DC 37, 4 OCB2d 29 (BCB 2011)

(Docket No. BCB-2956-11).

Summary of Decision: The Union appealed the Report and Recommendation of an Impasse Panel regarding a dispute with the City and HHC over funding various additions to gross ("ATGs") for employees in the Creative Art Therapist ("CAT") title. The Union argued that the Impasse Panel erred by failing to compare the benefits and conditions of employment of CATs to similarly situated employees pursuant to § 12-311(3)(b)(i) of the NYCCBL, failing to properly weigh the facts surrounding the creation of the title, concluding that certain ATGs were not cost neutral, ignoring the purpose of ATGs, ignoring the parties' bargaining history, and adopting the City's position that the Union must fund all ATGs. The City contended that the Panel properly considered the evidence, testimony, and arguments of the parties, and issued a report that is supported by the record and complies with the criteria set forth in the NYCCBL. The Board remanded the Report and Recommendation to the Panel for further explanation of its conclusion that ATGs (other than the agreed-upon 15-year Service Longevity Increment) would not be awarded, and affirmed the remainder. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of Impasse

-between-

DISTRICT COUNCIL 37, AFSCME, LOCAL 768,

Petitioner,

- and -

THE CITY OF NEW YORK, and NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

DECISION AND ORDER

On April 22, 2011, District Council 37, AFSCME, Local 768 ("Union") appealed the Report

and Recommendation ("Report") of a three-member Impasse Panel ("Panel") regarding a dispute with the City of New York ("City") and the New York City Health and Hospitals Corporation ("HHC") over various Additions-to-Gross ("ATGs") for employees in the Creative Art Therapist ("CAT") title. The impasse proceeding is docketed as Case No. I-255-08. On appeal, the Union argues that the Panel erred by failing to compare the benefits and conditions of employment of CATs to similarly situated employees as pursuant to § 12-311(3)(b)(i) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3)("NYCCBL"), failing to properly weigh the facts surrounding the creation of the title, concluding that certain ATGs were not cost neutral, ignoring the purpose of ATGs, ignoring the parties bargaining history, and adopting the City's position that the Union must fund all ATGs. The City contends that the Panel properly considered the evidence, testimony, and arguments of the parties, and issued a Report that is supported by the record and complies with the criteria set forth in the NYCCBL. The Board remands the Report to the Panel for further explanation of its conclusion that ATGs (other than the agreed-upon 15-year Service Longevity Increment) would not be awarded, and affirms the remainder.

BACKGROUND

The Union, HHC and the City are parties to a collective bargaining agreement applicable to a unit of employees employed at various HHC facilities ("Agreement"). The titles of Rehabilitation Counselor, Activity Therapist, and CAT are included in the unit. The CAT title was established by HHC in June 2006, as a result of new state legislation regulating the practice of creative arts therapy, and is the subject of the instant dispute.

On April 9, 2007, the Union requested bargaining over the CAT title. The parties met on

May 17, 2007, and the Union demanded that CATs receive the same ATGs paid to Rehabilitation Counselors, with full retroactivity to the date the Union was granted representation. Initially, the City agreed to provide the 15-year City-service Longevity Increment to CATs, but maintained that any other ATGs had to be funded by allocating money from future Municipal Economic Agreements. At a second meeting, on October 11, 2007, the City maintained its position that the Union must fund ATGs for the newly accreted CAT title. On December 9, 2008, the Union filed a Request for Appointment of Impasse Panel because the parties could not reach an agreement on which, if any, ATGs should be extended to employees holding the CAT title. The Request for Impasse identified ATGs as the issue in dispute; it specified that the Union maintained that the CAT title evolved from other titles that received the ATGs, while the City contended it was a newly accreted title that is not entitled to any ATGs. In January 2009, at the request of the Union, the City calculated the cost of applying the Longevity Differential and the Recurring Increment Payment ("RIP") to CATs to be .07%. The City offered to deduct this .07% from any future economic settlements in order to fund the ATGs, but the Union rejected this offer. Impasse hearings were held on September 14, and 15, 2010, at the Office of Collective Bargaining before the Panel.

On or about March 29, 2011, the Panel issued its Report, recommending that CATs "shall receive the annual 15-year City-service Longevity Increment as provided in Article III, Section 10 of the [Agreement]" and payments shall be retroactive to 2007. (Report, at 26).

On April 6, 2011, pursuant to NYCCBL § 12-311(3)(c)(e), the Union rejected the recommendation set forth in the Report. On April 22, 2011, the Union filed the instant appeal in accordance with NYCCBL § 12-311(4)(a) and the Rules of the City of New York, Title 61, § 1-05(m)(2).

POSITIONS OF THE PARTIES

Union's Position

The Union seeks an order modifying the Report to hold the City responsible for funding a portion of the ATGs at issue. The Union asserts several grounds for this appeal.

First, the Union alleges that the Panel failed to compare the benefits and conditions of employment of CATs to similarly situated employees as required by NYCCBL § 12-311(3)(b)(i). In particular, the Union alleges that an analysis of §18 of the Health Services Agreement, which states that "employees covered by this Agreement shall be eligible to receive the RIP" shows that CATs are treated differently than similarly situated employees because they do not receive the RIP, despite being covered by the Agreement. (Pet. ¶ 13). The Union claims that, although it argued this point at the hearing and in its brief, the Report fails to discuss §18 of the Health Services Agreement.

Second, the Union argues that the Panel failed to accord proper weight to the facts and circumstances surrounding the creation of the CAT title. Specifically, the Panel determined that the CAT title "was established as a new title, and not a successor to either the Rehabilitation Counselor or Activity Therapist titles." (Report, at 20). This conclusion resulted from the Panel too narrowly construing that "a title becomes a successor to another when the predecessor title is eliminated." (*Id.* at 23). Instead, the Union argues that the Panel should have considered testimony demonstrating that CATs have merely replaced Activity Therapists and Rehabilitation Counselors at several HHC facilities. The Union claims that the Panel should also have given more weight to the fact that the number of employees serving as Activity Therapists and Rehabilitation Counselors has declined significantly, and in proportion to the addition of employees in the CAT title, suggesting a shift, rather than a new or additional need. The Union argues that the Panel relied heavily on the fact that

HHC continues to hire individuals into the Rehabilitation Counselor title, without considering that creative arts therapy, and the need for CATs, is only required in a limited number of facilities. The Panel should also have recognized the role of the new law in necessitating this change and noted that those facilities that offer creative arts therapy no longer hire Rehabilitation Counselors and Activity Therapists because the CAT title is the better fit.

Third, the Union asserts that the Panel erred in its conclusion that extending the RIP and Longevity Differential to CATs is not cost neutral. Although the Report states that the RIP and Longevity Differentials to CATs "was calculated by the City at .07% and that figure was not disputed," the Union contends that it never accepted this figure. (*Id.* at 24). Instead, the Union claims that the RIP is cost neutral, because it depends on the total number of employees in a bargaining unit, and is not title specific.

Fourth, the Union argues that by limiting its analysis to whether the CAT title is a successor title and whether extending ATGs is cost neutral, the Panel failed to recognize the purpose, intent and import of the RIP and Longevity Differentials. The Union provided undisputed testimony that the RIP and Longevity Differentials serve to prevent turnover and reward tenure, but the Panel did not consider these factors and how ATGs benefit both the Union and the City.

Fifth, the Union asserts that the Panel ignored the relevant bargaining history between the parties. The Union claims that the Panel "judged this matter as an all or nothing proposition" by failing to acknowledge the Union's flexible position throughout the bargaining process. (Pet. ¶ 40).

Last, the Union claims that the Panel improperly adopted the City's position that the Union must fund all ATGs. The Union argues that the Panel should have distinguished the precedent cited by the City because those examples involved existing managerial titles, whereas the instant issue

concerns a legislative mandate that gave rise to a newly created title. Because no prior case of bargaining over ATGs concerning a new title exists, the Panel should have treated this matter as a case of first impression. By adopting the City's position, the Union argues that the Panel "has declared that all new titles shall be negotiated 'de novo' as if each new title was created and should be bargained for in a vacuum." (*Id.* ¶ 45). Had it properly considered "the context surrounding the creation of the CAT title, the significant reduction in headcount in the Rehabilitation Counselor and Activity Therapist titles, the lack of an increase in total unit headcount and the resulting cost neutral impact that extending additions-to-gross to CATs would have on the City," it would have concluded that the Union should not be responsible for funding all ATGs for CATs. (*Id.* ¶ 46).

City's Position

The City contends that the Panel properly considered the evidence, testimony, and arguments of the parties, and issued a Report that is supported by the record and complies with the impasse criteria set forth in the NYCCBL. The City also argues that the Union does not raise proper grounds for appeal. Therefore, the City asserts that the appeal must be dismissed.

First, the City claims that the Panel properly considered similarly situated employees pursuant to the criteria set forth in NYCCBL § 12-311(3)(b)(i) and with respect to §18 of the Health Services Agreement. The City argues that the Report rejected the Union's contract interpretation argument when it stated:

> The Union acknowledges in its brief that economic benefits are not simply conferred on newly accreted titles. The Union understands that if this were the case, the City's failure to grant the RIP and longevity differential to those employees holding the title of Creative Arts Therapist would properly be before a grievance arbitrator and not an Impasse Panel.

(Ans. ¶ 93 (quoting Report, at 25)). Further, the City notes that the Panel, to the extent it deemed relevant, compared CATs to Rehabilitation Counselors and Activity Therapists in its discussion of relevant facts and in its summaries of the Union's and the City's arguments.

Second, the City claims that the Union's argument that the Panel did not properly weigh the facts surrounding the creation of the title is improper. The Panel has discretion in its decision-making process and is free to weigh factors as it deems relevant to the particular case. Nevertheless, the City notes that the Panel heard evidence concerning the facts surrounding the creation of the CAT title, summarized these facts in the Report, and considered them in its recommendation.

Third, the Union's appeal of the Panel's determination that extending the RIP and Longevity Differential to CATs is not cost neutral is likewise improper. The City asserts that the Panel heard the Union's argument on this issue, and rejected it, by finding that:

> not all [CATs] came from the Rehabilitation titles . . . It is not a matter of simply transferring an equal cost of these benefits from Rehabilitation Counselors to [CATs]. The cost of these benefits is neither inconsequential nor de minimis. It was calculated by the City at .07% and that figure was not disputed.

(Ans. ¶ 108 (quoting Report, at 23-24)). The City presented substantial evidence on the method used to calculate the .07% cost, and the Union failed to refute these calculations. Thus, by appealing this issue, the Union is improperly requesting the Board to substitute its judgment for the Panel's.

The City argues that the Union's fourth claim, that the Panel did not consider the purpose of ATGs, does not constitute a proper ground for appeal. The Impasse hearings addressed solely the issue of whether the ATGs received by other titles should be automatically extended to CATs; the purpose, import and intent of various ATGs was not necessary to this determination. Nor is there a statutory obligation to consider the purpose, import and intent of a party's bargaining demands.

Still, the City notes that the Panel recognized the purpose of ATGs when it wrote: "[T]he Union contends that by withholding Longevity Differentials and RIP, the City is treating these employees differently, and unfairly, and by failing to reward their years of service, will cause [CAT] salaries to stagnate and lag behind those of their colleagues who receive these time-based benefits." (Ans. ¶ 114 (quoting Report, at 11)).

Further, the City asserts that the Panel considered the relevant bargaining history. The Panel recounted the bargaining history between the parties, and cited specific dates and proposals that led to the impasse. The City disputes the Union's characterization of its alleged flexibility and argues that the Panel's alleged failure to accord this stance proper weight is an improper ground for appeal.

Last, the City maintains that the Union's claim that the Panel improperly adopted the position that "ATGs must be funded by the Union" is a mischaracterization of the Report. According to the City, the Report is narrowly tailored to the evidence and is not a declaration that the Union must fund all ATGs, but only those at issue in the Report.

DISCUSSION

Pursuant to NYCCBL § 12-311(c)(4)(b), where the Report and Recommendation of an impasse panel is appealed to this Board, our review shall be based upon the record and evidence made and produced before the impasse panel, shall include an examination of whether the panel's recommendations take into account the standards for determination of wages, hours and working conditions prescribed by NYCCBL § 12-311(c)(3)(b), and shall include consideration of issues, if any, of conformity of the recommendation with any law or regulation properly governing the conduct of collective bargaining between the City and its employees. *UFA*, 51 OCB 19, at 10 (BCB 1993).

NYCCBL §12-311(c)(3)(b) sets forth the factors that an Impasse Panel shall consider, and provides that an Impasse Panel:

> . . . shall consider wherever relevant the following standards in making its recommendations for terms of settlement:
>
> (i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York city or comparable communities;
>
> (ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
>
> (iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;
>
> (iv) the interest and welfare of the public;
>
> (v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

"[N]o fixed value or weight, [however] is prescribed for any of these criteria to be applied equally in all cases" *CSBA*, 11 OCB 4, at 7-8 (BCB 1973). Further, an impasse panel "is free to apply the criteria as circumstances require to the exigencies of each particular case." *PBA*, 17 OCB 12, at 6 (BCB 1976).

The Board's function in this proceeding is limited to deciding "whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel." *Id.* The Board's review shall not substitute its own judgment in determining the

facts or adjudicating the merits for that of the impasse panel. *See UFA,* 37 OCB 11, at 6 (BCB 1986); *UFA*, 51 OCB 19, at 11; *Podiatry Soc. of NYS*, 9 OCB 23, at 8 (BCB 1972); *see also Caso v. Coffey*, 41 N.Y.3d 153, 158 (1976)("[I]t need only appear from the decision of the arbitrators that the criteria specified in the statute were "considered" in good faith and that the resulting award has a "plausible basis.")(citation omitted). Thus, an Impasse Report and Recommendation shall be upheld "unless it can be shown that the Report and Recommendations were not based on objective and impartial consideration of the entire record, and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law." *UFA,* 51 OCB at 11-12(quoting *Podiatry Soc. of NYS*, 9 OCB 23, at 8 (BCB 1972)); *see also Caso,* 41 N.Y.3d at 158 (Because the "essential function of compulsory arbitration panels is to 'write collective bargaining agreements for the parties,' [i]t follows that such awards, on judicial review, are to be measured according to whether they are rational or arbitrary and capricious.")(citing *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 503 (1970)).

Here, the Union alleges several grounds on which the Board should modify the Report to require the City to fund a portion of the ATGs at issue. Using the above standards of review, we now consider each of the Union's objections to the Report.

The Union's first claim alleges that the Panel failed to compare the benefits and conditions of employment of CATs to similarly situated employees in violation of NYCCBL §12-311(c)(3)(b)(i). We disagree. The Panel expressly identified and quoted the statute as the standard for its decision. The Panel further noted that it "carefully considered the documentary evidence submitted, the testimony elicited, and the arguments proffered by both parties," and "applied the relevant

statutory criteria in arriving at its findings and recommendations." (Report, at 19). The Panel "examined and compared the position descriptions" of CATs with those of Rehabilitation Counselors and Activity Therapists and determined that "significant distinctions" existed. (Report. at 20). Specifically, the Panel distinguished CATs from the other titles based on the purpose of the position, examples of typical tasks, the requirement of a license and a master's degree or higher in creative arts therapy, and the difference in salary earned by individuals in the CAT title. The Panel also noted that the new legislation set new standards and requirements for those practicing creative arts therapy that are distinct from Rehabilitation Counselor and Activity Therapist titles. Further, the Panel recognized the Union's argument that the RIP must be applied to CATs as "mandated by the unambiguous language of the Agreement," but disagreed, holding that CATs are a newly accreted title and "the subsequent addition of a new title does not reopen the contract as to the previously certified titles, nor does it automatically extend the provisions thereof to the added title." (Report, at 24 (citing *UFA, L. 943*, 7 OCB 3 (BCB 1971)). Although the Union disagrees with the Panel's interpretation, we cannot find that the Report was not an objective and impartial consideration of the record or that it relies on an essential error of law or fact. *See UFA*, 51 OCB 19, at 11-12.

Second, the Union argues that the Panel failed to accord proper weight to the facts and circumstances surrounding the creation of the CAT title in its determination that the CAT title is a new title. On appeal, the Union concedes that the Panel considered, but was not persuaded by, its argument that "some employees holding Rehabilitation Counselor and Activity Therapist titles used techniques and performed duties consistent with the statutory definition of creative arts therapy, and that some possessed creative arts therapy credentials," that "CATs were credited with experience gained while serving in Rehabilitation Counselor and Activity Therapist titles," and that "the number

of Rehabilitation Counselors and Activity Therapists employed by HHC in 2006, and the number of Rehabilitation Counselors, Activity Therapists, and [CATs] employeed by HHC in August 2010 are relatively the same." (Appeal, ¶ 19, 29). Although the Union contends that the Panel should have relied on specific testimony and evidence to reach a different conclusion, the Panel reasonably relied on the continued employment of Rehabilitation Therapists and Activity Therapists, and the hiring of additional employees into those titles to conclude that the CAT title is a newly accreted title, and the Board will not substitute its own judgment for that of the impasse panel. *See UFA*, 51 OCB 19, at 11 (BCB 1993).

Equally without merit is the Union's contention that the Panel erred by concluding that extending the RIP and Longevity Differential to CATs is not cost neutral. The Panel considered and rejected the Union's argument that "the cost of providing these benefits to [CATs] would be offset by the reduction in the number of Rehabilitation Counselors and Activity Therapists receiving them." (Report, at 23). Instead, the Panel reasonably concluded that the cost was "neither inconsequential nor de minimis" because the "record shows that not all [CATs] came from the Rehabilitation Counselor titles;" "[s]ome were hired as Activity Therapists who received a lower longevity differential than Rehabilitation Counselors, and others were hired as [CATs] with no prior service at HHC." (*Id.* at 23-24). In support, the Panel further recognized that the City computed the cost to be .07%, which the Union did not dispute. Although the Union contends on appeal that it did not accept this figure, the Report does not claim that the Union accepted this figure, and repeatedly states the Union's cost-neutral position. Thus, the record provides substantial support for the result reached by the Panel.

We also find that the Union's claim that the Panel failed to recognize the purpose, intent and

import of the RIP and Longevity Differentials lacks merit. We have long held that an impasse panel is free to apply the statutory criteria as circumstances require. *See PBA*, 17 OCB 12, at 6 (BCB 1976). Here, the parties framed the issue in dispute as whether employees in the CAT title are entitled to receive the contractual ATGs that are paid to those holding the Rehabilitation Counselor and Activity Therapist titles, which does not require consideration of the purpose and intent of the RIP and Longevity Differentials. Despite this, the Panel recognized the Union's argument that "by withholding Longevity Differentials and RIP, the City is . . . failing to reward their years of service, [and] will cause [CAT] salaries to stagnate and lag behind those of their colleagues who receive these time-based benefits." (Report, at 11). Thus, because the Report demonstrates that the Panel heard the Union's argument, we cannot find that the Union was denied a full and fair opportunity to be heard on this basis. We will not substitute our judgment for that of the Panel as to the relevance and merit of that argument.

Nor do we agree that the Panel ignored the relevant bargaining history. In contrast, the Panel provided a detailed review of the bargaining history that led the parties to this proceeding, and recognized that the Union "emphasizes the bargaining history and evolving circumstances of employees performing creative arts therapy for HHC." (Report, at 7). That the Union disagrees with the weight accorded to this issue or might be able to conceive other results is not controlling. *See UFA*, 51 OCB 19, at 11.

Last, the Union argues that the Panel improperly adopted the City's position that the Union must fund all ATGs. The Report, states in relevant part:

> The City has also demonstrated that it has taken a consistent position in negotiations over newly accreted titles: additions to gross must be funded by the Union. We can find no compelling reason, on this

record, to require the City to change its position in this case.

(Report, at 24). The Union contends that the present case is distinguishable from the prior cases involving newly accreted titles identified by the City; therefore, the Panel should have considered the ATG issue in this matter as a "case of first impression." (Pet. ¶ 43) Moreover, the Union argues, this determination "has declared that all new titles shall be negotiated 'de novo' as if each new title was created and should be bargained for in a vacuum." (Pet. ¶ 45). The City, however, argues that the Panel did not adopt this provision generally. According to the City, the Report is limited to the finding and recommendation that CATs shall receive the annual 15-year City-service Longevity Increment. We believe the parties' disagreement over the import of this part of the Report is attributable to a lack of clarity regarding the Panel's conclusion.

Section 12-311(c)(3)(a) of the NYCCBL provides that an Impasse Panel's Report shall contain findings of fact, conclusions, and recommendations for terms of settlement. The courts have held that the Panel's rationale and conclusions must be stated with a degree of specificity. *Matter of Boyle v. MacDonald*, Index No. 118517/93 (Jan. 7, 1994, Sup. Ct. N.Y. Co.) (vacating and remanding Board decision affirming impasse award); *see also Matter of Buffalo Professional Firefighters Assn. v. Masiello*, 50 A.D.3d 106, at 110-12 (4th Dept. 2008), *aff'd in part and rev'd on other grounds*, 13 N.Y.3d 803 (2009). We find that the rationale and basis upon which the Panel reached its conclusion not to award the ATGs (other than the agreed-upon 15-year Service Longevity Increment) is not clearly expressed in the Report. As written, the Report can be read to suggest that this conclusion is based on the fact that the City has consistently argued for it. It is unclear in the Report the extent to which that conclusion was based upon the Panel's analysis of other factors and record evidence. Having found that the CATs were not a successor title and that, consequently, the

ATGs were not automatically conferred upon that title, and having recognized that the parties had bargained over the question of funding the ATGs without reaching agreement, it was incumbent on the Panel independently to resolve that question. Since this Board is not authorized to consider that question *de novo* nor to substitute its judgment for that of the Panel, we are compelled to remand this issue to the Panel and direct it to issue an amended Report more fully explaining the rationale and basis for its conclusion that ATGs (other than the agreed-upon 15-year Service Longevity Increment) would not be awarded.

ORDER

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

ORDERED, that the appeal of the District Council 37, AFSCME, Local 768 be, and the same hereby is, granted in part and denied in part, as set forth herein; and it is further

ORDERED, that the Report and Recommendation of the Impasse Panel hereby is remanded to the Panel for further consideration as set forth herein; and it is further

DIRECTED, that the Impasse Panel issue an amended Report and Recommendation more fully explaining the rationale and basis for its conclusion that ATGs (other than the agreed-upon 15-year Service Longevity Increment) would not be awarded; and it is further

ORDERED, that the Report and Recommendation of the Impasse Panel, a copy of which is annexed hereto and made a part hereof, be, in all other respects, and the same hereby is, affirmed.

Dated: June 1, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

GABRIELLE SEMEL
MEMBER