OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK,

DECISION NO. B-21-87

DOCKET NO. BCB-948-87

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.
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DETERMINATION AND ORDER

On April 10, 1987, the Uniformed Firefighters Association ("UFA" or "petitioner") filed a verified improper practice petition and brief in support thereof in which it requests a finding that the City of New York ("City" or "respondent") has violated Section 1173-4.2a(1) and (4) of the New York City Collective Bargaining Law ("NYCCBL"),[1] in that it proposes unilaterally to implement changes in the work charts of

[1]Section 1173-4.2a of the NYCCBL provides, in relevant part:

> a. Improper public employer practices. It shall be an improper practice for a public employer or its agents:
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> (1) to interfere with, restrain or coerce public employees in the exercise of their rights granted in section 1173-4.1 of this chapter;
>
> (4) to refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees.

Fire Marshals and refuses to execute a 1984-1987 collective bargaining agreement that continues in effect the work chart provision of the predecessor contract between the parties. Petitioner requests that expedited treatment be accorded this matter in order that a final determination may issue before the implementation of proposed work chart changes.[2]

On April 20, 1987, respondent, appearing by its Office of Municipal Labor Relations ("OMLR"), duly filed its answer to the improper practice petition. On April 24, 1987, the UFA filed a reply to the answer and a reply memorandum of law.

Thereafter, on April 29, 1987, OMLR sought permission to file a sur-reply and brief. As the City also agreed to delay implementation of the proposed new work chart while this matter is under consideration by the Board, the Director granted OMLR's request. A sur-reply and brief were submitted on May 11, 1987.

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[2]Petitioner also sought orders directing the City, to refrain from implementing the proposed changes pending the resolution of the instant controversy and to serve and file its answer to the petition on an expedited basis. On April 13, 1987, the Director of the Office of Collective Bargaining ("OCB") advised the parties that the Board of Collective Bargaining ("Board") lacks jurisdiction to grant injunctive relief. However, as the City announced its intention to implement changes in the Fire Marshals' work chart on April 15, 1987, the Director agreed to expedite consideration of this matter by the Board by shortening the time for the filing of the City's answer. See, Revised Consolidated Rules of the OCB §7.8.

Background

The issue underlying this dispute is whether a provision of the 1982-1984 agreement between the parties relating to the work chart for Fire Marshals, and the actual work chart, deemed to have been incorporated therein, have been continued in the successor contract, or whether the City may, in the exercise of its management prerogatives under Section 1173-4.3b of the NYCCBL, unilaterally change the existing schedule.

Article III, Section 6 of the 1982-1984 agreement states as follows:

> Section 6.
>
> A. The work chart for Fire Marshals shall provide for an average work week of 40.25 hours and one fifteen and one-half (151/2) hour adjusted tour per year. Such work chart shall continue in effect for the term of this Agreement.
>
> B. Ordered overtime authorized by the Commissioner or the Chief Fire Marshal as his designated representative which results in a Fire Marshal's working in excess of his normal tour of duty shall be compensable in cash at time and one-half. Fire Marshals shall not be rescheduled when required to appear in court in connection with matters assigned to them.
>
> C. When Fire Marshals not continued on duty are ordered to report for court on a scheduled off-tour or a scheduled rest period, they shall be

> compensated for a minimum of four hours in cash at the overtime rate. The four hours of compensation shall include any travel time to which they are presently entitled.

The work chart referenced in Section 6A was achieved through the collective bargaining negotiations that produced the 1980-1982 agreement between the City and the UFA. It was continued in effect during the period of the 1982-1984 agreement, during which time an arbitrator held that the chart was binding on the parties to that agreement.[3]

Providing for a sequence of three tours of duty on three successive days followed by the next three days off, the negotiated chart prescribed the following starting and ending times for each tour:

8:00 a.m. - 5:00 p.m.
8:00 a.m. - 6:00 p.m.
6:00 p.m. - 9:30 a.m.

The chart that the City now proposes to implement would provide for the following tours of duty within the three-tour set:

9:00 a.m. - 6:00 p.m.
4:00 p.m. - 2:00 a.m.
6:00 p.m. - 9:30 a.m.

[3]Matter of City of New York and Uniformed Firefighters Association, Case No. A-1619-82 (Jan. 11, 1984)(Arb: Rubin, M.) at 8,9.

Impasse Panel Proceedings

On July 11, 1986, pursuant to Section 1173-7.0c of the NYCCBL, an impasse panel was appointed to resolve the outstanding issues between the City and the UFA in their collective bargaining negotiations for a 1984-1987 agreement covering Fire Marshals.[4] The panel, consisting of George Nicolau (Chairman), Walter Gellhorn and Benjamin Wolf, held seven days of hearing and conducted five mediation sessions in an effort to aid the parties to resolve their differences. Proceedings before the panel commenced on September 11 and were concluded on November 29, 1986. Subsequently, on December 30, 1986, the parties submitted post-hearing memoranda of law summarizing their respective positions. On January 6, 1987, the impasse panel issued its report and recommendations.

[4]The UFA is the certified collective bargaining representative for a unit that includes employees in the titles of Firefighter and Fire Marshal. Cert No. 1 NYCDL No. 2 (1958), as amended. Since 1971, when the Fire Marshal title was added to the UFA's bargaining certificate (Decision No. 61-70), both titles have been included in overall UFA/City agreements. In the negotiations for a 1984-1987 agreement, however, the UFA sought a separate contract for Fire Marshals. The City opposed the UFA's demand and the UFA filed an improper practice petition charging that the City improperly refused to bargain. The parties ultimately resolved this dispute by agreeing to submit their respective demands for an agreement covering Fire Marshals to an impasse panel.

Among the most critical of the disputed issues before the panel were:

> (a) the UFA's demand for a wage differential for Fire Marshals of approximately 28 percent over the base salary paid to First Grade Firefighters (equivalent to that paid to Fire Lieutenants);
>
> (b) the City's proposal that the Fire Marshals receive the economic package included in the Uniformed Forces Coalition settlement; and
>
> (c) the City's demand for an increase in the number of required appearances per year from 182 appearances of varying length to 261 appearances of eight hours each.

Although the panel found that the UFA's case for an increase in the wage differential had merit, it agreed with the City that any such increase should be accompanied by changes in the way Marshals perform their duties.[5]

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[5]The panel explained:

> Marshals are not Firefighters, they are investigators. Yet they persist in working what is essentially a Firefighter's schedule; 8 hours, 9 hours and 151/2 hours, the latter overnight. Though this totals 2,088 hours, the same basic annual hours as other uniformed employees, it is only 183 appearances. That number of appearances cannot be changed unilaterally and the result of this appearance limitation and this schedule is that Marshals are not deployed when most needed. Matter of the Impasse between Uniformed Firefighters Association and City of New York, Case No. I-187-86 (Jan. 6, 1987) (Arbs.: Nicolau, Gellhorn, Wolf), at 31.

The panel reported that, during the mediation phase of the proceedings, the parties explored issues relating, inter alia, to the work chart, including the number of appearances and the schedule. Despite their conscientious efforts, however, no agreement was achieved. In its report and recommendations, the panel attempted to take into account the concerns of both sides on these issues, and arrived at a solution which required the UFA to elect between two alternatives.

Option "A" consisted in the following:

> 1. The Uniformed Forces Coalition economic settlement together with a prospective increase in the differential (effective upon full acceptance of this Recommendation) from the present 9.68% to 14%;
>
> 2. A change in the chart, designed by the Department after having first consulted with the Union, (a) to increase the number of appearances to approximately 205, (b) to reduce the maximum hours to 11, and (c) to alter the ratio of daytime to nighttime deployment to meet Department needs, while (d) preserving, to the extent feasible, the swings and rotations the Marshals now have;
>
> 3. That those assigned to Headquarters, the Borough Offices and Chief's Squads and special squads, such as the Major Case Squad, the Welfare Fraud Squad, and the Auto Squad, the Juvenile Fire Setters Program and the like, work off the chart on 8, 81/2 and 9 hour tours as determined by the Department;

> 4. That the tours of Marshals, but not their scheduled days off, be subject to change without the payment of overtime if said change is necessary because of an appearance in court, including an appearance before a grand jury, or the need of the Marshal to confer with the staff of the District Attorney on a case;
>
> 5. That the Department be empowered to deploy one-person Red Cap cars in its reasonable discretion, subject to the grievance and arbitration procedure.

Option "B" consisted of the Uniformed Forces Coalition settlement, i.e., three compounded six per cent wage increases, with no change in the differential.

On January 28, 1987, Robert W. Linn, Director of the City's Office of Municipal Labor Relations, wrote a letter to UFA President Nicholas Mancuso, stating, in part:

> Pursuant to your request regarding a duty schedule the Fire Department will promulgate for Fire Marshals if your union elects to accept option "A" ..., I am enclosing a duty schedule that embodies the elements set forth in [the] Report and Recommendations which the Department expects to promulgate if option "A" is chosen. I have previously advised you that the Department has the right and may choose to exercise that right at any time to change the configuration of the Fire Marshals duty schedule as long as it embodies the elements set forth in the Report and Recommendations of the Impasse Panel.

During the period between issuance of the impasse panel's report and recommendations on January 7, 1987 and acceptance by the parties on February 17, 1987,[6] there were discussions concerning a new work chart which, petitioner alleges, was to be implemented in the event that Option "A" was chosen. However, on February 17, 1987, when petitioner accepted the report, based on a vote of its Fire Marshal members of 168 to 138, it indicated its selection of Option "B", and simultaneously stated its understanding that, with this choice,

> the 1984-87 Contract covering Fire Marshals will consist of the terms of the 1982-84 Contract, including the work chart schedule referred to in Article III Section 6, which the Impartial Chairman determined to be contractually binding in A-1619-82; the Uniformed Forces Coalition package applied to the Fire Marshals; and the Impasse Panel's Recommendations on the Fire Marshals' additional demands....

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[6]Section 1173-7.0c(3)(e) of the NYCCBL provides:

> Acceptance or rejection. Within ten days after submission of the panel's report and recommendations, or such additional time not exceeding thirty days as the director may permit, each party shall notify the other party and the director, in writing, of its acceptance or rejection of the panel's recommendations. Failure to so notify shall be deemed acceptance of the recommendations.

A copy of this letter was sent to OMLR, whereupon Mr. Linn wrote to Mr. Mancuso, on February 24, 1987:

> This letter shall serve as further and additional notification of the City of New York's position regarding the work chart schedule for Fire Marshals. As Jim Hanley, Deputy Director of this agency has stated throughout the negotiations, various mediations and the impasse proceeding for the 1984-87 Agreement, the City of New York has reserved and continues to reserve its right to change the configuration of the Fire Marshals work chart schedule as long as it embodies the elements that have been determined to be mandatory subjects of bargaining by the Board of Collective Bargaining.
>
> The Fire Department is reviewing the current schedule and we will notify you prior to implementing a new schedule.

In a letter dated February 26, 1987, OMLR Deputy Director and chief negotiator James F. Hanley advised the OCB that the City would accept the panel's report and recommendations.

Positions of the Parties

Uniformed Firefighters Association

Petitioner contends that the City has violated Sections 1173-4.2a(1) and (4) of the NYCCBL in that it intends unilaterally to change the work chart

for Fire Marshals without bargaining with the UFA. Although it concedes that matters of scheduling are within the City's management rights under Section 1173-4.3b of the NYCCBL, petitioner asserts that, as in Case No. BCB-206-74,[7] "more is involved here than mere scheduling of tours". Petitioner contends that the length of the work day and the total number of hours worked per year, both mandatory subjects of bargaining, would be affected by the City's proposed work chart changes.[8]

Even assuming, however, that the changes in the work chart desired by respondent are permissive subjects of bargaining and fall within the City's statutory rights, petitioner maintains that the City waived those rights in that it:

> (1) failed to invoke the statutory procedure to establish whether the union's demand for continuation of the work chart was within the scope of collective bargaining, although

[7]City of New York v. Patrolmen's Benevolent Association, Decision No. B-5-75.

[8]The UFA explains that, since the second tour of the three-tour set would be changed from 8:00 a.m. to 5:00 p.m. to 4:00 p.m. to 2:00 a.m., the length of the second day would be reduced by two hours to eight hours while the third day would be increased by two hours to ten hours.

it did invoke that procedure to challenge the negotiability of other UFA demands in the proceeding docketed as BCB-884-86;[9]

(2) negotiated extensively on the subject of work charts both during mediation sessions with the impasse panel and after the panel issued its report and recommendations; and

(3) failed to object to the terms of the panel's report and recommendations which, in Option "B", allegedly denied the City's demand to change the ratio of daytime and nighttime tours;[10]

(4) failed to appeal to the Board for review of the panel's recommendations, pursuant to section 1173-7.0c(4) of the NYCCBL and, in fact, affirmatively accepted the report and recommendations.

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[9]Although the UFA's proposals for a successor to the 1982-1984 agreement did not include a separate demand for continuation of the work chart that prevailed under the earlier agreement, petitioner asserts that such a demand was included in fact, as the preamble to its list of demands stated that all provisions of the 1982-1984 agreement should remain in effect for the term of the new agreement unless modified by the specific demands that followed.

[10]In petitioner's view, Option "B", which it selected, constituted an affirmative determination that the work chart included by reference in the 1982-1984 agreement should be continued because it did not provide for any change in the chart. That Option "A" contemplated such changes, so long as they were within the parameters spelled out in the report, is proof of the fact that the work chart issue was submitted to the panel and that the panel's report and recommendations dealt with that issue, according to the UFA.

According to petitioner, the fact that the City repeatedly stated its view that the work chart provision was a permissive subject of bargaining and one which would not be continued in a successor agreement, does not detract from the union's waiver argument, for the mere assertion of a position as to the negotiability of a demand does not remove the matter from the bargaining table. Petitioner notes that the Board alone may decide whether an issue is a mandatory subject of bargaining.

Petitioner emphasizes that in electing Option "B", and deciding to forego an increase in the Fire Marshals' wage differential, it expressly stated, in Mr. Mancuso's letter of February 17, 1987, its understanding that the schedule changes permitted under Option "A" would not be implemented. Petitioner urges the Board to consider the "unfairness" that will result from a decision allowing the City to achieve through unilateral action what it was unable to achieve through collective bargaining or from an impasse panel. Moreover, petitioner asserts, had it known that respondent would be free to change the work chart of Fire Marshals, even though the UFA had selected Option "B", it might the alternative option.

Petitioner also asserts that the City has committed an improper practice by its refusal to include the existing work chart in a 1984-1987 collective bargaining agreement. The UFA notes that the fact that some terms and conditions of employment for Fire Marshals were established through impasse proceedings rather than through negotiations does not relieve the City of the obligation to execute and implement a written document embodying all of the terms of a new agreement regardless of how they were established. Petitioner asserts that impasse arbitration is simply a statutory mechanism for creating an agreement and urges that the policy of the NYCCBL, requiring that terms of employment be reduced to writing, should apply with equal force to negotiated and to arbitrated terms.

Based upon all of the arguments outlined above, petitioner seeks a determination that the respondent has committed improper practices in violation of the NYCCBL and further requests an order directing respondent to cease and desist from proposing to change the work charts of Fire Marshals.

City of New York

In its answer to the UFA's petition, respondent asserts that the petition should be dismissed because it (a) fails to allege facts sufficient to satisfy the pleading requirements of Section 7.5 of the OCB Rules, and (b) fails to state a prima facie claim of improper practice. With respect to the latter, respondent contends that the UFA has failed to establish a nexus between the proposed change in the work charts of Fire Marshals and any interference, restraint or coercion of public employees, or a refusal to bargain in good faith on matters within the scope of collective bargaining.

Respondent contends that the determination of the work charts is a managerial prerogative under Section 1173-4.3b of the NYCCBL and therefore is a subject concerning which the City has no duty to bargain unless the exercise of its management rights results in a "practical impact" on terms and conditions of employment. Respondent alleges that, with respect to duty schedules, the Board has specifically held that the City must bargain over those aspects that affect hours of work and days off, but remains free to determine the number of personnel required at a given time and the starting and finishing times of their tours of duty. Moreover,

the City argues, the fact that the parties had an agreement on the subject of work charts under their prior contract does not transform that permissive subject of bargaining into a mandatory one for purposes of subsequent negotiations. Respondent concludes that it did not fail or refuse to bargain on matters within the scope of bargaining.

Respondent vigorously disputes petitioner's contention that the City waived its management rights with respect to the work chart issue. It is argued that the failure to challenge the bargainability of a permissive subject in a scope of bargaining proceeding under NYCCBL Section 1173-5.0a(2) does not render such subject a mandatory one, for the status of a subject matter is a matter of law. In this instance, the right to establish the configuration of a work chart is a management prerogative under the statute.

The City emphasizes that it put the UFA on notice, as early as the fall of 1985, that the work chart referred to in the 1982-1984 agreement, and the contractual reference itself, would not be continued in the 1984-1987 agreement and it repeatedly advised the UFA of its position on the work chart issue throughout the

bargaining, during the proceedings before the impasse panel (including mediation sessions with the panel), after the panel issued its report and recommendations, and again, after the UFA made its choice of options. Respondent contends that, once petitioner was aware of the City's position on this point, it became petitioner's obligation to challenge that position, either by making an explicit demand or by challenging the negotiability of the subject matter in a scope of bargaining petition of its own. However, respondent notes, petitioner did not express opposition to a change in the work chart until February 17, 1987, in the context of a letter notifying the OCB that it would accept the report and recommendations of the impasse panel.

Respondent contends that the UFA's general "demand" to have all provisions of the 1982-1984 agreement continue into the successor contract "unless modified by the demands" did not constitute an effective demand for the continuation of the work chart provision, but even if it did, the City's repeated statements of refusal to continue the chart removed the matter from the bargaining table before the impasse proceedings commenced. In any event, respondent notes, permissive subjects of bargaining may not be submitted to an impasse panel

except with the City's consent, which was not given here.

Respondent also disputes the UFA's contention that a waiver results from the City's failure to object to the impasse panel's report and recommendations on the subject of the work chart. According to respondent, the panel did not address permissive subjects of bargaining. The City characterizes the specific authorization contained in Option "A",to "alter the ratio of daytime to nighttime deployment to meet Department needs", as merely one element of a proposed package of "productivity enhancements" that Fire Marshals would accept in return for an increased wage differential. Similarly, it is argued, option "B", which is silent on the chart issue, also is a response to the UFA's wage demand and is not a ruling on the permissive subject of duty schedules. Respondent concludes that nothing in the report and recommendations of the impasse panel conflicts with or impairs the City's right to change the configuration of the Marshals' work chart.

Finally, respondent denies that it has failed or refused to reduce to writing the terms of a 1984-1987 agreement. In fact, it avers that, on or about March 26, 1987, OMLR served a copy of a complete 1984-

1987 collective bargaining agreement for Fire Marshals on the UFA for review and approval. Consistent with respondent's position throughout the negotiations and impasse proceedings, Article III, Section 6A of this draft agreement omits the sentence of the predecessor contract which stated "[s]uch work chart shall continue in effect for the term of this Agreement."[11] The City asserts that it has received no response or reaction from the UFA.

For all of the aforementioned reasons, respondent maintains that it has committed no improper practices under the NYCCBL and, accordingly, the petition should be dismissed.

Discussion

Before considering the merits of the petitioner's case, it is necessary to address respondent's contention that the UFA has failed to allege sufficient facts in its petition to satisfy the pleading requirements of OCB Rule 7.5 or to support its claim that the City's plan to make changes in the work charts of Fire Marshals violates Sections 1173-4.2a(l) or (4) of the NYCCBL.

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[11]Article III, Section 6A of the proposed 1984-1987 Agreement would provide, in its entirety:

> Section 6.
>
> A. The work chart for Fire Marshal shall provide for an average work week of 40.25 hours and one fifteen and one-half (15-1/2) hour adjusted tour per year.

Section 7.5 of the OCB Rules is essentially a rule of notice pleading, the purpose of which is to satisfy a respondent's right to due process and to permit the Board to determine its jurisdiction.[12] We find that the petition in this matter, accompanied by a five-page description of the controversy, including a recitation of the history of the bargaining that preceded this dispute, a precise statement of the basis for the UFA's claim, and references to relevant provisions of the statute and of the parties' 1982-1984 collective bargaining agreement, gave the City sufficient notice of the nature of the petitioner's claims, and of the material elements thereof, to enable respondent to formulate a meaningful response. Therefore, section 7.5 of Rules was amply satisfied in this case.

In considering further whether the petition states a prima facie case of improper practice, we note that a claim, even if perfectly pleaded, may be dismissed if the respondent demonstrates that nothing the petitioner might reasonably be expected to prove would aid him in securing a favorable decision. We also note however that, under our policy of liberal construction

[12]Decision Nos. B-39-85; B-12-85; B-8-85; B-1-83; B-23-82.

of the rules of pleading, the pleader is entitled to every favorable inference that may be drawn from its statements.[13] The City asserts that the petition herein must fail because a decision to alter duty charts is an exercise of the City's prerogatives and a matter concerning which there is no duty to bargain. The City also asserts that petitioner has failed to allege any facts to support its claim that respondent interfered with, restrained or coerced public employees in the exercise of protected rights. Having examined the allegations of the UFA's petition, we find that, without denying that management rights are involved, the petition is replete with arguments, principally involving the issue of waiver, as to why in the circumstances of this case it is a violation of NYCCBL Section 1173-4.2a(4) for the City to refuse to execute a written agreement including the work chart from the predecessor contract and for it prospectively to make unilateral changes in that work chart without negotiating with the UFA. Since one or more of these arguments may have merit, we shall

[13]This view is consistent with rules of civil practice as they have been construed by the courts. E.g., Westhill Exports, Ltd. v. Pope, 12 N.Y. 2d 491, 240 N.Y.S. 2d 961, 191 N.E. 2d 447 (1973).

reject respondent's contention that the petition fails to state a cause of action. We also reject this affirmative defense as applied to the UFA's assertion of a claim under Section 1173-4.2a(l) for, under appropriate circumstances, we have held that a refusal to confer with the certified employee representative regarding a change affecting terms and conditions of employment can constitute a violation of the prohibition against interference with, restraint or coercion of public employees.[14]

We begin our analysis of the merits of the petition with Section 1173-4.3b of the NYCCBL which states, in its entirety:

> It is the right of the city, or any 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

[14]Decision No. B-25-85.

> 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.

Based upon this section of the law, we have held that many aspects of scheduling are within management's rights and are not subject to a duty to bargain.[15] Management prerogatives nevertheless are lawful subjects of bargaining and may be negotiated on a permissive basis.[16] Further, where management negotiates and reaches agreement with a union on a permissive subject, and embodies such agreement in a collective bargaining contract, it will be found to have waived its right to take uni-

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[15]E.g., Decision Nos. B-24-75 (starting and finishing times of tours of duty, number of different charts, number of tours on each chart); B-10-75 (starting and finishing times); B-5-75 (changes in duty charts); B-6-74 (right to schedule work on holidays and weekends); B-4-69 (establishment of shift hours).

[16]Decision No. B-11-68.

lateral action with respect to that matter during the term of the contract.[17] In the present case, it is essentially conceded that the configuration of a work chart is a permissive subject of bargaining. The gravamen of the controversy is whether respondent is precluded, by waiver, from unilaterally and prospectively changing the existing work chart of Fire Marshals, which was incorporated into the prior agreement between the parties.

First, we should note that since the bargaining status of a subject matter is fixed and determined by law, the fact that agreement previously was reached on a permissive subject and included in a collective bargaining agreement does not transform that matter from a voluntary to a mandatory subject in subsequent negotiations.[18] From this, it is clear that even if the UFA's general demand in the present case for the continuation of the terms of the predecessor

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[17]City of New York v. Uniformed Firefighters Ass'n, 58 N.Y. 2d 957, 460 N.Y.S. 2d 521, 447 N.E. 2d 69 (1983).

[18]City of New York v. Social Service Employees Union, Decision No. B-11-68. In that decision, we noted that if agreement reached on a voluntary subject forever obligated bargaining thereon, there would be little incentive for the employer to engage in the highly desirable practice of freely discussing and negotiating on voluntary subjects. Accord, Chemical Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 78 LRRM 2974 (1971); City of Troy v. Troy Uniformed Firefighters Ass'n, 10 PERB ¶3015 (1977); Local Union 891, International Union of Operating Engineers v. Board of Education, 5 PERB ¶3054 (1972).

agreement had the effect of placing the work chart issue on the bargaining table, the City had no obligation to negotiate concerning that matter.

Nor was it incumbent upon respondent to seek a Board determination as to whether the subject of the work chart was within the scope of collective bargaining, as petitioner contends. Section 1173-5.0a(2) of the NYCCBL authorizes the Board to make scope of bargaining determinations "on the request of a public employer or a certified or designated employee organization." This provision was included in the statute in order to make possible the resolution of such questions by means of a type of declaratory judgment process which is deemed preferable to forcing a party to resort to an improper practice proceeding in which he must charge the other side with a refusal to bargain. However, the fact that a scope of bargaining determination is not sought cannot alter the non-mandatory bargaining status of a subject matter which, we reiterate, is fixed by law. It is not disputed that respondent gave the UFA early and repeated notice of the fact that the City considered the Fire Marshal work chart to be a permissive subject and that it intended to withdraw the contract provision relating thereto.

Under these circumstances, the burden was on petitioner, if it believed the continuation of the chart to be a mandatory subject of bargaining, to seek a determination of this question by the Board. For the aforementioned reasons, we shall reject petitioner's argument that the City's failure to seek a scope of bargaining determination on the work chart issue constitutes a waiver of its managerial prerogative.

The UFA also asserts that the City waived its rights by engaging in extensive negotiations with petitioner on the subject of the work chart. Respondent does not deny that it voluntarily discussed, at various times, the elements of a proposed new work chart. However, respondent maintains, and the record shows, that from the outset of the negotiations and periodically throughout all of the proceedings, including the impasse, the City maintained and reiterated that the work chart subject was not mandatorily bargainable and reserved its right to deal with the matter unilaterally. The record demonstrates that the City did negotiate with petitioner concerning the possibility of a settlement of the wage issue, and that it was willing to compromise its own position, i.e., no increase in the differential but the economic elements of the

Uniformed Forces Coalition settlement as a package, in exchange for certain changes in the Fire Marshals' chart. We note that the City was interested in increasing the number of annual appearances and standardizing the length of the tour of duty but that these are mandatory subjects of bargaining which respondent could not have changed unilaterally. There is no significant dispute that this was the nature and context of the bargaining on the subjects of the differential, work charts, appearances and length of tours. As is usually the case where discussion of permissive subjects is included in negotiations, the possibility of union concessions on mandatory subjects of bargaining, such as appearances and tour lengths, induces the City to bargain and make concessions on permissive subjects such as the work chart. We do not find any waiver inherent in such discussion. Any doctrine holding that negotiation on a permissive subject constitutes a waiver of management's rights with respect to that matter, even if no agreement is reached, would create a formidable deterrent to the free and open negotiation of voluntary subjects, which would be contrary to the policy of this Board.[19]

[19]See, e.g., Decision No. B-11-68.

Finally we must examine whether, as petitioner contends, a management waiver is evidenced by a report and recommendations of an impasse panel that dealt fully and mandatorily with the work chart issue. For if the panel did deal with this matter, it must be that the City, notwithstanding numerous repeated statements reserving its rights, nevertheless unreservedly submitted the work chart to the panel and thereby finally did waive its right unilaterally to change the chart.[20]

First, we note that the impasse panel exercised to a substantial degree in this case the mediation powers granted it under Section 1173-7.0c(3)(a) of the NYCCBL.[21] Seven days of hearing were followed by five mediation sessions, during which it appears that the parties discussed many aspects of the work chart, including the number of appearances, the length of the duty tours and the imbalance in the distribution of daytime and nighttime tours. The parties were unable to reach a final agreement on these matters in mediation. After a period of several months of taking testimony, mediating and evaluating

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[20]It is well-settled that permissive subjects of bargaining may not be submitted to an impasse panel without the consent of the City. Decision Nos. B-4-71; B-11-68; B-9-68.

[21]NYCCBL Section 1173-7.0c (3)(a) provides:

> An impasse panel shall have the power to mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary to resolve the impasse. If an impasse panel is unable to resolve an impasse within a reasonable period of time, as determined by the director, it shall, within such period of time as the director prescribes, render a written report containing findings of fact, conclusions, and recommendations for terms of settlement.

the information gathered from this process, the panel was thoroughly familiar with the needs and concerns of the parties and had formed rather definite opinions about the issues. For example, the panel stated that it was impressed with evidence demonstrating that the duties of Fire Marshals were more complex and demanding than before, a fact which led the panel to conclude that a change in the wage differential might be warranted (Report and Recommendations, p.28). The panel also was of the opinion, however, that "an improvement in the differential ... should not be recommended unless the Marshals agree to certain changes in the way they perform their duties" (Report and Recommendations, p. 31). It specifically noted that Marshals were not being deployed effectively, given the fact that nearly two-thirds of the incidents of arson occurred at night when only one-third of Fire Marshals were working. It also noted that the 151/2 hour tour in the present chart was not as productive as a shorter tour would be; the panel felt that this should be changed (Report and Recommendations, p. 32) Nevertheless, the panel concluded that the City's demands concerning the number of appearances and the length of tours could not be gran-

ted in toto because of the serious disruption in the lives of Marshals that would result (Id.).

After carefully reviewing and analyzing all of these matters, and others, the panel formulated a proposed "combined package" which attempted to take into account the competing considerations and interests of both parties. When the panel put this package forward, however, it did so not as a potentially mandatory report and recommendations, but as an option ("A") to be accepted or rejected by the petitioner. Simultaneously, the panel offered a second option ("B"), consisting of the Uniformed Forces Coalition settlement. In connection with Option "B", the panel summarily stated that it "would not recommend" the City's demands, inter alia, on the issues of appearances and the length of tours although, in its six-page discussion of the elements of "A", it had argued that these very demands had considerable merit.

We do not know precisely what the panel had in mind when it resorted to the unusual device of offering the union a choice between two alternatives. However, we believe that all the evidence, circumstantial though it is, points to and justifies certain conclusions. It is clear that the panel felt that Option "A" provided a fair, well-balanced compromise solution to a number of critical

issues and that it, in fact, represented the panel's best effort at resolving the parties' dispute. In these circumstances, the obvious question is why did the panel not issue that carefully crafted proposal as its award. Clearly the answer is that Option "A" touched upon matters which the panel did not have authority to determine because the City did not waive its statutory prerogative to determine the configuration of the chart. Without such a waiver, the panel was without authority to recommend any change in the permissive aspects of the chart, such as the alteration of the ratio of daytime to nighttime tours (option "A", part 2(c)), which it obviously considered an appropriate quid pro quo for an increase in the differential. Under this construction of the panel's actions, option "All may be characterized as merely a mediator's recommendation. Only Option "B" had the potential to become a mandatory award on the economic issues in dispute. Option "B" was the necessary, if less comprehensive, fallback position of the panel in the event that option "A" was rejected.

We recognize that petitioner claims to have had a different understanding of these matters when it accepted the panel's report and recommendations, expressing its view that with the selection of Option "B" the 1984-87 contract would consist of the terms of the predecessor agreement"including the work chart schedule referred to in Article III Section 6." However, a failure fully to

understand the implications of an impasse panel's report is not a basis for obtaining relief from the terms thereof, once the report and recommendations has become a final and binding award. Moreover, the City having reiterated in its post-hearing brief of December 30, 1986 to the impasse panel its reservation of rights with respect to the work chart, when it stated:

> [t]he City through Mr. Hanley has put the UFA on notice that any contractual references to the current work schedule will be deleted in the 1984-87 Agreement,[22]

further reminded the UFA of its position in a letter from the Director of OMLR, dated January 28, 1987, three weeks after the panel issued its report and recommendations but still well before the union made its election:

> I have previously advised you that the department has the right and may choose to exercise that right at any time to change the configuration of the Fire Marshals duty schedule as long as it embodies the elements set forth in the Report and Recommendations of the Impasse Panel...
>
> Therefore please be advised that the City reserves the right to change the configuration of the duty schedule as it sees fit.

[22]Matter of the Impasse between Uniformed Firefighters Association and City of New York, Case No. I-187-86, City's Post-Hearing Memorandum of Law, p. 29 n. 6.

Our decision in this matter leaves respondent free unilaterally to change the Fire Marshal work chart that was in effect under two prior agreements between the parties. We note that the proposed new chart, set forth supra at page 4, changes the starting and finishing times of the first and second tours of duty, but it does not involve changes in the number of appearances required of Fire Marshals or the length of their tours of duty. Nevertheless, petitioner asserts that the new chart will result in a change in the length of the work day and in the number of hours worked per year, and that the City therefore must bargain on the mandatory subject of hours. On its face, the latter allegation with respect to hours worked per year appears to be inaccurate and we shall not consider it further. The allegation that there will be an increase in the length of the work day requires that a "work day" be defined in terms of a 24-hour period that begins and ends at 12:00 midnight. Under such a definition, the 4:00 p.m. to 2:00 a.m. tour in the proposed new chart would entail eight hours of work on one "day" and two hours on the next "day". This argument wholly ignores the realities of a uniformed service where coverage must be provided on a twenty-four hour basis. The conventional meaning of the word "work day" is supplanted in such

contexts by the term "tour of duty". In the Fire Department, in particular, the Commissioner is directed in Section 487a-11.0 of the New York City Administrative Code to divide the workforce into "platoons". The Commissioner is further directed to maintain a two-platoon system with working hours not to exceed the limits prescribed in the statute. Clearly this scheme, which also includes a limitation that no member may be assigned to more than one tour of duty in any twenty-four consecutive hours, negates the UFA's argument which is based upon a presumption that such employees have a conventional work day. If petitioner believes that its members are required by the new chart to work hours in excess of limits prescribed by the contract (the provisions of the Administrative Code referred to above also are incorporated into the parties' collective bargaining agreement), it may challenge such a violation through the grievance and arbitration, procedure. Similarly, if the argument rejected here is intended to be one of a practical impact on employees resulting from the change in the work chart, the UFA may seek redress in a scope of bargaining proceeding in which the Board first will determine whether an impact does, in fact, exist.

Based upon the analysis developed above, which leads us to conclude that respondent is not barred,

by waiver or otherwise, from implementing prospectively a new work chart for Fire Marshals, we shall dismiss the UFA's petition in its entirety.

We further observe that the parties are now in bargaining for a successor contract to be effective July 1, 1987. Thus, the parties have the opportunity again to address the work chart issue.

O R D E R

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

ORDERED, that the improper practice petition filed by the Uniformed Firefighters Association in the matter docketed as BCB-948-87 be, and the same hereby is, dismissed.

DATE: New York, N.Y.
June 8, 1987

ARVID ANDERSON
CHAIRMAN

DANIEL G. COLLINS
MEMBER

EDWARD F. GRAY
MEMBER

EDWARD SILVER
MEMBER

DEAN L. SILVERBERG
MEMBER

CAROLYN GENTILE
MEMBER

Note: Impartial Member George Nicolau did not participate in this decision.