UFA, 4 OCB2d 3 (BCB 2011)

(IP) (Docket No. BCB-2820-09).

Summary of Decision: The Union alleged that the City unilaterally changed the selection criteria for company chauffeurs from seniority to a series of criteria including seniority, violating the duty to bargain. The City contended that the Board lacks jurisdiction because the Union is attempting to enforce a contractual provision, that the matter should be deferred to arbitration, that no change took place, and that there is no duty to bargain over the assignment of employees' job duties. The Board finds that it has jurisdiction, that deferral is not appropriate, and that the decision to use criteria including but not limited to seniority in filling the chauffeur position is not a mandatory subject of bargaining. Accordingly, the improper practice petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 94, IAFF, AFL-CIO

Petitioner,

-and-

THE CITY OF NEW YORK and the FIRE DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.

DECISION AND ORDER

On December 3, 2009, the Uniformed Firefighters Association, Local 94, IAFF, AFL-CIO (the "UFA" or "Union") filed a verified scope of practice/ improper practice petition against the City of New York ("City") and the Fire Department of the City of New York ("FDNY"). The petition

alleges that the FDNY violated §§ 12-306(a)(1), (4) and (5) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") by unilaterally changing the selection criteria for company chauffeurs from seniority to a series of criterial including seniority. The City contends that the Board lacks jurisdiction because the Union is attempting to enforce a contractual provision and thus the matter should be deferred to arbitration, that no change took place, and that the assignment of employees' job duties is not a mandatory subject of bargaining. The Board finds that it has jurisdiction, that deferral is not appropriate, that a change did occur, and that the decision to use criteria including but not limited to seniority in filling the chauffeur position is not a mandatory subject of bargaining. Accordingly, the improper practice petition is denied.

BACKGROUND

The FDNY, which serves as first responder to fire, public safety and medical emergencies, disasters and terrorist attacks within the City, has long employed designated firefighters in the role of company chauffeur. A chauffeur is a firefighter selected by the Company Commander to safely transport members in a fire apparatus or "rig"–generally either an engine ("Engine") or a ladder ("Ladder")–to the scene of an emergency. Upon arriving at the scene, an Engine company's chauffeur determines the best location for the Engine in relation to fire hydrants, connects the water pumps to hydrants, monitors water pressure gauges, relays water from one apparatus to another, and ensures that the Engine will not block a Ladder. A Ladder company's chauffeur's tasks include determining the best position of the Ladder for deployment and optimum coverage of its tower or aerial ladder, raising and positioning the ladder to either effect a rescue allow access or egress for

other firefighters or affect ventilation.

Since at least 1992, Company Commanders at each work location have had the sole authority to designate a firefighter as the Unit Chauffeur from those members of the company who are "chauffeur certified," which requires their completing training from the Company Commander on an apparatus, as well as completing "Chauffeur Training School" conducted by the FDNY. While any number of firefighters at a given location may be chauffeur certified, only one firefighter at a time is designated as the chauffeur at a location for a given tour.

Pursuant to the applicable collective bargaining agreements between the UFA and the City, the firefighters designated as Unit Chauffeurs receive an enhanced pay differential. The FDNY's Personnel Administration Information Directive 2-98 ("PA/ID 2-98"), entitled "Chauffeur Pay Differential" sets forth, among other things, which units are eligible to receive the chauffeur differential. These collective bargaining provisions and PA/ID 2-98 were the subject of a 2007 grievance, arising out of the City's denial of the chauffeur differential to firefighters at a specific "light duty" unit, who were designated as Unit Chauffeurs. In an October 19, 2009 arbitration decision, the grievance was resolved in favor of the City based on the fact that the designated Unit Chauffeurs did not perform the driving duties or specified non-driving duties. (Ans., Ex. 4).

Since approximately August 27, 1992, selection of Unit Chauffeurs by Company Commanders has been governed by "All Units Circular" ("AUC") 254, titled "Chauffeur Selection Policy." AUC 254 provides, in pertinent part:

> Members who have passed Chauffeur Training School shall be eligible for a position as a regular unit chauffeur. The selection of a regular Unit Chauffeur shall be by seniority except when members have received less than satisfactory annual evaluations in any area that reflects on the duties and responsibilities of a chauffeur. These

> members will be re-evaluated in accordance with [qualifications requirements] of this document. When members have equal seniority, then the member who is found to be significantly superior after the annual evaluation by the Company Commander shall be given preference.

(Pet., Ex. B ¶ 13).

On or about September 1, 2009, the FDNY distributed for the UFA and the UFOA to review a draft revised version of AUC 254 ("AUC 254 R"). The proposed revision was accompanied by a draft order which would revoke the original AUC, as well as other attachments not challenged by the Union here. The proposed AUC 254 R read, in pertinent part:

> The ultimate decision to award the position of regular unit chauffeur shall be made by the company commander in consultation with the company officers and shall be based primarily on the following: annual performance evaluations, aptitude, demeanor, judgment and seniority. When members have received less than satisfactory evaluations in any area that reflects on the duties and responsibilities of a chauffeur, these members shall be re-evaluated in accordance with [qualifications requirements].

(Pet., Ex. A ¶ 9).

On October 15, 2009, the FDNY formally issued AUC 254 R. This proceeding followed.

POSITIONS OF THE PARTIES

Union's Position

The Union argues that it has demonstrated that the City's promulgation of AUC 254 R constituted a change in policy prior to which "the standard of seniority was the basis of selecting regular unit chauffeurs." (Pet. ¶ 21). Under the revised policy, the Company Commander now has the ability to grant or deny the position of regular Unit Chauffeur based on subjective factors, an authority previously lacking. The City's claim that under the prior version of AUC 254, the

company commander retained discretion to select the Unit Chauffeur based on criteria other than seniority is contradicted by the language of the policy. Under the prior AUC 254, "the Company Commander had no choice but to designate the senior most member so long as the senior most member did not have a less than satisfactory annual evaluation in any area that reflects on the duties and responsibilities of a Chauffeur." (Reply ¶ 12). Thus, the City's claim that no change has taken place is not tenable.

The Union further asserts, citing *UPOA*, 35 OCB 23 (BCB 1985), and *City of White Plains*, 9 PERB ¶ 30007 (1976), that the use of seniority as a standard in taking personnel actions involves terms and conditions of employment, and thus is a mandatory subject of bargaining. Therefore, the City's unilateral implementation of AUC 254 R was a refusal to bargain in good faith, violating §§ 12-306(a)(1), (4) and (5) of the NYCCBL.

The Union denies that deferral to arbitration is appropriate in this case, arguing that its claim in the grievance arbitration is not relevant to the dispute here, as it related to a specific group of light duty firefighters and their right to receive the pay differential pursuant to the collective bargaining agreement. Those contractual provisions do not involve or relate to the criteria for selection of Unit Chauffeurs.

City's Position

The City argues that the Union's claims are reasonably related to the negotiated collective bargaining agreement between the parties, and thus the Board should defer the claims to arbitration. In support of this contention, the City argues that the crux of the Union's argument is that AUC 254 R changes the terms by which the chauffeur differential is paid to firefighters, and thus is essentially contractual in nature.

Further, the City argues, the revision to AUC 254 did not in fact constitute a change, in that the Company Commander under the original version of the policy retained discretion to consider evaluations as to firefighters' performance and to not designate a firefighter as a Unit Chauffeur who had been deemed unsatisfactory as to any area related to chauffeur duties.

The City contends that the assignment of employee job duties, including designating an employee to serve as a chauffeur is an express management right under NYCCBL § 12-307(b). Specifically, AUC 254 R addresses assigning duties to firefighters as well as deciding what duties firefighters will perform during work hours. The Board and the Public Employment Relations Board ("PERB") have both found that the employer has a right to unilaterally determine and assign job duties of employees, and AUC 254 R is a clear exercise of that statutory authority. As such, there is no duty to bargain over the implementation of AUC 254 R.

DISCUSSION

As a threshold matter, we find that the City's claim that this Board lacks jurisdiction and should defer the instant matter to arbitration to be unpersuasive. As we have long held, and often explained, "[t]he Board will defer improper practice claims where the improper practice allegations arise from and require interpretation of a collective bargaining agreement and in cases where it appears that arbitration would resolve both the claims that arise under the NYCCBL and the agreement." *DC 37, L. 1322*, 1 OCB2d 4, at 8 (BCB 2008); citing *SSEU, Local 371*, 79 OCB 24, at 8 (BCB 2007); Local 621, SEIU, 45 OCB 16 (BCB 1990); DC 37, 35 OCB 31 (BCB 1985). In the instant case, neither precondition for deferral exists. The limits of the specific Unit Chauffeurs' contractual rights to receive the pay differential does not in any way speak to the selection policy.

Nor does the City assert any grounds to believe that criteria for selection as a Unit Chauffeur is in any way governed by any provision of the collective bargaining agreement between the parties as was the right to pay at issue in the *UFA* arbitration. Indeed, the circumstances of this case present an easier question than did *Assistant Deputy Wardens*, 3 OCB2d 8, at 12-13 (BCB 2010), in which we found deferral inappropriate where "the alleged improper practice petition . . . was triggered by the same factual transaction giving rise to the grievance." No such identical transaction has been asserted here, and, as in *Assistant Deputy Wardens*, the Union here "asserts as the source of the rights at issue not the contract between the parties but rather the failure to bargain." *Id.* In such circumstances, "we have found that the claim of failure to bargain is properly resolved by this Board, and deferral is not warranted." *Id.* (citing cases).

We also find that the City's argument that the revision to AUC 254 does not constitute a change to the *status quo*, and therefore cannot implicate any duty to bargain, to lack merit. Under both variants of the policy, the Company Commander could exclude firefighters from consideration for designation based on unsatisfactory evaluations in relevant areas. However, under AUC 254 R, in addition to such exclusions, the Company Commander may now exercise discretion in selecting among the remaining firefighters. In making that selection, the Company Commander is free to weigh various factors, including "annual performance evaluations, aptitude, demeanor, judgment and seniority." By contrast, under the original policy, on its face, once the training requirements were met, and any evaluation-based exclusions made, seniority determined the outcome. On such a record, it cannot be disputed that a change has taken place. *See CEU*, 2 OCB2d 37, at 12-13 (BCB 2009) (where evidence did not support finding of purely *de minimis* change, material change found to exist); *see also DC 37*, 77 OCB2d 34, at 16 (BCB 2006). However, that a change occurred does

not of itself establish an improper practice unless that change can be shown to have been to a mandatory subject of collective bargaining. As we said in *CEU*, "[o]nly upon a showing of both of these elements will the Board find that an improper practice has occurred." 2 OCB2d 37, at 12 (citing *SSEU, L. 371,* 1 OCB2d 20, at 9 (BCB 2008)).

This Board has recently reaffirmed 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)."[1] *LEEBA*, 3 OCB2d 29, at 24-25 (BCB 2010) (citing *CSBA, L. 237*, 65 OCB 9, at 12-13 (BCB 2000); *UFA*, 43 OCB 4, at 155-156 (BCB 1989); *PBA*, 39 OCB 24, at 6 (BCB 1987), *affd., Caruso v. Anderson*, 138 Misc.2d 719 (N.Y. Co. 1987), *affd.,* 145 A.D.2d 1004 (1st Dept. 1988), *lv. denied,* 73 N.Y.2d 709 (1989)). Further, we have often held that "under both the NYCCBL and the Taylor Law, certain areas lie outside the scope of mandatory bargaining, and thus fall outside the scope of collective bargaining, including the right to allocate duties among its employees." SSEU, L. 371, 2 OCB2d 16, at 10-11 (BCB 2009) (citing, inter alia, DOITT, 77 OCB 13, at 16-17 (BCB 2007)). We find that here, the demand to bargain over the newly added non-seniority related criteria for selection as Unit Chauffeur, impermissibly infringes management's ability to make that judgement, and therefore is not a mandatory subject of bargaining.[2]

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[1] 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 . . . . "

[2] We are unpersuaded by the dissent's contention that factors other than seniority become mandatorily negotiable when they are added to a previously seniority-based process. The decisions cited in the body of our opinion permit seniority to be negotiated, not the other factors weighed in the decision to assign. Moreover, the dissent's concern that these additional factors are insufficiently "objective" to constitute a proper exercise of managerial prerogative is

In so holding, we note that our decision is in accordance with our own prior decisions as well as those of those of PERB. *See UPOA*, 35 OCB 23, at 27-28 (BCB 1985) ("where seniority is to be used as the sole criterion in filling vacant posts, it is not a mandatory subject of bargaining") (citing cases). PERB has likewise long held that a seniority as a "sole criterion" for selection among other qualified employees is non-mandatory, as an intrusion in management's right to assign employees. *Town of East Hampton*, 42 PERB ¶ 4534, at 4628 (ALJ 2009) (citing *Schenectady Patrolmen's Benev. Assn*., 20 PERB ¶ 4636, *affd.*, 21 PERB 3022 (1988))). Its reasoning for finding such a subject to be non-mandatory, like ours, rests on its understanding that "the right to assign, closely related to other areas of managerial prerogative–the determination of employee qualifications, promotional and evaluational criteria, the right to transfer, belongs to management." *County of Nassau*, 18 PERB ¶ 4557, at 4623 (ALJ), *affd.* 18 PERB ¶ 3076, at 3164 (1985).[3]

Our dissenting colleague states that the Board "errs in holding that NYCCBL § 12-307(b) validly creates or warrants some sort of enforceable 'managerial prerogative' or 'management right,'" and that it is "in conflict with governing State law. . ., and this Board['s] decisions predicated thereon are without authority in law." (Dissent at 1). We disagree. We are unaware of any grounds upon which an administrative agency is permitted to declare invalid, or decline to follow, a provision of its enabling statute. *See, e.g., Matter of Casado v. Markus*, 27 Misc.340, 345-346 (Sup. Ct. N.Y.

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not supported by any authority in the NYCCBL, the Taylor Law, or any decisions construing either statute and which can be read as requiring such objectivity.

[3] The Union cites *City of White Plains*, 9 PERB ¶ 3007, at 3009 (1976), which could be read as finding seniority as a sole criterion for assignments to be negotiable. However, that decision itself states that it should not be taken "to imply any restriction upon the prerogative of the City to establish criteria for the filling of particular jobs." Moreover, in view of the clear holdings of PERB's decisions cited in the text, over a 25 year period, such a broad reading of *City of White Plains* would be inconsistent with the law as stated by PERB as well as this Board.

Co.), *affd*., 74 A.D.3d 632 (1st Dept. 2010) (the "jurisdiction of an administrative board or agency consists of powers granted to it by statute, and determinations made in excess of that authority are void") (citing *Abiele Contr. v New York City School Constr. Auth.*, 91 N.Y.2d 1, 10 (1997)).

Moreover, we believe that, as relevant to the present case, § 12-307(b) is entirely consistent with the Taylor Law's concept of managerial prerogative as interpreted by PERB, and as endorsed by the Court of Appeals, which has equated the scope of management rights under the Taylor Law with that under the NYCCBL:

> Consistent with the Taylor Law, the New York City Collective Bargaining Law imposes a duty on public employers and certified employee organizations to bargain in good faith on wages, hours and working conditions (Administrative Code § 12-307(a)). An employer commits an improper practice if it alters, without prior good-faith negotiation, a term or condition of employment (see, Administrative Code § 12-306(a)(4); *Matter of State of New York [Department of Transp.] v. Public Employment Relations Bd.*, 174 A.D.2d 905 (3d Dept. 1991); *Matter of State of New York, Governor's Off. of Employee Relations v. Public Employment Relations Bd*., 116 A.D.2d 827 (3d Dept. 1986)). Specifically excluded from the scope of collective bargaining, however, are certain fundamental managerial decisions-management prerogatives-such as the methods by which an operation will be performed (*see*, Administrative Code § 12-307(b)). Although these decisions are excluded from bargaining, their practical impact on employees may be bargainable (Administrative Code § 12-307(b)); *Matter of West Irondequoit Teachers Assn. v. Helsby*, 35 N.Y.2d 46, 51-52).

Matter of Levitt v. Bd. of Coll. Barg, 79 N.Y.2d 120, 126-127 (1992) (*affg. in part*, *UFA*, 39 OCB 7 (BCB 1987); *see also County of Erie v. NYS Pub. Empl. Rel. Bd.*, 12 N.Y.3d 72, 78 (2009) (construing managerial prerogative under Taylor Law; relying upon, *inter alia*, *Levitt*); *see generally Matter of NYC Dept. of Sanit. v. McDonald*, 87 N.Y.2d 650, 657 (1996) (*affg*., *Local 375, DC 37*, 53 OCB 12 (BCB 1993); finding that § 12-307(b) does not "proscribe permissive bargaining of

managerial prerogatives"; citing *Matter of City v. Unif. Firefighters Assn*., 58 N.Y.2d 957, 958 (1983)(same; confirming arbitration award)).

Additionally, PERB's holdings are quite similar to our own. PERB has itself relied upon the concept of and even the phrase "managerial prerogative" in delineating exclusions from the duty to bargain encompassed in the Taylor Law equivalent to those set forth in NYCCBL § 12-307(b). *See, e.g.*, *Town of Portland*, 42 PERB ¶ 4549, at 4692 (ALJ 2009) ("Management retains the prerogative to determine the work to be performed and by whom. Decisions relative to the exercise of that prerogative are, therefore, nonmandatory, and the only constraints are that the duties assigned be inherent to the position or the tasks incidentally related thereto and the assignment must not be of exclusive bargaining unit work.") (citations omitted); *County of Nassau*, 41 PERB ¶ 4552, at 4638 (ALJ 2009) (summarizing and following *State of New York (DOT)*, 27 PERB ¶ 3056 (1994); "Finding that staffing decisions are a managerial prerogative since they relate primarily to an employer's mission, the Board dismissed the charge"); *see also County of Nassau*, 43 PERB ¶ 4509, at 4544 (ALJ 2010) (same; "[o]nly the assignment of duties that are not within the inherent nature of the employee's position, such as the assignment of vehicle repairs to a police officer or craftsman work to a firefighter, is a mandatorily negotiable matter that bars the employer from unilateral action") (citing and quoting, *inter alia*, *Manhassett Union Free Sch. Dist.*, 41 PERB ¶ 3005, at 3024 (2008), *confirmed sub nom. and mod, in part*, *Matter of Manhassett Union Free Sch. Dist. v. NYS Pub. Empl. Rel. Bd.*, 61 AD3d 1231(3d Dept 2009)). [4]

Accordingly, the petition is denied.

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[4] We further note that, by statute, only PERB has standing to seek a ruling on the question of the NYCCBL's substantial equivalence to the Taylor Law. Taylor Law § 212(2); *see Mayor of the City of New York v. Council of the City of New York*, 9 N.Y.3d 23, 28-29 (2007) .

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 claims contained in the improper practice petition filed by the Uniformed Firefighters Association, docketed as BCB-2820-10 is denied.

Dated: January 5, 2011
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

(I dissent; see attached opinion)

CHARLES G. MOERDLER
MEMBER

DISSENTING OPINION OF CHARLES G. MOERDLER

Matter of the Uniformed Firefighters Association and The City of New York and The Fire Department of The City of New York

(Docket No. BCB-2820-09)

I dissent because in material respects the majority opinion is fundamentally flawed and cannot stand as a matter of law. Indeed, cases that the majority itself cites squarely negate its holding.

(A)

The majority errs in holding that NYCCBL § 12-307b validly creates or warrants some sort of enforceable "managerial prerogative" or "management right." Bluntly put, the cited section is, to the extent thus construed, in conflict with governing State law, provides no validity at all for the cited position, and this Board decisions predicated thereon are without authority in law. The rationale for that position - one repeatedly articulated over the years - is explicated at length in the dissent in Uniform Firefighters Association, Decision No. B-39-206, (IP) Docket No. BCB 2531-06 (Dissenting Opinion). See also dissenting opinion in Uniform Firefighters Association, Decision No. B-2-2004, Docket No. BCB-2314-02 and concurring opinion in Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO, Decision No. B-6-2003, Docket No. BCB-2218-01.

As more fully detailed in the dissent in Uniformed Firefighters Association, *supra* Decision No. B-39-2006, the so-called "management rights" or "management prerogatives" proviso of NYCCBL § 12-307b must, in order to have any validity or force as a statutory enactment, "be substantially equivalent to the governing state law [the Taylor Law, N.Y. Civ.

Serv. Law § 212 (1)] as it relates to matters within the scope of mandatory negotiations," else it is invalid.[1] That occurs because the Taylor Law mandates that min-PERB provisos and procedures (such as the New York City Charter provisions here at issue) shall be "substantially equivalent" to those specified under paramount State law. N.Y. Civ. Serv. Law § 212 (1) (McKinney 2010). Dispositively, there is no provision of law, in the Taylor Law or elsewhere in applicable State law, that provides a substantial equivalent to NYCCBL § 12-307b. Without more, that ends the inquiry as a matter of law.[2] For, to repeat, that omission to provide a

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[1]The phrase "substantially equivalent" has been defined by PERB as "that which is equal in essential and material parts" to some State law counterpart. See, Lefkowitz, Public Sector Labor and Employment Law 487 (2 ed. 1998) ("Lefkowitz"). Mini-PERB provisos or procedures that fall short of that standard are subject to challenge. See Lefkowitz, supra at 798; cf., Shanker v. Helsby, 515 F. Supp. 871, 877 (S.D.N.Y 1981) aff'd, 676 F.2d 31 (2d Cir. 1982). Manifestly, this Board should decline to follow or apply provisos or procedures that are invalid.

[2]The majority plucks, apart from context, isolated fragments from several PERB opinions to suggest that, notwithstanding the noted statutory void, some relevant management prerogative has been conjured up that can be invoked here. (See Majority Opinion, pp. 8-9). When read in context, the cited fragments do not aid the majority's underlying thesis. See exp. Discussion *infra*, point (B). The Majority's reference to County of Nassau, 18 PERB ¶4557, at 4623 (ADJ), aff'd 18 PERB ¶3076 at 3164 (1985), aptly illustrates my point. There, Nassau County filed an Improper Practice charge against the Adjunct Faculty Association for the latter's failure to concede at fact finding that certain provisions of its expired bargaining agreement were non-mandatory subjects of bargaining. The Administrative Law Judge in reviewing what were and were not mandatory subjects of bargaining, stated the following, only the first portion (the non-italicized portion) of which the majority quotes, while ignoring the italicized materials:

> In general, the right to assign, closely related to other areas of management prerogative -the determination of employee qualifications, promotional and evaluation criteria, the right to transfer, belongs to the employer. *Seniority is one of the few long recognized inroads into this area; however, the use of seniority is limited by the employer's right to determine qualifications for employment. [A]s in White Plains, I read into the instant seniority demand an understanding that the employer's right to determine qualifications for appointment is unrestricted.*

The Administrative Law Judge than went on to hold that stated sections of the demand therefore *"are mandatory subjects of negotiation. They relate to seniority and the manner in which it can be accumulated." County of Nassau, supra,* at 4623 (Emphasis added; footnote references omitted). Similarly, *Town of Easthampton* 42 PERB ¶4534, at 4628 (ADJ 2009) does not on this

"substantial equivalent" in State law renders this proviso invalid under the Taylor Law. Add to that the further observation that State law mandates that "... it is the public policy of the state and the purpose of this act [the Taylor Law] to promote harmonious and cooperative relationships between government and its employees ...." and the conclusion becomes obvious: there is simply no authority under State law for the sweeping, one-sided provisions of NYCCBL § 12-307b. Harmonious and cooperative relationships between government and its employees cannot subsist where one side is afforded the unfettered right to act as it pleases simply by invoking the mantra "managerial prerogative."[3]

NYCCBL § 12-307b may not properly be asserted as the predicate for a management right warranting the majority determination. (See Majority Op., p. 8).[4] Reversal of the

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record aid the majority's thesis ("Seniority as a factor in making assignments is mandatory, unless, as here, seniority is the sole criterion.") In the case before this Board seniority was not previously nor is it proposed to be the "the sole criterion." See, Point (B), *infra. and Majority Opinion pp. 3-4.*

[3]Thus, the majority aptly summarizes the City's position as being that, under NYCCBL § 12-307 (b), "...the employer has a right to unilaterally determine and assign job duties of employees." That sweeping claim to unfettered unilateral prerogative effectively undermines collective bargaining and its attendant precepts.

Parenthetically, it is not inconceivable that management (like labor) may under limited circumstances have certain inherent rights, responsibilities and fundamental prerogatives and duties. However, they must be clearly discernible based on some ascertainable and cognizable predicate, applicable on a case-by-case basis and under a more circumscribed, accepted and balanced standard than the sweeping language of NYCCBL § 12-307b, much less the overbroad manner in which it is here applied by the majority. The asserted management prerogative exception to mandatory collective bargaining is not, as the Board urges, justifiable simply by reference to NYCCBL § 12-307b.

[4]Importantly, no appellate judicial tribunal has to date expressly sustained the provision against a challenge such as here is stated. It merits not that the argument has been advanced that, because NYCCBL § 12-207b has been cited and relied upon over many years, it somehow has

majority's determination is warranted. I strongly urge that judicial proceedings be instituted to obtain review of the majority determination and, in that process, to finally resolve this important and recurring issue.

(B)

The crux of this dispute, as stated by the majority, is that where a change in the *status quo* is found to have occurred - *and that precise finding was here made in the majority opinion* (Majority Opinion p. 7) - an improper practice can be found to have occurred, but only where "... that change can be shown to have been a mandatory subject of collective bargaining." (Id at 7-8). Cases that the majority itself cites specifically hold that such a change is, on this record, a mandatory subject of bargaining.

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effectively become "the law" by some form of estoppel. Respectfully, that view lacks merit, the law is clear, it mandates substantial equivalency to paramount state law. N.Y. Civ. Ser. Law § 212(1)(McKinney 2010). Erroneous construction, though adhered to for decades and compounded by further error (conscious or otherwise0 does not create an enforceable precept by estoppel or otherwise.

Furthermore, while the majority is correct in stating (in footnote 4 of its opinion) that Taylor Law Section 212 (2) provides that PERB alone "has standing to seek a ruling on the question of the NYCCBL's substantial equivalence to the Taylor Law," that does not bar the Courts from exercising their broad Art. 6, Section 6(a), Constitutional powers. Cf., Mulgrew v. Board of Education, Sup. Ct., Bronx County, Index No. 260000, July 14, 2010 (Barone, J.). Thus, "[e]ven where judicial review is proscribed by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given hi by stature or in disregard of the standard prescribed by the legislature. (Cf. Matter of Barry v. O'Connell, 303 N.Y. 46, 52, 100 N.E.2d 127, 130; People ex rel. Metropolitan Life Ins. Co.v. Hotchkiss, 136 App.Div. 150, 120 N.Y.S. 649.)."City of Amsterdam v. Helsby, 37 N.Y. 2d 19, 38-39 (1975) (Concurring Opinion). Moreover, to the extent that it is maintained that PERB is thus authorized to permit by inaction an expansion of the legislative grant of power so that the NYCCBL could properly create a "managerial prerogative" where none exists under the powers legislatively granted, not only would PERB's inaction be arbitrary and capricious, the supposed authority that PERB would have would abridge the Constitutional Separation of Powers. Cf., Huron Group, Inc.v. Pataki, 5 Misc. 3d 648, 682-683 (Sup. Ct. Erie Co., 2004), aff'd, 23 A.D. 3d 1051 (4th Dept 2005).

The starting points for discussion are the "All Unit Circulars " (AUC"), pertinent portions of which are quoted in the majority opinion at pp. 3-4. Under the prior or 1992 AUC, three qualifications for a position as a regular unit chauffeur were stated: that the candidate (1) "have passed Chauffer Training School", (2) that the selection "shall be by seniority" and (3) that the candidate not "have received less than satisfactory annual evaluations in any area that reflects on the duties and responsibilities of a chauffeur." Manifestly, seniority was not the sole basis for determination. In the 2009 AUC, three further qualifications were added: "aptitude, demeanor, judgment" (in addition to seniority"). *Id* at 4. Again seniority was not the *sole* criterion, a conclusion the majority also reaches. (See Majority Opinion at p. 7). Indeed, three new criteria were added, all of them subjective ("aptitude, demeanor [and] judgment") and those new criteria could be applied with a very broad brush, to say the least. Nonetheless, the majority concludes that an improper practice was not stated. Therein lies the second ground of reversible error.

As previously noted (see, fn.2., *supra*), cases that the majority itself cites at pp. 8-9 of its Majority Opinion squarely hold that seniority is not a mandatory subject of bargaining where seniority is the *sole* criterion for the determination. See discussion at fn.2 *supra*. Thus, the most recent PERB opinion relied upon by the majority states:

> The demand is also nonmandatory because it requires tour assignments to be made solely based upon seniority, which, as argued by the Town, does not allow assignments based on other factors, such as special training or expertise. *Seniority as a factor in making assignments is mandatory, unless, as [t]here, seniority is the sole criterion."*

Town of Easthampton, supra, at 4628. (Emphasis added). Similarly, in *Schenectady Patrolmen's Benev Assn.,* 20 PERB ¶4636, *aff'd*, 21 PERB 3022 (1988), which the majority also relies upon, it was noted:

> Seniority as a factor in making assignments is mandatorily negotiable provided, as here, it is not the sole criterion... While general demands for the establishment of unit-wide training programs are nonmandatory because they relate to the level of service provided by the employer and concern qualifications for employment...the training herein is limited to promotional opportunities and it reserves to the City the determination of qualifications. Accordingly, the demand is mandatorily negotiable.

Id., at p. 16 (Footnote citations omitted). See also, *County of Nassau, supra,* 18 PERB ¶ 4628.

(C)

While there is some tension between an employer's ability to set qualifications and a union's right to bargain for seniority-based assignments, the Board improperly invokes it here. First, neither the original policy nor the new policy provided for seniority to be the "sole" criteria for assignment, making the Board's reliance on cases such as UPOA, 35 OCB 23 (BCB 1985) cases misplaced. See Majority Opinion pp. 8-9. Both iterations of the policy here at issue required something more thank mere seniority, viz., that the employee have successfully completed the training requirement and not received less than satisfactory evaluations in any area that reflects on the duties and responsibilities of a chauffeur. Second, the new policy does not purport to change these qualifications. Rather, under the revised policy, once the basic qualifications are met, the employer is now permitted to make its selection by entirely subjective means through consideration of "aptitude, demeanor and judgment." These amorphous added considerations are simply a means of undoing objective, seniority-based assignment of otherwise qualified personal. As such, mandatory bargaining rights are implicated.

CONCLUSION

For each or any of the above-noted reasons, the improper practice should have been sustained and the majority's contrary determination should be reversed.

Dated: New York, New York
December 3, 2010

CHARLES G. MOERDLER
Member