orders which may be amended or supersede the present orders.**

City's Position

The City contends that this proposal involves matters that are within the statutory authority of the Board and/or the Civil Service Law. The City argues that demands that relate to matters covered by statute are non-mandatory unless they concern wages, hours, and working conditions, which this proposal does not. In any event, insofar as this proposal reiterates portions of the NYCCBL governing the relationship between the parties and the initial certification of LEEBA by the Board of Certification, it is non-mandatory because these obligations, by their very nature, are not subject to agreement between the parties.

Union's Position

The Union denies the City's contentions, and asserts that the issue of exclusive recognition was agreed to in the earlier mediation between the parties.

DISCUSSION

As explained previously, *supra* at 11 and 25, this Board has held that if a demand that relates to a matter covered by statute also concerns wages, hours, working conditions, or any other mandatory subject of bargaining, the demand is within the scope of mandatory collective bargaining unless: (a) it would require a contravention of law; or, (b) the subject has been pre-empted by statute; or, (c) it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion. *See EMS Superior Officers Ass'n*, 75 OCB 15, at 9-10 (BCB 2005); *PBA*, 59 OCB 24, at 41 (BCB 1997); *UFA,* 43 OCB 4, at 7-9 (BCB 1989).

Clearly, a demand by a certified representative for a union recognition clause in its collective bargaining agreement is a mandatory subject of bargaining. *DIA*, 79 OCB 13, at 18 (BCB 2007).

The fact that the Board of Certification, acting pursuant to the NYCCBL, has already certified LEEBA as the exclusive representative for EPOs, is a pre-condition, not a bar, to the negotiability of this proposal. Contractual recognition of a certified union does not contravene the law, nor do the certification provisions of the NYCCBL pre-empt consistent contractual provisions. Moreover, recognition of exclusive representation status is a statutory benefit of a certified employee organization pursuant to NYCCBL § 12-305.[12] We take administrative notice that many, if not most, collective bargaining agreements entered into within this Board's jurisdiction contain union recognition clauses similar to the one LEEBA proposes.

The Board of Certification certified LEEBA as the exclusive representative of the title "Environmental Police Officer (Title Code 70811)," referred to herein as "EPO." *LEEBA*, 76 OCB 5, at 2 (BOC 2005). LEEBA's union recognition proposal seeks recognition for the titles "DEP Police Officers, detectives, sergeants and lieutenants." While it appears that the "DEP Police Officer" title is the essentially the same as the EPO title, the titles "detectives, sergeants and lieutenants" are not referred to in the Board of Certification's decision. No evidence has been submitted here concerning whether these latter titles are in-house or office titles, to which EPOs may be assigned; or are separate civil service classifications, for which LEEBA has not been certified.

This situation is similar to that which this Board addressed in *DIA*, 79 OCB 13 (BCB 2007). There, the Union which was certified to represent Investigator titles, sought in bargaining the

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[12] NYCCBL § 12-305 provides, in pertinent part:
. . . A certified or designated employee organization shall be recognized as the exclusive bargaining representative of the public employees in the appropriate bargaining unit.

inclusion of the "Deputy Chief" title in the bargaining unit. This Board held, initially, that to the extent the demand would alter the bargaining unit by adding a new title, it was a nonmandatory subject of bargaining. *Id.* at 18; *see UFA*, 43 OCB 4, at 303-304 (BCB 1989). In further considering whether the Union's demand was bargainable, the Board stated:

> It is not clear from the record whether Deputy Chief is, in fact, a separate civil service position, or rather, just an assignment designation for employees serving in other Investigator titles. If the latter, the Union already represents the employees in the titles certified by the Board of Certification. If the former, the Union's recourse would be either to petition the Board of Certification to represent the Deputy Chief title, or to grieve the assignment of unit members to work out-of-title in the Deputy Chief title. In any event, we find that the ambiguity regarding the status of this position does not provide any legal basis to make an otherwise nonmandatory subject into a mandatory one.

DIA, *supra*, 79 OCB 13, at 19.

We find that the same principles apply to the "detective, sergeant and lieutenant" titles. To the extent that these are assignment designations given to employees who continue to serve in the EPO title, LEEBA already represents them. While the parties cannot by agreement change the unit certified by the Board of Certification, we see no reason why a contractual recognition clause could not refer to intra-agency designations to which the City has assigned EPOs. However, to the extent these titles are separate civil service positions, then the Union's options are the same as those described above regarding the Deputy Chief title.

Finally, regarding the aspects of LEEBA's proposal that concern the check-off and transmittal of union dues, we have long recognized that a demand for a union dues check-off is a mandatory subject of bargaining. *UPOA*, 35 OCB 23 (BCB 1985) (held mandatorily bargainable, but at the City-wide, not unit, level). As we discussed, *supra* at 9, this Board found in a prior decision that EPOs are classified as Rule X employees in the Miscellaneous Service and that, by

definition, Rule X excludes them from the Career and Salary Plan. We concluded that, since EPOs are not included in the Career and Salary Plan, the Citywide level of bargaining provisions of NYCCBL § 12-307(a)(2) do not apply to them. *LEEBA*, 79 OCB 18, at 19 (BCB 2007). Therefore, we now hold that the subject of a union dues check-off may be negotiated by LEEBA at the unit level.

LETTER PROPOSAL NO. 8: Health benefits

> **The City represents that it will continue all present Medical Health Care Benefits in the same form and same manner as are presently in effect for the unit 70811.**

LETTER PROPOSAL NO. 9: Ancillary health benefits

> **The city recognizes that the present eye glass, Dental and prescription drug coverage is administered by the Union and hereby agrees to designate LEEBA as the administrator of such plan(s) for the benefit of unit 70811. The amount provided to LEEBA to administer these plans is agreed to be increased to $3,000/year for each employee.**

City's Position

The City contends that these proposals are vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. Without any particularity about the specific benefits included in the proposals, there is no basis on which to negotiate. The parties have not previously negotiated on this subject, and there is no prior agreement between the parties to guide negotiations. In addition, to the extent the Union's health benefit proposal demands an unqualified guarantee of a particular level of benefits, such a demand would foreclose the possibility of future negotiations in the event of changed circumstances affecting Citywide health benefits. Moreover, the health benefit proposal places an unqualified obligation on the City to provide a benefit irrespective of the market availability of the benefit. For these reasons, these proposals are non-

mandatory subjects.

Union's Position

LEEBA denies all of the City's contentions regarding the health and ancillary health benefits, and asserts that the parties were in agreement on the issue of EPO health benefits during mediation.

DISCUSSION

Pursuant to the express terms of NYCCBL § 12-307(a), health benefits are a mandatory subject of bargaining.[13] *DIA*, 79 OCB 13, at 13 (BCB 2007); *UFA*, 71 OCB 13, at 6-7 (BCB 2003); *see also Local 237, IBT*, 67 OCB 37, at 6 (BCB 2001). Therefore, the subject of LEEBA's health benefit proposals is within the scope of mandatory collective bargaining.[14]

It is undisputed in this case that EPOs presently are covered by health benefits. Since there is no prior collective bargaining agreement between these parties, it is reasonable to assume that the EPOs' current health benefit coverage has remained unchanged from when the title was placed in

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[13] NYCCBL § 12-307(a) provides, in pertinent part, that the scope of mandatory bargaining includes:

. . . wages (including but not limited to . . . health and welfare benefits, . . .)

[14] We take administrative notice of the fact that this Board's past decisions have recognized that, historically, the Municipal Labor Committee ("MLC")(*See* NYCCBL § 12-303(k)), on behalf of its member unions, negotiates with the City on the subject of health insurance for municipal employees. The MLC Labor Management Health Insurance Policy Committee meets to address issues concerning the design, implementation, and administration of the City's health insurance program and oversees the gathering and exchange of pertinent data. The MLC Health Sub-Committee is comprised of representatives from the member unions of the MLC and the City. *PBA*, 79 OCB 6, at 5 (BCB 2007); *PBA*,73 OCB 14, at 2-3 (BCB 2004), *aff'd as modified, Patrolmen's Benev. Ass'n v. City of New York*, No. 113062/04 (Sup. Ct. N.Y. Co. Feb. 4, 2005), *aff'd*, 27 A.D.3d 381(1st Dept. 2007). That long-standing – and continuing – practice does not, however entirely extinguish the bargaining rights of individual unions. *See PBA*, 79 OCB 6, at 15 (BCB 2007) (City's duty to provide information needed for health benefit bargaining runs to each certified representative that requests it).

a bargaining unit represented by another union.[15] Clearly, the Union seeks to continue the presently existing health benefits. In addition, it is seeking an increase to the rate per unit employee as a contribution toward an ancillary health benefit plan. Under the circumstances, we are unconvinced that the City lacks understanding of the specific benefits included in the LEEBA's proposals. Moreover, we find the City's remaining arguments to relate to the merits of the Union's proposals and not to their negotiability.

Despite the City's objections in its scope of bargaining petition, LEEBA alleges that the parties were in agreement on the issue of the continuation of EPO health benefits during mediation. We need not resolve this inconsistency in the record. Since we find these proposals to be mandatory subjects, to the extent that the parties are not in agreement, these proposals may be submitted to the impasse panel for its consideration and determination.

LETTER PROPOSAL NO. 10: Uniform changes and selection of weapons:

> **The City hereby recognizes that LEEBA is a professional organization dedicated to the performance of law enforcement duties and as such will be presented with any and all proposals dealing with:**
>
> **a. Change of uniforms or insignia**
> **b. Change of transportation vehicles**
> **c. Changes to work schedules**
> **d. Changes in equipment**
> **e. Expenditures of funds received from Federal or State Homeland Security Department and agencies**
> **f. Changes in weapons**
> **g. Body armor**
>
> **LEEBA is hereby granted the right to test and approve the above items prior to implementation.**

City's Position

The City argues that LEEBA's demand to have the right to review and approve changes in

[15] *See* footnote 1, *supra*.

and/or expenditures for each of the above items would infringe upon the City's managerial prerogative to determine these matters. The Board has long held that decisions regarding uniforms, equipment, weapons, and scheduling, are matters of managerial prerogative. In addition, PERB also has held that the selection of equipment is a management prerogative. Also, the allocation of funds within an agency's budget is fundamental to the City's right to "determine the standards of service," "maintain the efficiency of governmental operations," and "exercise complete control and discretion over the organization and technology of performing its work" as set forth in NYCCBL § 12-307(b). Accordingly, all of these proposals are non-mandatory or prohibited subjects.

Union's Position

The Union denies all of the City's assertions. LEEBA contends that the City's "false claims" concerning the non-mandatory nature of these proposals are based on its refusal to recognize the "uniform status" of EPOs. These equipment and weapons demands involve issues of public safety as well as the safety of officers. The City's goal of saving money compromises the quality of equipment and weapons selected and hinders protection for the public and officers. The City claims financial hardship, but DEP siphons off $100,000,000 each year from the "Water Board." The truth of the City's financial claims should be judged by the impasse panel, which should be permitted to decide whether saving money is the proper criteria to use in procuring life protecting equipment.

DISCUSSION

This Board has long held that decisions regarding the selection or use of equipment involve the City's discretion over the methods, means and technology of performing its work, and that to the extent a union's demands usurp that discretion, they infringe on the exercise of managerial

prerogative and are rendered non-mandatory. *UFA*, 61 OCB 6, at 7 (BCB 1998); *USA*, 45 OCB 68, at 21 (BCB 1990); *UFA*, 43 OCB 4, at 145-146 (BCB 1989). Similarly, PERB has held that the selection of equipment is a management prerogative. *County of Nassau*, 41 PERB ¶ 4552 (ALJ 2008), citing *City of New Rochelle,* 10 PERB ¶ 3042 ((1977).

Consistent with these well-established holdings, LEEBA's proposals relating to transportation vehicles, equipment, weapons, and body armor – all of which we deem to be items or articles of equipment – are non-mandatory subjects of bargaining. In this regard, we note that this Board previously has specifically found demands relating to weapons to be non-mandatory. *UPOA*, 35 OCB 23, at 22 (BCB 1985); *see COBA*, 27 OCB 16, at 79 (BCB 1981); *see City of New Rochelle,* 10 PERB ¶ 3042, at 3079 ((1977). We also have found a demand for bulletproof vests [body armor] to be an equipment demand and, therefore, not mandatorily bargainable. *UFA*, 43 OCB 4, at 63 (BCB 1989); *see City of New Rochelle,* 13 PERB ¶ 4540 (1980).

Concerning LEEBA's allegations that the City's equipment decisions have an effect on the safety of EPOs, we have recognized that the potential consequences of the exercise of a management right may be so serious as to give rise to an obligation to bargain, pursuant to the practical impact provisions of NYCCBL § 12–307(b), over the amelioration of the impact. However, the burden is on the Union to prove a threat to the safety of employees before we find there is an impact justifying the imposition of a duty to bargain. *UFA*, 43 OCB 4, at 63 (BCB 1989). In the present case, the Union's references to the safety of EPOs are entirely conclusory and are indistinguishable from the Union's similarly non-specific assertions of dangers to public safety.

LEEBA's proposal regarding changes in uniforms and insignia, though not directly an equipment demand, similarly is a non-mandatory subject. This Board has held that the

determination and prescription of authorized uniforms is a management prerogative. *UFA*, 43 OCB 4, at 66 (BCB 1989); *COBA*, 27 OCB 16, at 79 (BCB 1981). PERB also has held that changes relating to badges, hat bands, and other uniform attachments for uniformed police and other para-military employees are non-mandatory subjects. *See County of Suffolk*, 39 PERB ¶ 4603 (ALJ 2006), and cases cited therein.

Further, we agree with the City that the Union's proposal seeking the right to review and approve DEP's "expenditure of funds received from Federal or state Homeland Security Department and agencies" would infringe on the City's managerial prerogative to "determine the standards of service," "maintain the efficiency of governmental operations," and "exercise complete control and discretion over the organization and technology of performing its work" as set forth in NYCCBL § 12-307(b).

Finally, we address LEEBA's demand to review and approve "changes to work schedules." It is well established that the City unilaterally may determine staffing levels and certain aspects of schedules, such as starting and finishing times, but that it must bargain over the total numbers of hours employees work per day or per week. *See UFOA,* 1 OCB2d 17, at 10 (BCB 2008); *DC 37*, 75 OCB 10, at 8 (BCB 2005); *PBA*, 15 OCB 5, at 17 (BCB 1975); and its companion case, *PBA*, 15 OCB 24, at 16-17, 19 (BCB 1975), *aff'd, Patrolmen's Benev. Ass'n v. Bd. of Coll. Barg.*, N.Y.L.J., Jan. 2, 1976, at 6 (S. Ct. N.Y. Co.). Further, this Board has held that the duty to bargain over hours includes the duty to bargain over "swings," or time off between tours. *UFOA,* 1 OCB2d 17, at 10 (BCB 2008); *DC 37,* 75 OCB 10, at 9 (BCB 2005); *see FADBA*, 55 OCB 1, at 10-11 (BCB 1995); *PBA*, 15 OCB 24, at 19-20. In accord with these holdings, we find that it is the City's prerogative unilaterally to establish and change the work schedules for EPOs; that the City need not

seek approval from LEEBA for any change in work schedules; but that the number of hours of work per day or per week, as well as the time off between tours, are mandatory subjects of bargaining.

LETTER PROPOSAL NO. 11: Hiring program and future staffing:

> **The employer hereby agrees that Department of DEP Police is presently understaffed for the performance of the desired functions and duties and both LEEBA and the employer agree to establish meaningful guidelines and procedures to cure the understaffing and to provide for proper future staffing of the unit designated 70811.**

City's Position

The City argues that the determination of staffing levels is a management prerogative. The Board and PERB both have held that staffing is a non-mandatory subject of bargaining.

Union's Position

LEEBA submits that inadequate staffing affects the public interest. It also affects safety and job performance. PERB's holdings on this issue are irrelevant, since it lacks jurisdiction.

DISCUSSION

This Board's decisions have abundantly established that the City's managerial prerogative extends to the subject of staffing levels. This subject is beyond the scope of mandatory collective bargaining. *See, e.g.*, *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); *see* NYCCBL § 12-307(b). The relevant decisions of PERB are to the same effect. *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). Clearly, LEEBA's staffing proposal is a non-mandatory subject of bargaining.

LETTER PROPOSAL NO. 12: Promotions and upgrades:

> **It is hereby agreed that DEP Police may from time to time become eligible for promotions and upgrades. For the purpose of this agreement, promotions are differentiated from upgrades. Promotions are to be utilized to increase an officer's title to sergeant or lieutenant. Upgrades are considered to be for the purpose of increasing responsibilities to Detective status. It is hereby agreed that all promotions will, in the future, be accomplished by merit and fitness and by the competitive examination process as stated in the Civil Service Law for the State of New York and by Article Six of the New York State Constitution. Upgrades to Detective will be accomplished by merit and fitness but need not require competitive examination**.

City's Position

The City contends that this proposal interferes with the City's right to establish and change the job descriptions for positions, and to assign employees to duties within their job descriptions. To the extent this demand involves the qualifications and criteria for intra-unit promotions, it involves the exercise of a management right. Further, to the extent it involves promotion to competitive titles outside the bargaining unit, such promotions are covered by the Civil Service Law and are not bargainable. This demand also seeks to define the meaning of terms in the EPO job specification and to constrain the City's right to determine the allocation of manpower by dictating the meaning and purpose of designations within the EPO title. For these reasons, the Union's proposals are non-mandatory subjects.

Union's Position

The Union contends that the City has conducted promotions based on whim and the desire of the Chief since 1946. The Civil Service Law requires a competitive process for promotions. Moreover, the State Constitution, Article V, § 6 requires that promotions be based on merit, fitness, and competitive examination. This is a proper subject for an impasse panel.

DISCUSSION

This Board and PERB have held consistently that management may unilaterally set standards for individual promotions. *See PBA*, 73 OCB 12, at 21-22 (BCB 2004); *UFOA*, 71 OCB 6 (BCB 2003) (educational requirements prior to promotion); *PBA,* 39 OCB 24 (BCB 1987)*, aff'd sub nom. Caruso v. Anderson,* 138 Misc. 2d 719 (Sup. Ct. N.Y. Co. 1987), *aff'd,* 145 A.D.2d 1004 (1st Dep't 1988); *UFOA*, 39 OCB 7, at 18 (BCB 1987) (questionnaire for promotional candidates), *aff'd in part and modified in part, Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120, at 128 (1992); *City of Buffalo*, 29 PERB ¶ 3023 (1996) (procedures for promotions from civil service list); *West Irondequoit Teachers Ass'n*, 4 PERB ¶ 4511 (promotional policy for teachers' job titles), *aff'd in part and modified in part*, 4 PERB ¶ 3070 (1971), *aff'd on other grounds sub nom. West Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46 (1974). With regard to the non-promotional "advancement" of employees, this Board similarly has held that the establishment of qualifications for advancement, including specifically designation as a detective, falls within the City's managerial prerogatives. *PBA*, 51 OCB 39, at 11 (BCB 1993).

To the extent that LEEBA believes that the City is not complying with the merit and fitness and competitive examination provisions of the Civil Service Law and the State Constitution, its recourse lies in the courts. *See, e.g.*, *City of Long Beach v. Civil Service Employees Ass'n*, 8 N.Y.3d 465, at 470-471 (2007). Even such violations, should they exist, would not render bargainable and submissible to an impasse panel what is otherwise a non-mandatory subject.

LETTER PROPOSAL NO. 13: Legal defense fund:

> **The employer recognizes from time to time, DEP Police Officers may require legal services resulting from the performance of their duties. These legal servi ces may not be adequately provided by the employer and the union is**

> **authorized to provide such additional legal services. In that regard, the employer agrees to pay to the union the sum of $100.00 per year for each DEP Police Officer employed as and for the establishment and maintenance of a legal defense fund to be used by LEEBA to protect the rights, privileges and obligations of its DEP Police Officer members.**

City's Position

The City contends that these proposals are vague, ambiguous, and lacking in sufficient detail to inform the City of the Union's specific intent. It is impossible to determine from this proposal when and for what purpose such a fund would be used. As written, the proposed fund could be used for any legal proceeding whatsoever, including defending against charges of criminal wrongdoing and disciplinary actions taken by the City. Moreover, the proposed fund contemplates the use of City funds by the Union to perform its usual and customary functions of representing its members, thereby arguable constituting interference with the administration of an employee organization in violation of the NYCCBL. This is a non-mandatory subject of bargaining.

Union's Position

LEEBA contends that lawsuits are a natural contingency of the job function of EPOs. EPOs are ordered to make arrests based on employer-supplied information (which is often erroneous) and on information supplied by other police jurisdictions. They carry deadly weapons and are trained to use them to protect the public interest, but if an innocent bystander is injured, there is no assurance of adequate representation. The City has offered no policy or statement that it will protect EPOs from legal liability. Accordingly, a legal defense fund is an appropriate contractual issue.

DISCUSSION

This Board has addressed the matter of a demand for employer contributions to an employee legal defense fund only tangentially. In *UFA*, 49 OCB 45 (BCB 1992), the City objected to the

Union's demand to establish a Criminal Legal Representation Fund for Fire Marshals. When the Union, in its answer, clarified that the Fund would be used only for job-related legal matters, the City withdrew most aspects of its objection. This Board ruled only on a remaining issue regarding the assignment of City attorneys, an issue that has not been raised in the present case.

PERB, however, has expressly ruled that a demand for "legal insurance" is an economic benefit and a mandatory subject of bargaining. *Town of Haverstraw*, 11 PERB ¶ 3109 (1978), *aff'd sub nom. Town of Haverstraw v. Newman*, 75 A.D.2d 874 (2d Dept., 1980). In affirming PERB's decision, the Appellate Division wrote:

> There is no reason to distinguish legal insurance from health insurance or group life insurance. All are a form of compensation and, as such, are encompassed within the definition of terms and conditions of employment.

Id., 75 A.D.2d at 874-875. Subsequently, PERB has reiterated its conclusion that a demand for employer payments to a legal defense fund for employees is mandatorily bargainable, but noted that this holding was made in cases in which the demands sought the legal defense of employees in litigation arising in the course of the performance of their employment. *City of Albany*, 22 PERB ¶ 4603 (Dir. 1989).

We agree with the City that LEEBA's legal defense fund proposal is vague in terms of the scope of the representation to be provided. To the extent this proposal were limited to the legal defense of employees in litigation arising in the course of the performance of their employment, it would be a mandatory subject of bargaining. As presently worded, the proposal is overbroad and may not be submitted to the impasse panel.

LETTER PROPOSAL NO. 14: Retirement plan:

It is hereby agreed that the employer will contribute an additional 10 percent

of each employee's salary to a special retirement fund to allow for proper funding of a Police Retirement fund for DEP Police Officers after twenty (20) years of service. These funds shall be separate and not commingled with other employer funds of the employer. That the employer will provide for a retirement plan for DEP Police Officers after 20 years of service and that the plan will provide income to the retired police officers at a rate of 75 percent of the average earnings of the officer's highest yearly earnings during the five years of service prior to making his written request to retire.

City's Position

The City asserts that, for the reasons previously stated, retirement benefits are a prohibited subject of bargaining.

Union's Position

LEEBA alleges that retirement age is a public safety issue.

DISCUSSION

The subject of retirement and pension bargaining has been discussed, *supra* at 14-15, in connection with the Impasse Request issue on "Retirement Age and Years of Service," and in the prior decisions cited therein. For the reasons stated there, this is a prohibited subject of bargaining.

LETTER PROPOSAL NO. 15: Leave to attend hearings and monthly union delegate meetings:

Individual employees shall be granted leave with pay to attend necessary arbitration, discipline or grievance hearings and to attend monthly Union Delegate meetings. Where LEEBA is involved with these hearings and submits a list of witnesses to the employer, the employer agrees to provide the witnesses in a timely manner and to compensate the witnesses with the normal rate(s) of pay during the required appearance.

City's Position

The City argues that this proposal, seeking unrestricted release of employees for appearance at grievance arbitration hearings, infringes on the City's prerogatives to maintain staffing levels and

to schedule its employees according to the operational needs of the agency. In addition, while release time for labor relations and union activities is a mandatory subject, a demand for such leave must be limited to activities that are "significantly and materially related" to the collective bargaining relationship. Release time for other purposes, such as politics or internal union matters, is a non-mandatory subject.

Union's Position

The Union observes that the subject of union leave already is covered by Executive Order 75, with which the City refuses to comply. These matters are mandatorily negotiable. Moreover, the City has consistently denied compensation for significantly and materially related activities of LEEBA officers, even though the City provided such benefits to the officers of the union that represented EPOs prior to LEEBA's certification. These are mandatory subjects of bargaining.

DISCUSSION

In general, a demand for release time for labor relations and union activities falls within the scope of mandatory bargaining. Different criteria apply for paid and unpaid release time, however. Since LEEBA's proposal seeks compensation for the leave requested, we will limit our analysis to paid release time.

In order for paid release time to be a mandatory subject of bargaining, it would have to be used for purposes that are "significantly and materially related to a collective bargaining relationship, and that serve to further the policy favoring sound labor relations between the parties." *Local 621, S.E.I.U.*, 51 OCB 34, at 24 (BCB 1993); *UFA*, 43 OCB 4, at 229-230 (BCB 1989), *aff'd, Uniformed Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept 1990); *UFOA*, 15 OCB 22, at 7-8 (BCB 1975).

Examples of these activities include participation in negotiations and grievance proceedings, and membership on labor-management committees. Additional types of activities that this Board would accept as being materially related to a collective bargaining relationship include the investigation and processing of grievances; service as a member of a City pension board or on the Municipal Labor Committee; and participation in impasse proceedings. *Local 621, S.E.I.U.*, 51 OCB 34, at 24 (BCB 1993).

LEEBA's proposal extends beyond these activities and includes, for example, attendance at monthly delegates' meetings. We note that while attendance at union meetings may be a proper basis for *unpaid* release time, it is not so significantly and materially related to the collective bargaining relationship as to justify the negotiation of a demand for paid release time. Therefore, while we find the Union's proposal for paid leave for reasonably necessary attendance at arbitration, disciplinary or grievance hearings to be mandatorily bargainable, its proposal for paid leave for monthly delegates' meetings is not.

We are sensitive to the City's expressed concern over the impact of "unrestricted" release time on the staffing and scheduling of employees to meet the operational needs of the agency. However, this legitimate management interest does not convert a mandatory subject into a non-mandatory one. The impasse panel may consider in connection with this proposal reasonable limitations on the numbers of employees released at any one time, the amount of prior notice required, and the cost to be credited to the employer. Such considerations would provide a basis for a fair assessment of the interests of the City and the Union.

DETERMINATION

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, and for the reasons set forth in the foregoing decision, it is hereby

DETERMINED, that the demands of the Law Enforcement Employees Benevolent Association , the negotiability of which was challenged in the scope of bargaining petitions filed by the City, on February 24, 2010, are within or without the scope of mandatory collective bargaining between the parties to the extent set forth in the specific rulings contained in the foregoing decision, which are incorporated by reference herein.

Dated: June 29, 2010
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

PAMELA SILVERBLATT
MEMBER

PETER PEPPER
MEMBER

Note: City Member M. David Zurndorfer recused himself and did not participate in the decision in this case.

Index to Scope of Bargaining Determination