Uniformed Firefighters Ass'n, 43 OCB 4 (BCB 1989) [Decision No. B-4-89 (S)], aff'd, Uniformed Firefighters Ass'n v. Office of Collective Bargaining, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), aff'd, 163 A.D.2d 251, 558 N.Y.S.2d 72 (1st Dep't 1990).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of :	
THE CITY OF NEW YORK, :	
Petitioner, :	Decision No. B-4-89 Docket No. BCB-1117-88 (I-193-88)
-and- :	
UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, :	
Respondent.	
In the Matter of :	
UNIFORMED FIREFIGHTERS ASSOCIATION OF GREATER NEW YORK, :	
Petitioner,	
-and- :	
THE CITY OF NEW YORK, :	
Respondent. :	

DECISION AND ORDER

On November 30, 1988, the City of New York, appearing by its Office of Municipal Labor Relations ("OMLR"), filed a petition ("City Petition I") seeking a determination on whether a number of matters which have been raised in negotiations between the City and the Uniformed Firefighters Association ("UFA" or "the Union") are mandatory subjects of bargaining within the meaning of Section 12-307 of the New York City Collective Bargaining Law ("NYCCBL"). The matters raised in this petition involve what are

denominated as "Fire Marshal demands". On December 16, 1988, the City filed a second petition ("City Petition II") seeking a determination on the negotiability of additional matters raised in negotiations between the parties involving what are denominated as "Firefighter demands". In these two petitions, the City challenges the bargainability of 140 numbered Union demands, many of which contain a number of subdivisions, that have not been resolved in negotiations between the parties for a successor agreement to their 1984-1987 unit contract.

On December 27, 1988, the UFA filed a petition ("Union Petition") seeking a determination on whether certain demands raised by the City in negotiations between the parties are mandatory subjects of bargaining within the meaning of Section 12-307 of the NYCCBL. The Union's petition involves fifteen matters appearing in the current contract which the City proposes unilaterally to delete from the successor agreement, as well as two new matters which the City seeks to negotiate.

Simultaneously with the filing of its petition, the UFA submitted the affidavits of Union President Nicholas Mancuso and Fire Marshal John Knox, answers to each of the City's two petitions, and a memorandum of law. On January 10, 1989, the City filed its answer to the Union's petition and its reply in support of the City's petition. On January 17, 1989, the UFA filed its reply in support of its petition, a supplemental affidavit by Nicholas Mancuso, and a reply memorandum of law. On

February 14, 1989, the Union submitted a supplemental memorandum of law. The City submitted the affidavit of Director of Labor Relations Robert Linn in response to the Union's supplemental memorandum on February 17, 1989.

Background

On June 10, 1988, Nicholas Mancuso wrote to the Chairman of the Board of Collective Bargaining to advise him that "... the process of collective bargaining has been exhausted ..." with regard to negotiations between the UFA and the City for a successor to the parties' 1984-1987 collective bargaining agreement. Based upon Mr. Mancuso's letter, Chairman Malcolm D. MacDonald designated Deputy Chairman Alan R. Viani to investigate the status of the negotiations and to assist in such further efforts at negotiation as might be made. The parties' renewed efforts, aided by the mediation services of Mr. Viani, resulted in the reaching of a tentative settlement on July 12, 1988. However, the proposed agreement was rejected by the Union's Delegate body on August 5, 1988.

On August 9, 1988, Deputy Chairman Viani reported to Chairman MacDonald that collective bargaining between the parties had been exhausted and that conditions were appropriate for the creation of an impasse panel. Chairman MacDonald informed the parties in a letter dated August 10, 1988, that based upon Mr. Viani's report, as well as his own evaluation of the

circumstances and events of the negotiations, he had concluded that he would recommend to the Board at its next scheduled meeting that collective bargaining negotiations had been exhausted and that an impasse panel should be appointed. In a letter dated August 17, 1988, the City responded to Chairman MacDonald's letter by agreeing with his recommendation to the Board. The UFA, in a document filed on August 22, 1988, formally requested the appointment of an impasse panel.

Thereafter, at its meeting on September 6, 1988, the Board adopted Chairman MacDonald's recommendation, declared the existence of an impasse in bargaining between the City and the UFA, and authorized the appointment of an impasse panel to resolve the dispute in accordance with the provisions of Section 12-311c of the NYCCBL. Following a selection process agreed upon by the parties and consistent with the Revised Consolidated Rules of the Office of Collective Bargaining ("OCB Rules"), the three members of the impasse panel were designated on December 2, 1988: Arvid Anderson, Chairman; Lewis M. Gill; and Eli Rock. Preliminary conferences between the parties and the impasse panel have been held and hearings before the impasse panel are scheduled to commence on March 6, 1989. The petitions of the City and the UFA herein seek a determination of whether the disputed demands are mandatory subjects of negotiation which may be considered by the impasse panel. Demands which are not mandatory subjects of negotiation may not be considered by an

impasse panel unless submitted to the panel by the mutual agreement of the parties.[1]

RELEVANT STATUTORY PROVISION

The NYCCBL, Section 12-307, provides:

Scope of collective bargaining; management rights.

a. Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that:

(1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for in said election; (2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;

[1]Decision No. B-9-68; see Decision No. B-16-71.

(3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department;
(4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved; (5) matters involving pensions for employees other than those in the uniformed forces referred to in paragraph four hereof, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as representing bargaining units which include more than fifty per cent of all employees included in the pension system involved.

b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

PRELIMINARY ISSUES

A. Demands which duplicate statutory benefits or require compliance with provisions of law.

The City, in challenging several demands herein, asserts that a demand for a contractual provision which duplicates statutory benefits or requires compliance with the law is redundant and is a nonmandatory subject of negotiations. It cites several decisions of the Public Employment Relations Board ("PERB") which it contends support its positions. The UFA disputes the City's contention, alleging that the Board has held that the duty to bargain extends to matters covered by law when they relate to terms and conditions of employment. The Union argues that its demands which seek contractual protections which can be remedied through the contractual grievance and arbitration procedure are not rendered nonmandatory subjects of bargaining merely because they relate to matters covered by law.

We have considered disputes involving the relationship between statutory mandates and collective bargaining demands since the earliest years of the NYCCBL. In a case involving the statutory requirement under NYCCBL §12-312e, that collective bargaining agreements contain a no-strike clause, we held that while the inclusion of such a clause was mandated by law and, therefore, its omission was a prohibited subject of bargaining nevertheless that holding:

> . . . does not preclude inclusion of the statutory reservation of public employer rights, and duties of public employees and

> public employee organizations, under state law, or the inclusion of additional clauses not inconsistent with the statutory requirement.[2]

More recently, we stated that:

> We do not agree with the assertion that a matter covered by a statute is necessarily a prohibited subject of bargaining. It is well-settled that the requirement of good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment.[3]

The threshold inquiry in examining a demand alleged to relate to a matter covered by statute is whether the subject matter of the demand concerns wages, hours, or working conditions. If the demand does not concern these matters, then it is a nonmandatory subject of bargaining regardless of whatever rights or benefits may be conferred by the statute in question. However, if the demand does concern one of these matters, it is within the scope of mandatory collective bargaining unless:

> a. it would require a contravention of law;[4] or,
>
> b. the subject has been pre-empted by

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

[3] Decision No. B-41-87.

[4] Decision No. B-5-75.

statute;[5] or,

c. it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion.[6]

We do not agree that a demand which involves terms and conditions of employment becomes nonmandatory merely because it duplicates statutory benefits or requires compliance with a law. We perceive no reason why a demand which, but for a parallel statutory provision, would be a mandatory subject of bargaining, should be converted into a nonmandatory subject in the absence of evidence of its contravention or a statutory policy or procedure. Such a demand is not "redundant", as alleged by the City, for, as argued by the UFA, inclusion of a benefit in the collective bargaining agreement makes the benefit enforceable through the agreement's grievance and arbitration provisions. The ability to enforce an alleged violation of a benefit granted both by law and by contract through the grievance and arbitration process involves a right which supplements the statutory benefit and is not merely redundant.

We recognize that in several cases, PERB has stated that a public employer cannot be compelled to negotiate a demand, the provisions of which are identical with or merely restate the

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[5] Decision No. B-41-87.

[6] Decision No. B-15-77.

terms of a statute,[7] or which require compliance with a law.[8] However, our reading of these decisions fails to disclose the rationale upon which PERB based its holdings. In some cases, PERB's conclusion is stated without any explanation or citation of authority;[9] in others,[10] the conclusion is supported only by citation to earlier decisions which, we find, do not squarely address this issue. The PERB rulings rely upon City School District of the City of New Rochelle and New Rochelle Federation of Teachers,[11] and Yorktown Faculty Association and Yorktown Central School District,[12] neither of which involved a demand

[7] City of Saratoga Springs and Saratoga Springs Firefighters, 16 PERB ¶3058 (1983); Scarsdale Police Benevolent Association and Village of Scarsdale, 8 PERB ¶3075 (1975); City of New Rochelle and Uniformed Firefighters Association, 8 PERB ¶3071 (1975).

[8] Cincinnatus Education Ass'n and Cincinnatus Central School District, 13 PERB ¶4512 (1980); Chateaugay Central School District and Chateaugay Chapter, NYSUT, 12 PERB ¶3015 (1979).

[9] Saratoga Springs Firefighters, supra, 16 PERB ¶3058 at 3091.

[10] Cincinnatus Education Ass'n, supra, 13 PERB ¶4512 at 4526; Chateaugay Chapter, NYSUT, supra, 12 PERB ¶3015 at 3029; Scarsdale Police Benevolent Association, supra, 8 PERB ¶3075 at 3134; Uniformed Firefighters Association, supra, 8 PERB ¶3071 at 3126.

[11] 4 PERB ¶3060 (1971).

[12] 7 PERB ¶3030 (1974).

which either duplicated or required compliance with a statutory provision.

In New Rochelle Federation of Teachers, the issue before PERB involved the question of whether the employer could adopt budget cuts and reallocation of funds which would result in the termination of a substantial number of employees, without prior notification to and bargaining with the union which represented its employees. In finding that the proposed budget cuts involved a managerial decision, PERB used broad language affirming the right of,

> . . . the public employer, acting through its executive or legislative body, [to] determine the manner and means by which . . . services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process.[13]

We do not believe that this statement or anything else decided in the New Rochelle Federation of Teachers case serves as authority for the principle for which it was cited in the later decisions dealing with the negotiability of demands for contractual incorporation of statutory benefits.

The Yorktown Faculty Association case involved demands relating to the elimination of jobs; workload; participation in the decision-making process with respect to curriculum, evaluations, and student guidance; and student contact periods in

[13] 4 PERB ¶3060 at 3706.

various subjects. It does not appear that any of the demands sought to duplicate or require compliance with statutory rights. We fail to see how this case supports the principle for which it was cited in the PERB cases in question herein.

We also do not agree with the logic of the PERB decisions which holds that while a demand which merely restates existing law is a nonmandatory subject, a demand which restates and expands upon existing law in a manner which provides additional protection is a mandatory subject.[14] We believe that if a demand concerns a mandatory subject of bargaining, it should not lose its mandatory status just because it seeks a benefit which is the same as rather than greater than a corresponding statutory benefit.

Accordingly, we decline to follow the PERB cases in this area. Where the City has challenged UFA demands herein as being nonmandatory because they are "redundant" or seek compliance with existing law, we will determine their negotiability utilizing the test set forth at pages 9-10 herein. We believe that this standard represents a proper balance between the Union's right to bargain over mandatory subjects of negotiation and the public's right to enjoy the benefits and protections of law.

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[14] E.g., Saratoga Springs Firefighters, supra, 16 PERB ¶3058 at 3092.

B. Negotiability of demands which are mandatory subjects in part, and nonmandatory subjects in part.

The City, relying upon several decisions of PERB, submits that:

> [A] demand consisting of various parts, some of which are mandatory and some of which are nonmandatory, which is presented in such a manner as to reasonably indicate that it was to be negotiated as a single entity is nonmandatory in its entirety.

The UFA, however, contends that its demands are "severable" and requests,

> . . . in the event that the Board finds a particular section of a UFA demand is outside the scope of bargaining, that the Board grant the [City's] petition only with respect to the portion of the demand that is deemed non-bargainable.

In cases where a demand has a dual character, we have followed a practice of advising the parties of those elements of a demand which are mandatory subjects and of those elements which are nonmandatory subjects of bargaining.[15] This practice is consistent with our authority, under the NYCCBL §12-309a(2), to determine whether a matter is within the scope of mandatory collective bargaining. We view our function in implementing this authority as one of informing the parties rather than penalizing them for refusing to bargain over disputed demands. To this extent, our function under §12-309a(2) necessarily differs from

[15] E.g., Decision No. B-16-81.

that performed by PERB in ruling upon refusal to bargain charges under the improper practice provisions of §209-a of the Taylor Law. Since each of the cases cited by the City herein involves a ruling by PERB in an improper practice case under §209-a and not a declaratory scope of bargaining ruling such as authorized by NYCCBL §12-309a(2),[16] these cases are inapposite to the matter before this Board. Therefore, we adhere to our policy of informing the parties of both the mandatory and the nonmandatory elements of their demands.

C. The alleged conversion of permissive subjects of bargaining into "working conditions."

The Union claims that because certain items have been in collective bargaining agreements between the parties for "substantial periods," they have became an integral basis of Firefighter "working conditions" which may not be deleted by the City. As examples of such items, the Union cites the minimum manning provisions which have been included in collective bargaining agreements since the 1971-73 agreement, and the job description which has been in all collective bargaining agreements since the 1968-70 agreement. In response to the Union's claim, the City argues that the fact that it has

[16] Section 210.1 of PERB's Rules of Procedure authorizes a public employer or union to petition for a declaratory ruling with respect to the scope of negotiations under the Taylor Law. This Rule was not involved in any of the PERB decisions relied upon by the City.

negotiated and reached agreement on nonmandatory subjects of bargaining in the past, does not preclude it from withdrawing such subjects from a subsequent collective bargaining agreement.

It is well established that the fact that a public employer negotiates over a permissive subject of bargaining does not transform the subject into a mandatory subject of bargaining nor obligate the employer to negotiate that subject in the future.[17] Both this board and PERB have held that a subject's status is fixed by law and is unaffected by the parties' actions or intentions.

In Board of Education of the City of New York and Local 891, IUOE,[18] PERB rejected a hearing officer's finding which adopted an argument similar to that proffered by the Union herein. At issue was whether the employer could abandon unilaterally what PERB labeled "a long-term contractual obligation" with respect to assigning employees. The hearing officer found that while the subject matter was not a mandatory subject of negotiations, because the parties had entered into three successive collective bargaining agreements dealing with it, the employer was precluded from unilaterally altering the policy.

PERB found that the Taylor Law imposes no such obligation on

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[17] Decision Nos. B-62-88; B-16-74; B-7-72; B-11-68; Auburn Teachers Ass'n and Auburn Enlarged City School District, 13 PERB ¶4614 (1980); Troy Uniformed Firefighters Ass'n and City of Troy, 10 PERB ¶3015 (1977).

[18] 5 PERB ¶3054 (1972).

the employer, and consequently, PERB had no authority to compel negotiations over the issue. The parties' prior agreements could not serve to enlarge the scope of mandatory negotiations.

We have taken the same stance as PERB. We have held that the fundamental nature of a bargaining demand is immutable. The label that a party gives to a particular demand cannot alter the nature of the demand; if a demand covers a subject that was originally within managerial prerogative, then the subject is always within the prerogative except if limited by an agreement, and then only for the purpose of administering the agreement and not for purpose of negotiation.[19] Indeed, the issues of mandatory collective bargaining are derived from a statute which also contains an express reservation of management rights.[20] To permit the parties by agreement to reclassify bargaining demands would undermine the statutory basis of collective bargaining.

In Decision No. B-11-68, we set forth the reasoning for our policy:

> Generally, full and free discussion and airing of problems are the keystones of good labor relations. If agreement is reached on a voluntary subject, the agreement may be embodied in the collective bargaining contract. The obligation is then contractual, and may be enforced as such during the term of the contract. But the fact that such agreement has been reached and included in a contract cannot transform a

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[19] Decision No. B-62-88.

[20] NYCCBL §12-307b.

> voluntary subject into a mandatory subject in subsequent negotiations, for the latter is fixed and determined by law. Moreover, any doctrine that agreement reached on a voluntary subject forever obligates bargaining thereon would, as a practical matter, constitute a formidable deterrent to the highly desirable freedom of discussion and negotiation on voluntary subjects.

Similarly, in Decision No. B-16-74, we held that:

> [t]he fact that the City has bargained with the Union in the past with regard to the manning of fireboats, or that agreement on that issue has been included in a prior contract, does not affect the bargainability of the subject since agreement on a voluntary subject and inclusion of the agreement in a contract does not transform it from a voluntary subject to a mandatory subject.

We have had occasion to determine that certain permissive subjects of bargaining have become mandatory issues of bargaining in very limited, unusual circumstances. In Decision No. B-2-73, we held that the provision of housing for nurses had become a mandatory subject of bargaining. Relying on American Smelting & Refining Co. v. NLRB, 406 F.2d 552, 70 LRRM 2409 (9th Cir. 1969), cert. denied, 395 U.S. 935, 71 LRRM 2328 (1969), we held that "the question as to whether housing is a condition of employment is a question to be determined on the basis of the given circumstances of particular cases." The record before this Board led us to conclude that the "provision of various types of housing is a regular and even traditional practice with relation to nurses both in the private and the public sector, . . ."

In Decision No. B-43-86, the Union pleaded that in the

course of fire marshals' investigation of arson scenes, they became wet and dirty and required facilities to shower or wash up and to store clean clothing and equipment. The Union alleged that such facilities were a "regular and traditional" practice of the Department, and that fire marshals assigned to every task force and base had such facilities except those assigned to one particular unit, and it was for the benefit of those employees that the Union sought to include a demand for facilities in a collective bargaining agreement. We found that the City's general denial of the Union's specific allegations was insufficient to rebut the Union's assertions or raise a triable question of fact. Given the circumstances pleaded by the Union, the facilities demanded by the Union were found to constitute a condition of employment and thus a mandatory subject of bargaining.

In neither of the aforementioned cases did we find that simply negotiating over a provision and including the results of the negotiations in a collective bargaining agreement converted an otherwise permissive subject of bargaining into a mandatory subject of bargaining. There were circumstances and facts pleaded and proved which rendered the objects of the demands mandatory. We, therefore, reject the Union's contention herein that any issue which has been negotiated and included in a collective bargaining agreement, for a "substantial period" has become a mandatory subject of bargaining by reason of the City's

prior negotiation of such issues. We note, however, that notwithstanding the above, questions concerning the practical impact which results from the City's decisions on such permissive subjects of bargaining, such as questions of manning, may be found to be within the scope of mandatory collective bargaining if this Board determines that such practical impact exists.[21]

D. Request for hearings on practical impact claims.

In a letter from City Director of Labor Relations Robert Linn to UFA President Nicholas Mancuso, dated November 29, 1988, the City presented a list of provisions in the parties' 1984-87 collective bargaining agreement which it contends are not mandatory subjects of bargaining and which it proposes to delete from the next agreement.[22] The UFA's petition challenges the City's position as to each of these items. Additionally, however, the Union's petition contains a "Request for Hearing" in which it alleges generally that if this board determines that portions or all of the provisions at issue are nonmandatory subjects of negotiation, we should schedule hearings to permit the Union to establish the existence of the practical impact of those matters on the workload and safety of Firefighters.

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[21] NYCCBL §12-307b. Decision Nos. B-69-88; B-43-86.

[22] The contractual provisions which the City proposes to delete are referred to herein as "City Demand No. " followed by the number of the corresponding paragraph of the November 29, 1988 Linn letter.

We have held consistently that the question of whether a management action has a practical impact on employees within the meaning of the NYCCBL[23] is a question of fact which may require the holding of a hearing.[24] Nevertheless, conclusory allegations of practical impact do not warrant the holding of a hearing. The existence of a claimed impact cannot be determined when insufficient facts are provided by the Union.[25] The "Request for Hearing" contained in the UFA's petition provides no facts in support of its unspecific claim of practical impact on employee workload and safety. Accordingly, we reject the Union's general request. We shall, however, examine and rule upon each of the Union's more specific practical impact claims in the context of the particular demands in which each arises, and will direct the holding of such hearings on questions of practical impact as may be justified by the factual allegations made with respect to particular demands or issues.

E. Status of provisions of the current collective bargaining agreement which are not challenged in the parties' scope of bargaining petitions.

In its argument concerning the severability of its demands (see point B, supra) the Union incidentally states:

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[23] NYCCBL §12-307b.

[24] Decision Nos. B-34-88; B-31-88; B-43-86; B-38-86; B-18-85; B-2-76; B-16-74.

[25] Decision Nos. B-37-82; B-27-80; B-16-74.

> "the UFA respectfully petitions the Board to declare that all the provisions of the current collective bargaining agreement in their entirety involve mandatory subjects of bargaining that may not be deleted unilaterally."

The City urges that this request be denied because the Union has failed to allege any specific facts, circumstances, or law which would establish that the entire collective bargaining agreement is within the scope of mandatory bargaining. Moreover, the City notes that the provisions of the current agreement which are not the subject of the parties' scope of bargaining petitions are not at issue herein.

We agree with the City's position. We see no reason to address the negotiability of provisions of the current agreement which are not disputed in any of the scope of bargaining petitions filed herein. In the absence of any objection to or argument concerning numerous provisions of the agreement, our consideration of the negotiability of such provisions would be an unwarranted academic exercise. Accordingly, we deny the Union's request and will limit our determinations herein to those demands which are challenged in the parties' scope of bargaining petitions.

We will discuss seriatim the demands which have been challenged, the positions of the parties, and our decision on the bargainability of each demand. We wish to repeat that a finding that a matter is bargainable does not constitute an expression of

any view on the merits of a demand.[26]

THE DEMANDS

Firefighter Demand No. 3
Fire Marshal Demand No. 6

WORK SCHEDULE - Article III
Amend to provide for a 37.5 hour work week and work chart consistent with the two-platoon system set forth in Section 487a-11.0[27] of the Administrative Code.

City Demand No. 1

WORK SCHEDULE - Article III
Delete the first sentence of Article III, Section 1 and all of Section 2.

Firefighter Demand No. 4
Fire Marshal Demand No. 7

WORK SCHEDULE - Article III
Provide that the adjusted tour be one (1) fifteen-hour tour or two (2) nine-hour tours to be taken at Firefighter's/Fire Marshal's option. Further provide that if a Firefighter/Fire Marshal is denied his choice of adjusted tour and required to work the alternative tour, he shall be compensated for the adjusted tour actually worked at premium time.

Article III, Section 1 of the 1984-1987 Agreement states that the working hours of Firefighters shall be in accordance

[26] Decision Nos. B-43-86; B-16-81; B-17-75; B-10-75; B-1-74; B-2-73.

[27] We note that the Administrative Code of the City of New York was renumbered subsequent to the negotiation of the 1984-1987 Agreement. The Code section formerly set forth at Section 487a-11.0 is now set forth at Section 15-112.

with Section 487a-11.0 of the Administrative Code of the City of New York, which provides for a "two-platoon system". Article III, Section 1 further provides that since each Firefighter is scheduled to work in excess of a forty-hour work week under the two-platoon system, "[t]he specific additional time shall be compensated for by each Firefighter being excused from one fifteen-hour tour of duty [also referred to as the 'adjusted tour'] in each calendar year."

Section 487a-11.0 of the Administrative Code is fully set forth in Article III, Section 2 of the Agreement. It states, generally, that the two-platoon system shall consist of not more than two tours of duty, and sets forth the number of hours that each tour of duty shall last as well as the number of hours between each tour of duty. Section 487a-11.0 further provides that "Notwithstanding the provisions of any other section of this act, the provisions of this section, as amended, in relation to the establishment and continuance of the platoon system and the tours of duty and the hours thereof shall not be repealed, superseded, supplemented or amended by local law ...."

City Position

The City challenges the bargainability of these demands on the ground that its statutory management right to direct its employees and to determine the methods, means and personnel by which governmental operations are to be conducted makes the

scheduling of work hours and the determination of work charts a managerial prerogative. This position, the City asserts, has been upheld in prior decisions of this Board.

Moreover, inasmuch as the first sentence of Article III, Section 1 provides only that the provisions of Section 487a-11.0 of the Administrative Code must be complied with and Section 2 fully sets forth the precise language of the statute, the City claims that they are redundant and, thus, nonmandatory subjects of bargaining.

Union Position

According to the Union, the City's claim that work charts are not a mandatory subject of bargaining is "grossly overbroad" and "simply not supported by the authority cited in the City's petition." It argues that this Board has held repeatedly that the City must bargain over the total number of hours in a work day and work week. Since the number of hours in a week can also be expressed as the number of tours in a set, the UFA claims that its demand is a mandatory subject of bargaining.

The UFA contends that its demand for a 37.5 hour work week is clearly a mandatory subject of bargaining because "it simply seeks to set the length of the work week as opposed to the starting and finishing times of tours within the work week." Furthermore, it argues that its demand is consistent with the two-platoon system set forth in the Administrative Code in that

all of the elements of the two-platoon system described in the Code and demanded by the UFA fall within the categories of length of tours or time off between tours. "Both of these categories", the Union asserts, "unquestionably are mandatory subjects of bargaining."

The UFA also contends that a demand for a work chart consistent with the system described in the Code "does not implicate any possible area of managerial discretion concerning work charts." While the Union recognizes that the starting and finishing times of tours may not be a mandatory subject of bargaining, it notes that the two-platoon system described in the Code does not dictate starting and finishing times. Additionally, the Union claims that in view of the fact that the two-platoon system is mandated by the Administrative Code, the contractual provision requiring a work schedule that is consistent with the Code "neither conflicts with any law nor intrudes on any area of managerial discretion." This Board, the Union argues, has held that matters covered by law are mandatorily bargainable when they relate to terms and conditions of employment.[28] Since the elements of the work schedule described in the Code plainly are working conditions, the UFA maintains that they are within the scope of bargaining.

In any event, the Union asserts that the contractual

[28] Decision No. B-41-87.

provision at issue herein requires a work schedule "in accordance with" the two-platoon system described in the Code; it does not "merely repeat" the statutory provisions as alleged by the City. Inasmuch as the cited Code section does no more than set forth standards governing the lengths of tours of duty, the number of appearances per week, and the amount of time off between tours, all of which have been held to be mandatory subjects of bargaining, the Union claims that the City may not unilaterally delete the provisions.

With respect to its demand that the adjusted tour be one 15-hour tour or two 9-hour tours, the Union notes that Section 12-307a of the NYCCBL provides that public employers shall have the duty to bargain in good faith on time and leave benefits. It further notes that Section 12-307a(4) provides that all matters, including overtime and time and leave rules, which affect employees in the fire services shall be negotiated with the certified employee organization representing the employees involved. In interpreting these provisions, the UFA maintains, this Board has held that time and leave benefits are mandatory subjects of bargaining, and include a duty to negotiate on the regulation and procedure governing the proper use of leave.

According to the Union, the adjusted tour refers to a tour of duty that is granted as leave time in addition to vacation leave. It is usually scheduled at the beginning or the end of the employee's vacation leave. The Union asserts that its demand

would simply permit Firefighters to take off two 9-hour tours as the adjusted tour, instead of one 15-hour tour. It contends that the proposal does not establish an unlimited right to schedule the adjusted tour without regard to the Department's needs. "Indeed", the Union argues, "the proposal by its terms contemplates a situation where a Firefighter 'is denied his choice of adjusted tour'".

The Union claims that its demand is consistent with Decision No. B-16-81, wherein this Board held that time and leave benefits are mandatory subjects of bargaining and include a duty to negotiate on the regulation and procedure governing the proper use of leave.[29] Inasmuch as its demand consists of nothing more than a "regulation or procedure governing the proper use of leave", the Union maintains that the first portion of this demand is a mandatory subject of negotiation.

As to the second portion of its adjusted tour demand, the UFA alleges that it is nothing more than a request for compensation in the event the Firefighter's choice is denied. Since a demand for a "pure economic benefit" is a mandatory subject of bargaining, the Union contends that this portion of its demand is also a mandatory subject of bargaining.

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[29] The Union notes, however, that in that decision this Board further stated that once agreement is reached on a leave provision "it is the City's managerial prerogative to determine the level of staffing to be provided, by means of work schedules, within the limitations of the agreement on hours and leave benefits."

Discussion

37.5 Hour Work Week

It is well-settled that the City must bargain on the total number of hours in a work day and the total number of hours in a work week.[30] Section 12-307a of the NYCCBL states that "...public employers and certified or designated employee organizations shall have the duty to bargain in good faith on ...hours (including but not limited to overtime and time and leave benefits)...." Thus, to the extent the instant demand requests bargaining over the hours of work, we find that it is a mandatory subject of bargaining.

Work Charts

We note that contrary to the Union's assertion, the prior Board decisions cited by the City do support its position that the determination of work charts is within its statutory management rights.[31] Accordingly, we find that the UFA's demand

[30] See, e.g., Decision Nos. B-16-81; B-24-75; B-10-75; B-5-75. PERB also has held that the number of hours in the work day and work week is a mandatory subject of bargaining. In Local 294, International Brotherhood of Teamsters and City of Amsterdam, 10 PERB ¶3007 (1977), PERB held that the Taylor Law requires negotiations over terms and conditions of employment and it defines "terms and conditions of employment" to mean, among other things, hours.

[31] See, Decision Nos. B-21-87; B-24-75; B-10-75; B-5-75.

is not a mandatory subject of bargaining.[32]

We also find nonmandatory the provisions referred to in City Demand No. 1. We note that the first sentence of Article III, Section 1 requires compliance with the Code, which is fully set forth in Article III, Section 2. Nevertheless,it is well-settled that where as here the employer has voluntarily agreed to include a permissive subject in the agreement, in this case a provision of the Administrative Code which refers to work charts and therefor concerns the scheduling of work, it is under no obligation to continue that provision in a successor agreement. Therefore, we find that the City may unilaterally delete these provisions from the next agreement without first negotiating with the UFA.

Adjusted Tours

The City claims that the Union's adjusted tour demand is not a mandatory subject of bargaining because it is within its statutory management rights to schedule the work hours of its employees. The Union, on the other hand, argues that the adjusted tour is usually scheduled at the beginning or the end of the employee's vacation leave and therefore constitutes a time

[32] Furthermore, we note that for the reasons stated previously in this decision, we are not persuaded by the City's claim that the demand at issue herein is a nonmandatory subject of bargaining simply because it restates the language of the Administrative Code and, therefore, is redundant.

and leave benefit. Since Section 12-307a of the NYCCBL provides that public employers shall have the duty to bargain in good faith on time and leave benefits, the Union maintains that its demand is a mandatory subject of bargaining.

In prior decisions we have held that scheduling is a management right pursuant to Section 12-307b of the NYCCBL and, as a result, it is not a mandatory subject of bargaining.[33] Thus, the fact that the adjusted tour may have been used in the past to extend the vacation leave of employee's does not transform it from a work scheduling issue to a time and leave issue, as the Union claims. We further find that the fact that the Union's demand does not seek an unlimited right to schedule the adjusted tour without regard to the Department's needs, but rather requests compensation at premium time rates only in the event the Firefighter's choice is denied, does not qualify it as a demand for a "pure economic benefit"; and thus, a mandatory subject of bargaining.

We also reject the Union's claim that Decision No. B-19-79 supports its position. In that case, we held that a demand for an alternative economic benefit is mandatorily bargainable

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[33] See generally, Decision No. B-21-87. See also, Decision No. B-24-75 (starting and finishing times of tours of duty, number of different charts, number of tours on each chart); Decision No. B-10-75 (starting and finishing times); Decision No. B-5-75 (changes on duty charts); Decision No. B-6-74 (right to schedule work on holidays and weekends); Decision No. B-4-69 (establishment of shift hours).

despite the alleged prohibited or permissive nature of the benefit originally sought.[34] In the instant case, however, the fact that the UFA's demand seeks premium pay only if the employee's choice of adjusted tour is denied does not suffice to make it a demand for an alternative economic benefit and, therefore, a mandatory subject of bargaining within the meaning of Decision No. B-19-79. Accordingly, we find that the UFA's demand concerning the adjusted tour is a nonmandatory subject of bargaining.

Firefighter Demand No. 5

> WORK SCHEDULE - Article III
> Provide that a Firefighter injured during an overtime tour of duty shall continue to be compensated at premium time until the end of the scheduled tour.

Fire Marshal Demand No. 8

> WORK SCHEDULE - Article III
> Amend to provide that 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 171 hours in a work period of 28 consecutive days and/or in excess of his normal tour of duty shall be compensable in cash at time and one half. Further provide that a Fire Marshal injured during an overtime tour of duty shall continue to be compensated at premium time until the end of the scheduled tour.

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[34] The relevant demand in Decision No. B-19-79 provided that employees who performed satisfactorily at a higher level in their title were guaranteed the pay level they achieved despite possible subsequent reassignment to a lower level position within their title. We determined that that demand "is one coming within the ambit of 'wages'."

City Position

The City maintains that this "demand goes to the heart of the City's managerial right under Section 12-307(b) of the NYCCBL to schedule, reschedule, direct and assign its employees." It claims that a demand pertaining to work schedules which does not also concern the issue of maximum hours per day and per week is a permissive subject of bargaining. Therefore, the City argues, it is not required by law to bargain over that issue. Furthermore, the City claims that this demand would encroach upon its management right to determine the level of manning in its agencies; take all necessary actions to carry out its mission in an emergency, as well as to determine the methods, means and personnel by which governmental operations are to be conducted. For all of these reasons, the City argues, this demand is not a mandatory subject of bargaining.

Union Position

The Union claims that a demand concerning the "direct and immediate economic benefits flowing from the employment relationship" constitutes a wage demand. Accordingly, it argues that any demand seeking overtime or premium wage rates is a wage demand, even if it seeks to establish the circumstances in which premium or overtime rates of pay will be due. Therefore, the Union argues, its demand is a mandatory subject of bargaining.

The Union contends that contrary to the City's assertion,

it's demand concerns wages, not scheduling. In support of its contention, the Union notes that its demand does not seek to dictate the circumstances in which the Commissioner or the Chief Fire Marshal can authorize overtime. Instead, the Union submits, the demand pertains to rates of payment for Fire Marshals who have worked over a certain number of hours, and for Firefighters and Fire Marshals injured during an overtime tour of duty.

Discussion

The City asserts, and we agree, that a demand pertaining to work schedules which does not also concern the issue of maximum hours per day and per week is a permissive subject of bargaining.[35] In the instant case, however, we find that the first portion of Fire Marshal Demand No. 8 does in fact concern the issue of maximum hours per day and per week. The demand seeks premium pay for work "in excess of 171 hours in a work period of 28 consecutive days and/or in excess of his normal tour of duty." Section 12-307a of the NYCCBL provides as follows:

> public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working conditions .... (Emphasis added)

[35] See, e.g., Decision Nos. B-21-87; B-24-75; B-10-75; B-5-75; B-4-75.

Therefore, we find that this portion of the demand is a mandatory subject of bargaining. We note, moreover, that our finding is in accord with the decisions of PERB. In Local 589, International Association of Fire Fighters and City of Newburgh, 16 PERB ¶4516 (1983), PERB held that demands which concern rates of compensation for time spent in connection with work are mandatory subjects of negotiation. Overtime pay demands concerning compensation at the rate of time and one-half or compensatory time, is a mandatory subject of bargaining.[36]

With regard to Firefighter Demand No. 5 and the second portion of Fire Marshal Demand No. 8, the Union asserts that these demands concern wages, not scheduling. The Union submits that it is not seeking to restrict the City's right to schedule, reschedule, assign or direct its employees. Rather, these demands are addressed to the question whether employees injured during an overtime tour of duty should be compensated until the end of the scheduled tour at the premium time rate of pay.[37]

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[36] See also, Civil Service Employees Association, Inc., Niagara Chapter and Town of Niagara, 14 PERB ¶3049 (1981), wherein PERB held that the Union's proposal concerning rate of overtime pay for police officers was mandatorily negotiable. PERB determined, however, that the demand was rendered nonmandatory by the second portion of the proposal; and since both portions of the demand constituted a unitary demand, PERB held that the demand was nonmandatory.

[37] In support of its position, the UFA cites Bridge and Tunnel Officers Benevolent Association, Inc., and Triborough Bridge and Tunnel Authority, 13 PERB ¶4526 (1980). In that case, PERB held that the Union's proposal, which would require the employer when it called an employee for overtime work on his

We agree, and find that the Union's demand is concerned with the employee's entitlement to wages in the event certain circumstances arise after the City has exercised its statutory management right to schedule and assign its employees. We note, moreover, that the position of the UFA is supported by PERB's decision in Local 274, IAFF and the City of White Plains, 10 PERB ¶3043 (1977). In that case, PERB held that a demand that requests overtime payment when medical attention requires an injured firefighter to return to his assigned station after the end of his normal tour, but prior to the commencement of his next tour, "clearly involves a mandatory subject of negotiation, i.e., rate of compensation for time spent in connection with work." Therefore, we find that the UFA's demands are mandatory subjects of bargaining.

Firefighter Demand No. 8
Fire Marshal Demand No. 12

WORK SCHEDULE - Article III
Require automatic recalls for snow emergencies.

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regular day off, to guarantee the employee at least an 8-hour shift and if the employee was called in early or held over on his normal shift to guarantee the employee a minimum of 4 hours of overtime, constituted a demand for wages. Therefore, PERB held that is was a mandatory subject of negotiations. We find that case to be inapposite to the instant matter inasmuch as the UFA's demand is concerned with a particular situation - when an employee is injured during an overtime tour - rather than a general demand for minimum recall or minimum overtime.

City Position

The City contends that the Union's demand would interfere with its statutory management right to maintain the efficiency of governmental operations; direct its employees; determine the methods, means and personnel by which governmental operations are to be conducted; and exercise complete control and discretion over its organization. The City further argues that the case law on demands for automatic recall "is extremely clear." PERB, the City submits, has stated that a demand for automatic recall is a nonmandatory subject of bargaining because it deprives the employer of its managerial right "to determine whether or not to call-in off-duty [firefighters]."[38] In any event, the City claims that PERB has held that a demand which requires that the performance of duties be dependent on weather conditions is not a mandatory subject of bargaining.

With regard to the Union's claim that the absence of a provision for automatic recall for snow emergencies creates a "practical impact" on the workload of Firefighters, the City maintains that before this Board considers such a claim, the UFA must first demonstrate that the alleged impact results from "a management decision or action, or inaction in the face of changed circumstances." The mere refusal to accede to a Union's demand does not state a claim of practical impact. The City claims that

[38] Hudson Falls Permanent Fire Fighters, Local 2730 and Village of Hudson Falls, 14 PERB ¶3021 (1981).

since there has been no significant change in the amount of snowfall and, it asserts, the Union has conceded that there is no past practice pertaining to automatic recalls, there can "be no viable assertion of practical impact."

Union Position

The Union contends that its demand is bargainable because it relates to a practice that has been employed by the Fire Department, and which has a practical impact on the workload of Firefighters. In support of its position, the UFA claims that Firefighters currently are called upon to respond to snow emergencies. "Consequently," the Union argues, "during snow emergencies when the Fire Department fails to recall off-duty Firefighters, the workload of on duty Firefighters is greatly increased by their response to the snow emergency in addition to the rigors of their continuing responses to fire emergencies."

Discussion

The City contends, and we agree, that the case law pertaining to demands for the automatic recall of off-duty employees "is extremely clear;" it is a nonmandatory subject of negotiations.

In Hudson Falls, PERB held that a demand requiring the Village to call in available off-duty Firefighters to answer fire

alarms was not a mandatory bargaining subject because it would interfere with the Village's management prerogative to determine whether or not to call in off-duty personnel. PERB determined that even if the intent of the demand was to impose a minimum call-in provision, it was not mandatorily negotiable because it "would prevent the Village from deciding that it no longer wishes off-duty firefighters to answer fire alarms."[39]

The City further claims that PERB has held that a demand which requires that the performance of duties be dependent on weather conditions is a nonmandatory subject of negotiations. The

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[39] See also, Local 589, IAFF and City of Newburgh, 16 PERB ¶3030 (1983) (Firefighters' union's proposal requiring the City to summon all off-duty firefighters to duty whenever it was required to summon assistance from surrounding communities to fight major fires was not mandatorily negotiable. The manner and means by which service is provided, as well as the number of employees to have on duty at any given time,is a management prerogative); City of Saratoga Springs and Saratoga Springs Firefighters, Local 343, IAFF, 16 PERB ¶3058 (1983) (Firefighters' union's proposal requiring the Fire Department to recall off-duty firefighters when responding to mutual aid calls in another municipality was a nonmandatory bargaining subject. The Union's demand sought to create a contractual obligation to call in off-duty firefighters, even though PERB has held that the decision whether or not to call in off-duty firefighters during an emergency is a management prerogative); City of Albany and Albany Permanent Professional Firefighters Association, Local 2007, 7 PERB ¶3079 (1974) (A demand which would require the employer to call in off-duty personnel and would preclude the reassignment of on-duty personnel was not a mandatory subject of negotiations).

Nevertheless, we note that in Troy Uniformed Firefighters Association, Local 2304, IAFF and City of Troy, 10 PERB ¶3015 (1977), PERB held that a demand that "only deals with the procedural matter of recalling employees on a rotating basis which can be accomplished in a manner that respects the right of the City to determine its manpower needs" is a mandatory subject of negotiations.

City cites two PERB decisions, Rochester Fire Fighters, Local 1071, IAFF and City of Rochester, 12 PERB ¶3047 (1979) and Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083 (1979), in support of its position. We find, however, that we need not determine whether PERB's decisions in those cases are applicable under the NYCCBL because those demands are distinguishable from the UFA's demand. Unlike the demands in those cases, the UFA's demand does not concern weather conditions, per se. Rather, it concerns whether the City may, pursuant to its statutory management rights, determine unilaterally whether off-duty Firefighters should be recalled under a specified set of circumstances to perform certain duties; or whether that determination is a mandatory subject of bargaining.

Finally, with regard to the UFA's claim that its demand is bargainable because it relates to a practice that has a practical impact on the workload of Firefighter, we note that the duty to bargain over practical impact generally does not arise until the question whether the alleged practical impact actually exists has been determined. Determination by this Board that practical impact exists is a condition precedent to the determination whether there are any bargainable issues arising from the impact. This is a question of fact which may require a hearing.[40] We

[40] Decision Nos. B-31-88; B-38-86; B-18-85; B-2-76; B-16-74.

have held, however, that we will not direct a hearing on the basis of a bare allegation that impact has occurred or will occur. As a precondition to our consideration of a claim of practical impact, the petitioner must specify the details thereof; the allegations of mere conclusions is insufficient.[41] Applying these principles to the instant demand, we find that the UFA has failed to present any evidence to support its claim of practical impact. Therefore, we shall deny its claim.

Firefighter Demand No. 9

> UNION REPRESENTATIVE - Article IV
> Assure right of Union Officials to visit all fire units without hindrance.

Fire Marshal Demand No. 14

> UNION REPRESENTATIVE - Article IV
> Retain provision in 1984-86 [sic] agreement. Add provision to assure right of Union Officials to visit all fire units without hindrance.

Under Article IV of the 1984-1987 Agreement, elected Union officers are permitted to visit all fire units on official union business. The Agreement provides that the Union officer must announce his presence to the officer in command and carry out his function in a reasonable manner, "subject to established labor relations and the Regulations for the Uniformed Forces."

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[41] Decision Nos. B-31-88; B-38-86; B-23-85.

City Position

The City claims that it has the right, pursuant to Section 12-307b of the NYCCBL, to direct its employees, to determine the methods, means and personnel by which governmental operations are to be conducted, to exercise complete control and discretion over its organization and to carry out its mission in emergencies. The City contends that the Union's demand infringes upon its statutory management rights in that it "seeks an inflexible and absolute right" to enter the employer's premises. According to the City, PERB has stated that:

> Except for access provisions reasonably related to, and limited to, the organization's representation duties, the use of the employer's property cannot be considered a "term and condition of employment."[42]

The City argues that there exists no demonstrated nexus between a demand for access "without hindrance" by Union officials to the employer's property and the Union's representational duties. Therefore, the City maintains that this demand is not bargainable.

Union Position

The UFA asserts that a demand which concerns the Union's ability to fulfill its duties to administer the collective

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[42] Charlotte Valley Central School District and Charlotte Valley Teachers Association, 18 PERB ¶3010 (1985).

bargaining agreement and protect the individual and collective interests of the employees it represents is a mandatory subject of bargaining. Thus, the Union submits that when limited access to the employer's property is necessary for a union to represent the employees in the bargaining unit effectively, a demand for such access also is a mandatory subject of bargaining. The Union argues that contrary to the City's assertion, its demand is both reasonably related to, and limited to, the representational duties of the UFA. In order to administer the collective bargaining agreement, Union officials must have access to the employees they represent and to the workplace. "[S]ince the demand seeks mere access to and not actual use of the property", the Union alleges that "it does not infringe on the City's property rights." Accordingly, the UFA contends that its demand is bargainable.

Discussion

The City does not dispute the UFA's claim that a demand for limited access to the employer's property is a mandatory subject of bargaining. It recognizes that the Union must have access to the employer's property in order to represent the employees in the bargaining unit effectively. Rather, the City challenges the bargainability of the UFA's demand on the ground that it seeks access to all fire units "without hindrance". The City submits that the Union has not demonstrated that such an "inflexible and

absolute right" to enter its premises is necessary in order to fulfill its representational duties. Therefore, it claims that the UFA's demand, as stated, is not a mandatory subject of bargaining.

We find, however, that to the extent this demand seeks access to all fire units "without hindrance" for the purposes and within the express limitations set forth in Article IV of the Agreement, it is a mandatory subject of bargaining. In reaching this conclusion, we are persuaded that the demand is intended to better enable the Union to administer the collective bargaining agreement and to protect the individual and collective interests of the employees it represents. Moreover, we find that contrary to the City's assertion, the Union's demand is both reasonably related to, and limited to, its representational duties.

Firefighter Demand No. 10
Fire Marshal Demand No. 16

> MEDICAL OFFICES - Art. VA
> Assure department establishes satellite medical offices.

City Demand No. 3

> Delete Article VA, Section 1 (Medical Offices).

The 1984-1987 Agreement provides that there shall be "two medical offices in two boroughs in addition to Manhattan" (Article VA, §1). Notwithstanding this provision, it appears

that the Fire Department medical office located in lower Manhattan is the only office maintained at this time. The Union seeks to have the City "comply with its existing promises to establish such offices", while the City has announced that it intends to withdraw this provision from the Agreement.

City Position

The City contends that the Union's demands are nonmandatory because the reference to "satellite medical offices" is vague and ambiguous. The City also asserts that the demands infringe upon its statutory right to determine its organizational structure, allocate resources, and exercise complete control and discretion over its organization.

Union Position

The Union contends that the City "is well aware" of the meaning of its demands. The Union asserts that its demands clearly seek the City's compliance with existing promises to establish satellite medical offices and are in no way vague or ambiguous.

The Union also argues that the City's failure to maintain satellite medical offices results in long delays in the receipt of medical attention by Firefighters who are injured in the outer boroughs and must be transported to the medical office in Manhattan. This situation creates a practical impact on the

health and safety of Firefighters, the Union argues, and renders the instant demands mandatory subjects of bargaining. Therefore, and, in addition, the Union asserts that the City should be precluded from deleting the existing Section 1 of Article VA.

Discussion

PERB has held that a demand is nonmandatory if it is so vague that the other party is unable to determine what it would be required to do or so ambiguous that it cannot be determined whether nonmandatory subjects of bargaining might be involved.[43] Here, the demands plainly seek to have the City comply with Article VA, section 1 of the 1984-1987 Agreement by establishing two additional medical offices for Firefighters in two boroughs other than Manhattan. Therefore, we decline to reject the demands on grounds of vagueness or ambiguity.

Essentially these demands are concerned with the establishment of a department facility. In dealing with such demands, we have observed that the City's management prerogatives give it broad discretion to allocate its resources and to determine its organizational structure.[44] However, this discretion is not absolute as, for example, where the furnishing

[43]Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083 (1979); City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

[44]NYCCBL §12-307b.; Decision No. B-43-86.

of facilities (or the failure to do so) affects working conditions. In City of New York v. Uniformed Firefighters Association, we held that the furnishing of facilities for Fire Marshals to clean up and store clean clothing involved a working condition because the job required employees to get wet and dirty and, further, because there was a regular and traditional practice of providing such facilities.[45] In New York State Nurses Association v. City of New York, we found that the provision of housing for nurses was a regular and traditional practice and, therefore, was a mandatory subject of bargaining.[46] However, where a demand for parking facilities went beyond bargaining for the benefit, which already was provided, and sought alteration of the physical layout of the department's facilities, we found that the subject of the demand was nonmandatory.[47]

Here, the Union's demands seek an increase in the number of medical offices to be provided by the Department. The demands also seek to direct the placement of the additional offices. To

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[45]Decision No. B-43-86 at 12. In that decision, we noted that the existence of a regular and traditional practice with respect to a benefit may be persuasive evidence in determining whether a particular benefit is a management prerogative or a condition of employment.

[46]Decision No. B-2-73.

[47]Decision No. B-16-81 at 65. Accord, Western Regional Off-Track Betting Corporation and Service Employees International Union, Local 222, 16 PERB ¶3028 (1983)(number of facilities necessary to service constituency).

this extent, we find that the demands infringe upon the City's rights and obligations with regard to providing facilities and therefore do not involve a mandatory subject of bargaining. The fact that the expired 1984-1987 Agreement required that two medical offices be established in boroughs other than Manhattan does not affect our determination. It is essentially conceded that the City has not implemented this provision, which simply allows us to conclude that provision of medical offices in the outer boroughs is not a "regular and traditional practice" in the Department. If the City has failed to implement the provisions of the expired Agreement, the Union may pursue its remedy under the grievance procedure of that agreement.[48] It is well-settled that an agreement reached on a nonmandatory subject does not transform such subject into a mandatory one for subsequent negotiations. The bargaining status of a particular subject is fixed and determined by law.[49] For all of the aforementioned reasons, we conclude that the Union's demands are nonmandatory subjects of bargaining and that the City may delete Article VA, section 1 from the Agreement.

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[48]Section 12-311d of the NYCCBL provides that during a "period of negotiations", the public employer "shall refrain from unilateral changes in wages, hours, or working conditions". We have interpreted this provision to require the City to continue in effect all the provisions of an expired agreement, including the grievance arbitration procedure, until a new agreement is negotiated or an impasse panel is appointed. E.g., Decision Nos. B-4-72; B-1-72.

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

In addition to its contention that the subject of satellite medical offices is a mandatory subject of bargaining, which we have rejected, the Union asserts that the failure to provide such facilities in the outer boroughs has a practical impact on the safety of Firefighters and Fire Marshals. The safety impact claim is based upon the assertion that "Firefighters who are injured in the outer boroughs are faced with long delays before they receive medical attention because of the length of time it takes to travel all the way into Manhattan".[50] While this may be true, it does not establish a case of practical impact within the meaning of the NYCCBL.

The concept of practical impact is included in NYCCBL section 12-307b as a means of alleviating the adverse impact upon employees of a decision made by the employer in the exercise of its statutory prerogatives. In order to avail itself of the practical impact procedures of the law, a union must demonstrate that the alleged safety impact results from a management decision or action, or from inaction in the face of changed circumstances.[51] Here, the Union attributes the alleged safety threat to the City's failure to comply with its agreement on satellite medical offices, an omission which the Union apparently tolerated for the entire term of the 1984-1987 Agreement. Now

[50]Mancuso Affidavit ¶10.

[51]Decision Nos. B-69-88; B-31-88; B-43-86.

that the City intends to delete that nonmandatory provision from the Agreement, the Union would have us find that the failure to implement it has a practical impact on employees. Since the Union has failed to assert any management action or change in circumstances other than the City's intention to delete a contract provision that, in any case, was never implemented, we do not find any predicate for the Union's safety impact claim. Furthermore, the Union has failed to offer any evidence that the delay in treatment engendered by the City's failure to create satellite medical offices has had any adverse impact on the health or safety of sick and injured Firefighters. For all of the aforementioned reasons, we hold that the Union has failed to state a claim of practical impact and we shall deny its request for a hearing on this question.

Firefighter Demand No. 11

> MEDICAL OFFICES - Art. VA
> Provide for improved monitoring in and recordkeeping by the Bureau of Health Services regarding employees exposed to hazardous chemicals or materials.

Fire Marshal Demand No. 17

> MEDICAL OFFICES - Art. VA
> Retain provision in 1984-1986 [sic] agreement except as to provide:
>
> 1) for improved monitoring and recordkeeping by the Bureau of Health Services regarding employees exposed to hazardous chemicals or materials.

Section 2 of Article VA of the 1984-1987 Agreement concerns the implementation of recommendations of the Fire Department Medical Practices Review Committee which are set forth in Attachment C to the Agreement. Section 2 provides that the underlined portions of Attachment C "shall be implemented forthwith". It also states that the parties agree to ask the Committee to review and make recommendations concerning the implementation of portions of Attachment C that are not underlined. Firefighter Demand No. 11 and Fire Marshal Demand No. 17 seek to add to this section of the Agreement a provision for improved monitoring and recordkeeping regarding employee exposure to hazardous substances.

City Position

The City asserts that the reference to "improving monitoring and recordkeeping" and to "hazardous chemicals" is vague and ambiguous, thus rendering these demands nonmandatory. The City also contends that the demands infringe on its statutory prerogatives which allegedly include the right to determine the method by which records shall be kept. The City also asserts that the demands are nonmandatory because they would require an increase in the duties of employees in the Bureau of Health Services.

In response to the Union's assertion of a practical impact on the health and safety of Firefighters, the City contends that

the Union has failed to demonstrate any management action, or inaction in the face of changed circumstances, which would permit the assertion of a practical impact claim.

Union Position

The Union contends that its demands for better monitoring and recordkeeping are clear on their face. It alleges that any further specification would involve medical matters that should be addressed in consultation with experts in that field. Therefore, it alleges, the demands should not be rejected as vague or ambiguous.

With regard to the substance of its demands, the Union alleges that there has been an increase in the use of toxic substances in building materials with a resulting increase in exposure of Firefighters to substances which may have long and short term consequences to their health and safety. The Union argues that there is a need for better monitoring and recordkeeping of employee exposure because "no one knows what the health effects are of exposure to many new substances." Because of the alleged danger to health and safety, the Union maintains that the City should be required to bargain concerning its demands. Alternatively, the Union asks that a hearing be held to determine whether a practical impact on health and safety exists.

Discussion

We note initially that the City has not challenged the preamble to Fire Marshal Demand No. 17 which seeks to retain Article VA, Section 2 of the 1984-1987 Agreement, although it did oppose Fire Marshal Demand No. 103, in which the Union seeks the retention of the existing provisions of Attachment C. Attachment C, as described above, contains recommendations of the Medical Practices Review Committee.

With respect to the demands for improved monitoring and recordkeeping, we reject the City's argument that the demands are so vague and ambiguous that they must be found to be nonmandatory. Pursuant to Article XIII, Section 7 of the 1984-1987 Agreement, the parties already have agreed that:

> [a] medical expert designated by the UFA and a representative designated by the Fire Department shall meet to develop procedures to monitor firefighters who may be exposed to hazardous materials.

Particularly in light of this evidence of prior bargaining, the City cannot claim that it is unable to determine what it would be required to do or that the demands are so ambiguous that it cannot be determined whether nonmandatory subjects might be involved.[52] Monitoring and recordkeeping relate to the "methods, means and personnel by which government operations are to be conducted" and thus are expressly reserved to the City

[52]See, Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083 (1979); City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

pursuant to Section 12-307b of the NYCCBL. Moreover, in City of New York v. Correction Officers Benevolent Association, we held that a demand seeking to limit the time period during which the employer could maintain disciplinary records infringed on management's right to keep files concerning employees.[53] Similarly, PERB has held that the manner in which an employer chooses to maintain personnel files is not a term or condition of employment.[54]

Nevertheless, recent legislative recognition of the danger to the health of employees due to workplace exposure to toxic substances[55] lends support to the argument, implicit in the Union's demands herein, that the failure adequately to monitor and record employee exposure to such substances may adversely affect their safety and constitute a practical impact within the meaning of the NYCCBL. It is

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[53]Decision No. B-16-81 at 35.

[54]Patrolmen's Benevolent Association of Newburgh, New York, Inc. and City of New York, 18 PERB ¶3065 (1985).

[55]Article 28 of the State Labor Law and Article 48 of the Public Health Law, both dealing with toxic substances in the workplace, were added to those laws pursuant to Chapter 551 of the Laws of 1980 and were effective December 24, 1980 (L. 1980, c.551 §5). Section 879 of the Labor Law requires employers to "keep a record of the name, address and social security number of every employee who handles or uses substances included in ... the federal occupational safety and health regulations...." Section 880 of the Labor Law provides that "employees or their representatives may request ... and shall receive all information relating to toxic substances set forth in [§878(3)] of this article."

apparent that without adequate monitoring and recordkeeping, the dangers of exposure are increased because it is impossible to determine whether an employee has reached maximum acceptable levels of exposure to known substances or to keep track of exposure to substances whose toxic effects may not, as yet, be understood fully. We cannot determine on the basis of the pleadings here whether the inadequacy, if any, of existing methods of monitoring and recording the incidence of Firefighter and Fire Marshal exposure to potentially hazardous substances presents a threat to employee safety sufficient to constitute a practical impact. However, as we are persuaded that a substantial issue is raised in this regard, we shall direct that a hearing be held in order that the parties may present evidence on the question. We also shall direct that this hearing be consolidated with the hearing ordered in connection with Firefighter Demand No. 55 (Fire Marshal Demand No. 70), as both sets of demands involve allegations of a practical impact on health and safety relating to exposure to toxic substances.

Firefighter Demand No. 15

SALARIES - Art. VI
§5: Provide that City shall provide at no cost to each employee fire protective equipment (including, but not limited to, helmet, boots, gloves, eye shields, fire retardant pants and

shirt, turnout coat) and shall defray the cost for the cleaning and maintenance of said fire protective equipment.

Firefighter Demand No. 93

SALARIES - Art. VI
§5: Require that in addition to providing fire protection equipment at no cost to each employee as proposed in UFA demand number 15, the City shall provide at no cost to probationary Firefighters all other required uniforms, in lieu of the uniform allowance required to be paid to such probationary Firefighters pursuant to Article VI, Section 5 of the Collective Bargaining Agreement.

Fire Marshal Demand No. 25

SALARIES - Art. VI
§5: Provide for $300 increase in uniform allowance in Fiscal Year 1987-1988. Further provide that City shall provide at no cost to each employee fire protective equipment (including, but not limited to, helmet, boots, gloves, eye shields, fire retardant pants and shirt, turnout coat) and shall defray the cost for the cleaning and maintenance of said fire protective equipment and Fire Marshal work uniforms. Additionally provide that the City shall provide for an upgraded bulletproof vest. Retain §5D as in 1984-1986 [sic] agreement.

The uniform allowance is provided in Article VI, §5 C of the current collective bargaining agreement. The City does not cite in its petition the Union's demand for a $300 increase in the uniform allowance as part of the demand to which it objects. The City has failed to object to this part of the demand, which is not otherwise a prohibited subject of bargaining, therefore it is subject of bargaining

which can be considered by the impasse panel.

Fire Marshal Demand No. 69

SAFETY STANDARDS AND EQUIPMENT - Add to Art.XIII
Provide that radios, as primary source of communication for Fire Marshals, shall be upgraded to the same quality as used by firefighting units with an exclusive City-wide frequency for Fire Marshals. Additionally provide for new portable radios with the same frequency and vehicle radios capable of monitoring mixer-off messages.

City Demand No. 4

Delete Article VI, § 5D.

Article VI, §5D provides that the wash and wear work uniform or any new uniform agreed upon by the parties is permitted as a work uniform. Furthermore, it provides that on or after July 1, 1977, only a new uniform designated by the parties will be permitted as a work uniform.

City Position

The City contends that Firefighter Demand Nos. 15 and 93 and Fire Marshal Demand No. 25 concern the provision of items of protective equipment which are covered by statute and as such, are prohibited subjects of bargaining.[56]

[56] The City argues that N.Y. State Admin. Code tit. XII, Part 800 requires a public employer to provide certain protective clothing to Firefighters at no cost. The City also cites Patrolmen's Benevolent Association of Newburgh, New York and City of Newburgh, 18 PERB ¶3065 (1985) and In the Matter of the Town

Relying on NYCCBL §12-307b and this Board's application of it[57], the City maintains that it has the right to determine the equipment to be used in performing work duties. It also argues that NYCCBL §12-307b gives it the right to unilaterally determine the appropriate uniform for its employees.[58]

With respect to Fire Marshal Demand No. 69, the City contends that a demand that specific equipment be used or upgraded implicates the City's "unfettered right" to select equipment to be used. It analogizes the Union's demand to a demand seeking possession of weapons to aid in performance of job duties. When faced with such a demand in Decision No. B-23-85, the Board found that the demand infringed on management's prerogative.

Finally, the City contends that by deleting Article VI, §5D it has not changed the content or design of the uniform. It merely seeks to eliminate the contractual reference to the subject matter. Because it has not yet acted, it argues that there has been no practical impact, and consequently,

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of Greenburgh, 94 A.D.2d 771, 462 N.Y.S.2d 718 (2d Dept. 1983).

[57] The City cites Decision No. B-16-81.

[58] [58]The City cites City of Buffalo and Buffalo Police Benevolent Ass'n, 15 PERB ¶3027 (1982) and County of Onondaga and Deputy Sheriff's Benevolent Ass'n of Onondaga County, 14 PERB ¶3029 (1981).

it has no duty to bargain.[59]

Union Position

Relying on a December 4, 1987, directive of the New York State Department of Labor which, in part, states that a uniform allowance in a collective bargaining agreement does not constitute compliance with the relevant standards, the Union rejects the City's position. The directive notes that if the parties to a collective bargaining agreement intend that a uniform allowance satisfy the standard for safety equipment, they must file a written statement of their intent and demonstrate that the allowance satisfies the standards.[60] The Union argues that the "directive makes clear that collective bargaining on this subject is an important component of the implementation of the law and regulations."

With respect to the demand for upgraded bulletproof vests in Fire Marshal Demand No. 25, the Union argues, relying on the Affidavit of John Knox, a Fire Marshal, that Fire Marshals are police officers under state law who carry

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[59] The City cites Decision Nos. B-43-86 and B-5-75.

[60] Directive, dated December 4, 1987, from Thomas F. Hartnett to "All Fire Districts," regarding "Uniform Allowance and Protective Equipment No Cost Requirements of New York State's Public Employee Occupational Safety and Health And Federal OSHA Standards."

and use firearms in the course of their duties of apprehending and arresting suspected arsonists. He states that they have "repeatedly" been engaged in the exchange of gunfire and some Fire Marshals have allegedly been wounded. The Knox Affidavit refers to one former Fire Marshal who was paralyzed from bullet wound he received while on duty. The Union argues that there is a direct impact on the health and safety of a Fire Marshal which renders this issue bargainable.

With respect to Fire Marshal Demand No. 69, the Union relies on Decision No. B-43-86 in which it alleges we held that the question of inadequate portable radios be submitted for a practical impact hearing. The Union claims it is now ready for that hearing.

Finally, in opposing the City's demand to delete Article VI, §5D, the Union argues that there is a practical impact on the health and safety of Firefighters arising from the selection of work uniforms. Relying on the Mancuso Affidavit, ¶8, the Union asserts that there are national standards for clothing and equipment and there is a wide range in the quality of materials that meet the national standards. Citing an incident in which eight Firefighters received burns while fighting a fire in Manhattan, the Union argues that equipment and materials that burn or fail in other respect have a direct impact on the health and safety

of Firefighters, thus the Union has "taken a great interest in the quality of the uniforms and equipment."

Discussion

Protective Equipment and Associated Costs

To the extent that the Union seeks the fire protective equipment enumerated in Firefighter Demand No. 15 and Fire Marshal Demand No. 25 ("including, but not limited to, helmet, boots, gloves, eye shields, fire retardant pants and shirt, turnout coat"), its demands are clearly nonmandatory subjects of bargaining.[61]

The City does not specify what equipment it must supply to employees nor which equipment sought by the Union is required by federal and state regulation; it generally alleges that regulations require a public employer to provide "certain protective clothing to Firefighters" at no cost to the Firefighters. We need not decide what equipment the regulations require.

Nonetheless, union demands which are covered by statute are not necessarily prohibited subjects of bargaining[62]; they

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[61] City of Albany and Albany Police Officers Union, L. 2841, AFSCME, 7 PERB ¶3078 (1974).

[62] Decision No. B-41-87.

may be redundant and nonmandatory subjects of bargaining.[63] However, any demand for protective equipment infringes on the City's prerogative to determine the mission of its agencies as guaranteed by NYCCBL §12-307b,[64] regardless of whether the equipment sought by the Union is to be provided by the City as a result of the parties' mutual agreement or, as the City alleges, the equipment is mandated by federal or state law.

The New York State Department of Labor directive relied upon by the Union merely indicates that if the City agrees to negotiate an allowance in lieu of supplying the requisite equipment, it must file the parties' agreement with the state. The directive does not transform the subject of protective equipment into a mandatory subject of bargaining but merely provides a procedure should the parties agree to negotiate a substitute for required equipment.

Although the type of equipment sought by the Union is not bargainable, the issue of whether employees should pay for the equipment is a mandatory subject of bargaining.[65] Thus, to the extent the Union's demands seek the provision

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[63] See Croton Police Ass'n and Village of Croton-on-Hudson, 16 PERB ¶3007 (1983).

[64] Decision Nos. B-43-86; B-23-85; B-16-75; B-3-73.

[65] City of Saratoga Springs and Saratoga Springs Firefighters, L. 343, IAFF, 16 PERB ¶4523 (1983); Police Ass'n of New Rochelle and City of New Rochelle, 10 PERB ¶3042 (1977).

of required equipment "at no cost to each employee," they are mandatory subjects of bargaining regardless of whether regulations require that they be provided. We cannot determine from the record which of the Union's demands for specific equipment the City claims it must already supply free of charge.[66]

Moreover, PERB has held that a demand that the employer defray the cost of cleaning and maintaining uniforms is a mandatory subject of bargaining.[67] Similarly, we hold that the Union's demands that the City defray the cost of cleaning and maintaining fire protective equipment, as well as uniforms, in Firefighter Demand No. 15 and Fire Marshal Demand No. 25 are mandatory subjects of bargaining. Like a uniform allowance, they are demands seeking compensation.

Therefore, with respect to the Union's demands for protective equipment, we hold that Fire Marshal Demand Nos. 15 and 25 are nonmandatory to the extent they seek certain pieces of protective and safety equipment. However, the Union's demands are mandatory to the extent they seek

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[66] N.Y. State Admin. Code tit. XII, §800.3 (1988) adopts 29 C.F.R. §1910.156(e)(1) which provides, in relevant part, that the "employer shall provide at no cost to the employee and assure the use of protective clothing which complies with" federal regulations.

[67] Town of Haverstraw and Rockland County Patrolmen's Benevolent Ass'n, 11 PERB ¶3109 (1978), aff'd, 13 PERB ¶7006 (2d Dept. 1980).

negotiations on whether the City should pay the costs of purchasing equipment and whether the City should pay the costs of cleaning and maintaining uniforms and equipment.

Bulletproof Vests

A demand for bulletproof vests is an equipment demand and, thus, not a mandatory subject of bargaining.[68] We have said that in order to avail itself of the practical impact procedures of the NYCCBL, as the Union seeks to do here, a union must demonstrate that the alleged safety impact results from management's inaction in the face of changed circumstances.[69] In some circumstances, we have recognized that the potential consequences of the exercise of a management right are so serious as to give rise to an obligation to bargain before actual impact has occurred. However, the burden is on the Union to prove a threat to the safety of employees before we find there is an impact justifying the imposition of a duty to bargain.[70]

On the present record we cannot determine whether the City's failure to act has resulted in a practical impact on employee safety requiring the City to bargain over the

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[68] Police Ass'n of New Rochelle, New York and City of New Rochelle, 13 PERB ¶4540 (1980).

[69] Decision Nos. B-69-88; B-43-86.

[70] Decision Nos. B-69-88; B-31-88; B-37-82.

impact. We are, nonetheless, persuaded that the Union has raised a substantial issue of safety impact which is sufficient to warrant a hearing. The Knox Affidavit states that under state law, Fire Marshals are police officers and use and carry firearms during the course of their duties. They have been involved, according to the affidavit, in the exchange of gunfire; some have been wounded and, in one case, a Fire Marshal has been paralyzed. Consistent with our decisions[71], we direct that a hearing be held before a Trial Examiner designated by the Office of Collective Bargaining in order to permit the parties the opportunity to present evidence upon which we may determine whether the changed conditions described by the Union have caused any practical impact on the safety of the employees involved which would mandate bargaining on the alleviation of that impact.

Radios

In considering Fire Marshal Demand No. 69, we note that in Decision No. B-43-86 the Union sought "radios. . . upgraded to the same quality as used by the Fire Department" for Fire Marshals. We found that the Union had pleaded enough facts to warrant a hearing on the alleged practical

[71] Decision Nos. B-70-88; B-69-88; B-43-86.

impact of the City's failure to provide the upgraded radios on the safety of Fire Marshals.

The Union never asked for a hearing on the substance of its demand until it resubmitted that demand in the instant round of bargaining. The City does not argue that the facts alleged by the Union which were relied upon by this Board in Decision
No. B-43-86 have changed. We, therefore, direct a hearing be held on the Union's allegations of practical impact before a Trial Examiner designated by the Office of Collective Bargaining with respect to the portion of Fire Marshal Demand No. 69 which seeks "upgraded radios."

Fire Marshal Demand No. 69 also seeks "an exclusive City-wide frequency for Fire Marshals" and "new portable radios with the same frequency [as the City-wide frequency sought in the demand] and vehicle radios capable of monitoring mixer-off messages." We agree with the City that this demand purports to dictate the equipment the City must use in contravention of NYCCBL §12-307b. Unlike the Union's radio-related demand in Decision No. B-43-86, this portion of the demand is unsupported by any allegations of practical impact. We find that it is not a mandatory subject, and we will not send the demand to a hearing to determine whether there has been a practical impact on Fire Marshals.

Uniforms

The Union's demands with respect to uniforms are non-mandatory subjects of bargaining. We have held that the determination and prescription of authorized uniforms is a management prerogative.[72]

To the extent the Union can establish that management's decisions on equipment have a practical impact on the health and safety of unit employees, the Union can bargain over the alleviation of the practical impact.[73] In the instant case, the Union has expressed its "great interest" in the quality of equipment and uniforms but has pleaded no specific allegations with respect to any specific demand for a type of uniform and the alleged practical impact failure to supply the type of uniform has had on employees, which would

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[72] Decision No. B-16-81. Although not relied upon by the City, management's right to prescribe uniforms is further buttressed by N.Y.C. Admin. Code, §15-120 which states, in relevant part:

> It shall be the duty of the commissioner to make suitable regulations under which the officers and members of the department shall be required to wear an appropriate uniform and badge by which the authority and relations of the officers and members in such department shall be known. The commissioner shall select the grade of cloth and quality required for such uniforms, but shall not prescribe where or from whom such uniforms or uniform clothing shall be purchased, or the price to be paid therefor.

[73] NYCCBL §12-307b.

warrant the holding of hearing with respect to its demand for the retention of Article VI, §5D.[74] Thus, the Union's demand that the City retain Article VI, §5D is nonmandatory to the extent that §5D prescribes a uniform for employees, and the City may delete this provision without bargaining with the Union. The Union's demand, with respect to a uniform allowance, as we noted above, is not objected to by the City.

Finally, Firefighter Demand No. 93 that the City supply probationary Firefighters uniforms in lieu of a uniform allowance is also a mandatory demand. It seeks the provision of an item required of probationary Firefighters, which is a condition of employment, in lieu of a uniform allowance. It too is bargainable.

[74] Decision Nos. B-35-82; B-16-81.

Firefighter Demand No. 18

SALARIES - Art. VI (additional provision)
Specialization pay for Firefighters performing specialized functions, e.g., Chauffeurs, tillerman, emergency medical technicians, Firefighters assigned to rescue company, Firefighters assigned to training companies, Firefighters assigned to field inspections and clerical duties in the Bureau of Fire Prevention, in headquarters and the Bureau of Health Services; add new section providing that Firefighters performing specialized functions shall be selected from among eligible members by seniority.

Firefighter Demand No. 62

VACANCIES - Art. XVIII
Delete last sentence, thereby making right to a vacancy solely upon seniority and qualifications contractual.

Fire Marshal Demand No. 78

VACANCIES - Art. XVIII
Retain all but last sentence of provision of 1984-1986 (sic) agreement, thereby making right to a vacancy solely upon seniority and qualifications contractual.

Article XVIII of the 1984-1987 Agreement sets out criteria to be considered by the Department in filling vacancies, but provides that the Department's decision will be final.

City Position[75]

[75] The City has not raised a challenge to the portion of Firefighter Demand No. 18 which seeks specialization pay.

The City contends that these demands interfere with its statutory managerial prerogative. It argues that this Board has held that management has great flexibility to fill vacancies and deploy its personnel. Consequently, it maintains that the instant demands, which seek the use of seniority in determining employee assignments, are nonmandatory subjects of bargaining.

Union Position

The Union agrees with the City's contention that a demand seeking to establish seniority as the sole criterion to fill a vacancy may not be a mandatory subject of bargaining. However, it contends that these demands provide management with a range of discretion in assessing its employees for vacancies by allowing it to consider "qualifications" (Fire Marshal Demand No. 78 and Firefighter Demand No. 46) and "eligibility" (Firefighter Demand No. 18) in making its decision. Therefore, the Union argues that the instant demands are subject to mandatory collective bargaining.

Discussion

Initially, we find that the portion of Firefighter Demand No. 18 seeking specialization pay for specialized functions is mandatorily bargainable. Specialization pay is

an issue which involves the payment of wages, a subject over which the NYCCBL specifically imposes the duty to bargain.[76]

Moreover, we note, as does the Union, that we have held demands seeking the assignment of personnel based on seniority levels to be beyond the scope of mandatory collective bargaining only when they contemplate seniority to be the sole criterion in determining employee assignments.[77] We have found this type of restriction on managerial action to interfere with the City's statutory authority to assign personnel within its discretion.[78]

However, we have also held demands seeking "the use of seniority to be one factor among others"[79] in determining employee assignments to be mandatorily bargainable. In Decision No. B-3-75 we held a demand involving the institution of a pick and bid job assignment system based upon seniority to be a mandatory subject of bargaining because the thrust of the demand provided that seniority need only be a consideration in assigning employees. Similarly, in Decision No. B-23-85 we held a demand seeking

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[76] NYCCBL §12-307a(1).

[77] Decision Nos. B-16-81; B-4-81; See also, Schenectady Patrolmen's Benevolent Association and City of Schenectady, 20 PERB ¶4636 (1987).

[78] Decision Nos. B-35-82; B-16-81; B-10-81; B-19-79.

[79] Decision No. B-23-85 at 27; See also, Decision Nos. B-16-81; B-3-75; B-2-73.

that seniority be a "significant factor" in determining employee transfers, to be a mandatory subject.

The Union argues, and we agree, that the instant demands do not contravene the City's statutory managerial prerogative to assign its personnel because they do not mandate that employees be assigned according to seniority levels. Rather, these demands seek that seniority be determinative in assigning "eligible" and "qualified" employees. Since these demands do not completely remove the assignment of employees from within the City's discretion, we find that they are within the scope of mandatory collective bargaining.

Firefighter Demand No. 27

SECURITY BENEFIT FUND - Art. IX
Amend to provide continued contributions for surviving spouse and unmarried dependents of covered, active and retired employees, such contributions to continue until, in the case of a surviving spouse, the spouse remarries or, in the case of a dependent, the dependent reaches the age of 19 or if a full-time college student, the age of 23.

Fire Marshal Demand No. 38

SECURITY BENEFIT FUND - Art. IX
Provide continued contributions for surviving spouse and unmarried dependents of covered, active and retired employees, such contributions to continue until, in the case of a surviving spouse, the spouse remarries or, in the case of a dependent, the dependent reaches the age of 19 or if a full-time college student, the age of 23.

Firefighter Demand No. 28
Fire Marshal Demand No. 39

SECURITY BENEFIT FUND - Art. IX
Provide for each retiree who left service on or prior to December 31, 1970, a contribution to the Retirees Security Benefit Fund equivalent to the contribution for subsequent retirees.

Firefighter Demand No. 29
Fire Marshal Demand No. 40

SECURITY BENEFIT FUND - Art. IX
Provide that employees and/or their dependents who are entitled to and elect to continue City health insurance coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (P.L. 99-272), shall also be entitled to elect continued coverage under the Security Benefit Fund for the same applicable period, the cost thereof to be incurred by the City.

The 1984-1987 Agreement provides that the City shall make pro rata annual contributions of prescribed amounts to the Security Benefit Fund of the Uniformed Firefighters Association, Local 94 ("Security Benefit Fund") for each employee. It also provides continued coverage for employees who were separated from service subsequent to December 31, 1970, on the same contributory basis as incumbent employees, so long as such former employees are eligible beneficiaries of the New York City Health Insurance Program.

Firefighter Demand No. 27 and Fire Marshal Demand No. 38 seek to extend coverage under the Security Benefit Fund to the surviving spouse and unmarried dependents of active and retired employees who are covered by the Fund.

Firefighter Demand No. 28 and Fire Marshal Demand No. 39 seek to extend continued coverage to retirees who left service on or before December 31, 1970. Firefighter Demand No. 29 and Fire Marshal Demand No. 40 seek to permit an election of continued coverage by employees and/or their dependents for a period that coincides with the period of their continued coverage under the City Health Insurance Program pursuant to the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").

City Position

The City maintains that it has no obligation to negotiate concerning benefits for persons who are not within the collective bargaining unit. Therefore, and to the extent that these demands seek to negotiate with respect to contributions by the City to the Security Benefit Fund on behalf of spouses and dependents of employees or on behalf of retired employees, none of whom are members of the Union's bargaining unit, the City contends that the demands are outside the scope of mandatory collective bargaining. The City notes that retired employees are not "employees" within the meaning of section 12-303(e) of the NYCCBL.[80]

[80]Section 12-303(e) provides as follows:

> The term "municipal employees" shall mean persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury.

With respect to Firefighter Demand No. 29 and Fire Marshal Demand No. 40, which seek continued Security Benefit Fund coverage for the same period as continued health insurance is available pursuant to the provisions of COBRA, the City contends that these are prohibited subjects of bargaining because they are "extensively addressed by legislation" including COBRA, the Tax Reform Act of 1986, the Internal Revenue Code and the rules and regulations of the Internal Revenue Service.

Union Position

The Union notes that public employers are obligated to bargain in good faith over health and welfare benefits. The Union also asserts that this Board and PERB have held that a demand for a post-employment benefit for current employees, which these demands allegedly are, is a mandatory subject of bargaining. The Union argues that since such benefits and the right to payment accrue during employment, the employer contributions, although not paid until after employment ceases, should be viewed simply as the funding mechanism for a benefit which was negotiated on behalf of current employees.

The Union disputes the City's contention that a demand is nonmandatory simply because it is "addressed" by existing law. It asserts that the Board has held that a demand that

involves an obligation or a duty that is fixed by law is not necessarily a prohibited subject. Moreover, according to the Union, its demands for continued Security Benefit Fund coverage and the federal statutes cited by the City "are not even remotely in conflict". Accordingly, it argues, the City should be required to negotiate concerning these demands.

Discussion

Section 12-307a of the NYCCBL expressly provides that "public employers and certified ... employee organizations shall have the duty to bargain in good faith on wages (including ... health and welfare benefits, ...)...." Therefore, a demand to negotiate concerning contributions to the Security Benefit Fund is a mandatory subject of bargaining. The City correctly states, however, that there is no duty to negotiate with respect to persons outside the bargaining unit.[81] The right of an employee organization to negotiate is limited to current employees within its

[81] See, e.g., Lynbrook Police Benevolent Association and Incorporated Village of Lynbrook, 10 PERB ¶3067 (1977), reversed in part sub nom. Incorporated Village of Lynbrook v. New York State Public Employment Relations Board, 64 AD2d 902, 11 PERB ¶7012 (2d Dept. 1978), reinstated, 48 NY2d 398, 12 PERB ¶7021 (1979); City of Oneida Police Benevolent Association and City of Oneida, 15 PERB ¶3096 (1982); Police Association of New Rochelle,Inc. and City of New Rochelle, 10 PERB ¶3042 (1977); The Troy Uniformed Firefighters Association, Local 2304, IAFF and City of Troy, 10 PERB ¶3015 (1977).

bargaining unit and does not extend to former employees, retired employees or current employees who are not in its bargaining unit.[82]

Firefighter Demand No. 27 and Fire Marshal Demand No. 38 seek continued city contributions to the Security Benefit Fund for the surviving spouse and unmarried dependents of active and retired employees. Contrary to the City's assertion, however, we do not deem this to be a demand to negotiate on behalf of spouses and dependents, who clearly are not bargaining unit employees. Rather, we find that the demands seek City contributions for the covered employee upon whom the "intimate dependency [of spouse or child] make[s] their concern his concern".[83] Thus, to the extent that the demands seek contributions to a fund that will provide a source of support for a surviving spouse and unmarried dependents of a current bargaining unit employee after his death, they involve a mandatory subject of

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[82]In Decision No. B-21-72, we held that retired employees were not "employees" within the meaning of NYCCBL section 12-303(e), following the decision of the U.S. Supreme Court in Allied Chemical & Alkali Workers, Local 1 v. Pittsburgh Plate Glass Company, Chemical Division, et al., 404 U.S. 157, 78 LRRM 2974 (1971) to the effect that retired employees are not "employees" appropriately includable in a collective bargaining unit under the National Labor Relations Act, which covers only "active" workers.

[83]Incorporated Village of Lynbrook v. New York State Public Employment Relations Board, 48 N.Y.2d 398, 12 PERB ¶7021 at 7042 (1979).

bargaining.[84] This conclusion is consistent with City of New York v. Correction Officers Benevolent Association where we stated that post-employment benefits for present employees are mandatorily bargainable.[85]

However, insofar as these demands seek continued contributions for surviving dependents of former employees who have already retired, we find that they do not involve mandatory subjects.[86] Nor does the fact that a retiree is himself "covered" by the Security Benefit Fund affect the negotiability of this proposal. Since retirees are not employees within the meaning of section 12-303e of the NYCCBL, they are not bargaining unit members and the Union may not negotiate on their behalf.[87]

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[84]See, Incorporated Village of Lynbrook, supra, 10 PERB ¶3067 (hospitalization insurance for beneficiaries of current police officers who die after they retire held mandatorily bargainable).

[85]Decision No. B-16-81 at 38. In that case, the Correction Officers Benevolent Association sought an identification card for a retiring member which would also serve as a gun permit. The demand was ruled to be nonmandatory because it dealt with matters outside the scope of employment.

[86]Decision No. B-21-72. See, Incorporated Village of Lynbrook, supra, 10 PERB ¶3067 (hospitalization insurance for beneficiaries of police officers already retired held not mandatorily bargainable); City of Troy, supra, 10 PERB ¶3015 (since retired and deceased members of Bureau of Fire were not "public employees" within the meaning of Taylor Law, there was no statutory duty to negotiate concerning a demand for health coverage for such former employees or their dependents).

[87]We note that the obligation to negotiate concerning continued contributions for the surviving dependents of current

Firefighter Demand No. 28 and Fire Marshal Demand No. 39 seek City contributions to the Retirees Security Benefit Fund on behalf of persons who retired prior to December 31, 1970 to put them on a par with subsequent retirees.[88] As discussed above, retired employees are not "employees" within the meaning of section 12-303e of the NYCCBL. Accordingly, they are not members of the bargaining unit and the Union may not negotiate on their behalf. Therefore, these demands are outside the scope of mandatory collective bargaining.

Firefighter Demand No. 29 and Fire Marshal Demand No. 40 seek the continuation of Security Benefit Fund coverage, at City expense, for employees "and/or their dependents" for the same period of time as continued health insurance coverage is available to and elected by such employees or dependents pursuant to the provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985. COBRA, enacted

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employees who die, either before or after they retire, necessarily is limited to the period of a contract in effect at the date of such employee's death or retirement. Once the employee dies or retires, the Union can no longer bargain on his behalf. Garden City Police Benevolent Association and Village of Garden City, 21 PERB ¶4511, aff'd, 21 PERB ¶3027 (1988); Newfield Central School District and Newfield Teachers Association, Local 2810, NYSUT, AFT, AFL-CIO, 17 PERB ¶3009 (1984); City of Oneida, supra, 15 PERB ¶3096.

[88]Article IX(d) of the 1984-1987 Agreement already provides continued coverage, on the same contributory basis as incumbent employees, for employees separated from service subsequent to December 31, 1970.

on April 7, 1986, required that, effective July 1, 1987, the City offer its employees the option of continuing coverage for themselves and their dependents under group health and welfare funds for prescribed periods in cases where benefits otherwise would be reduced or terminated.[89] The instant demands appear to seek to have the City pay for continued Security Benefit Fund coverage for employees and their dependents and to define the applicable period of continued coverage in terms of the provisions of COBRA. To the extent that the demands seek such continued coverage for current employees, they seek a post-employment benefit for current employees and are mandatorily bargainable.[90] However, to the extent that the demands may be read to provide that the dependents of current employees, who as "qualified beneficiaries" under COBRA are entitled in their own right to elect continued coverage under a group plan, shall be entitled to make an election for continued Security Benefit Fund coverage under the collective bargaining agreement, they seek a benefit for non-bargaining unit members and are not bargainable.[91]

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[89]P.L. 99-272, Title X, 100 Stat. 222.

[90]Decision No. B-16-81.

[91]COBRA prescribes certain "qualifying events" which trigger the running of a sixty-day period during which an employee or other "qualified beneficiary", including spouses and dependent

We reject the City's argument that the demands are either prohibited or permissive subjects because they involve subjects that are covered by the cited federal statutes and rules. The mere fact that a particular subject is "addressed" by existing laws does not render it a nonmandatory subject of bargaining.[92] Coverage by existing law is a basis for finding a matter non-bargainable if the statute pre-empts bargaining on the subject matter or if the demand seeks a provision that would be inconsistent with the statute.[93] Here, the Union's reference to the provisions of COBRA appears to be only for purposes of measuring eligibility for coverage under its demands and the duration

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children, may elect continued health insurance coverage at a cost to him or herself of 102% of the group rate. "Qualifying events" are defined to include, inter alia:

> (c) The divorce or legal separation of the covered employee from the employee's spouse.
>
> * * *
>
> (e) A dependent child ceasing to be a dependent child under the generally applicable requirements of the plan.

[92]Decision No. B-41-87; City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

[93]Decision Nos. B-41-87; B-24-75; B-5-75; B-3-73; B-16-71; B-11-68; Incorporated Village of Garden City, supra, 21 PERB ¶3027. See, Board of Education of Huntington v. Associated Teachers of Huntington, 30 NY2d 122, 331 NYS 2d 17 (1972); Matter of Town of Greenburgh, 94 AD2d 771, 462 NYS 2d 718 (2d Dept. 1983).

of such coverage. Since the City has not alleged or established that the demands are pre-empted by or in conflict with COBRA,[94] we find that they are mandatorily negotiable except as otherwise limited by our decision herein.

Firefighter Demand No. 30

> HEALTH - Art. X
> Clarify continuation of City liability for all health care costs incurred by retirees resulting from job-related injury or illness including, but not limited to, costs of appliances.

Fire Marshal Demand No. 42

> HEALTH - Art. X
> Retain provision in 1984-1986 [sic] agreement but clarify continuation of City liability for all health care costs incurred by retirees resulting from job-related injury or illness including, but not limited to, costs of appliances.

Article X, Section 1 of the 1984-1987 Agreement guarantees a fully-paid choice of health and hospitalization plans for employees, with an annual reopening period during which active employees may elect to transfer to a different medical plan. Article X, Section 2 provides that retirees

[94]We note that the City also cited sections of the 1986 Tax Reform Act, the Internal Revenue Code and Rules and Regulations of the Internal Revenue Service, which incorporate certain provisions of COBRA for purposes of establishing the deductibility to an employer of the cost of maintaining a group health plan. These tax provisions are inapplicable to the City. Local governments, like private employers, are subject to the provisions of COBRA. The parallel requirements for such governmental group health plans are set forth in Section 10003 of COBRA, and are codified in the Public Health Service Act.

shall have a one-time option to change their prior choice of health plans at any time after one year of retirement. Thereafter, pursuant to Section 2, every two years, during the reopener period for health insurance, retirees have the option of changing health plans "in accordance with procedures established by the Employer".

The present demands seek to retain the existing Section 2 and to specify further that the City shall pay for all health care costs incurred by retirees which result from job-related injury or illness.

City Position

The City contends that these demands seek to confer a benefit on "retirees", who are not "employees" within the meaning of the NYCCBL. Therefore, it alleges, the demands are nonmandatory subjects of bargaining.

Union Position

The Union contends that its demands seek a deferred welfare benefit which accrues during employment but is paid after retirement. The Union asserts that this Board has held that a demand to bargain over a post-employment benefit for current employees is a mandatory subject. For the additional reason that health and welfare benefits are a mandatorily bargainable subject matter, the Union submits

that the instant demands are within the scope of mandatory collective bargaining.

Discussion

While the Union correctly states that a demand for health insurance coverage to be provided current employees after they retire would be a mandatory subject of bargaining,[95] it is well-settled that the same demand asserted on behalf of employees who have already retired is a nonmandatory subject.[96] Retired employees are not "employees" within the meaning of Section 12-303e of the NYCCBL.[97] Therefore, they may not be members of a bargaining

[95]Decision No. B-16-81. See, Lynbrook Police Benevolent Association and Incorporated Village of Lynbrook, 10 PERB ¶3067 (1977), reversed in part sub nom. Incorporated Village of Lynbrook v. New York State Public Employment Relations Board, 64 AD 2d 902, 11 PERB ¶7012 (2d Dept. 1978), reinstated, 48 NY2d 398, 12 PERB ¶7021 (1979); Newfield Central School District and Newfield Teachers Association, Local 2810, NYSUT, AFL-CIO, 17 PERB ¶3009 (1984); Police Association of New Rochelle, Inc., and City of New Rochelle, 10 PERB ¶3042 (1977).

[96]Garden City Police Benevolent Association and Incorporated Village of Garden City, 21 PERB ¶3027 (1988); City of Oneida Police Benevolent Association and City of Oneida, 15 PERB ¶3096 (1982); Lynbrook Police Benevolent Association, 10 PERB ¶3067 (1977); The Troy Uniformed Firefighters Association, Local 2304, IAFF, and City of Troy, 10 PERB ¶3015 (1977). See, Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Company, Chemical Division, et al., 404 U.S. 157, 78 LRRM 2974 (1971); Decision No. B-21-72.

[97]Section 12-303e provides as follows:

> The term "municipal employees" shall mean persons employed by municipal agencies whose salary is

unit and a union is not authorized to negotiate benefits on their behalf. Additionally, under present law, bargaining over "payments to retirees" is expressly prohibited.[98] Since the present demands, on their face, seek coverage for "health care costs incurred by retirees," we find that they contemplate a benefit for retirees and therefore involve a prohibited subject of bargaining.

Fire Marshal Demand No. 42 also seeks to retain the existing provision for retiree health insurance set forth at Article X, Section 2 of the 1984-1987 Agreement. For the reasons stated above, Article X Section 2 involves a prohibited subject of bargaining and its continuation may not be negotiated by the City and Union.

Firefighter Demand No. 31
Fire Marshal Demand No. 41

> HEALTH AND HOSPITALIZATION BENEFITS - Art. X
> Amend to update and improve basic health plan coverage including, but not limited to, coverage for diagnostic examinations and full coverage for treatment for all employees injured in the line of duty, or presumed, by operation of law, to be injured in the line of duty.

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paid in whole or in part from the City treasury.

[98]Section 201.4 of the New York Civil Service Law (Taylor Law) defines the term "terms and conditions of employment" to exclude "any benefits provided by or to be provided by a public retirement system, or payments to retirees or their beneficiaries". It states that "[n]o retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void". See also, Retirement and Social Security Law §470 (McKinney Supp. 1989).

Article X, Section 1 of the 1984-1987 Agreement provides for continuation of a fully-paid choice of health and hospitalization insurance plans for every employee. Firefighter Demand No. 31 and Fire Marshal Demand No. 41 seek to broaden the existing basic health plan coverage to include, at a minimum, diagnostic examinations and full treatment of all line-of-duty injuries.

City Position

The City asserts that these demands are "vague and ambiguous" insofar as they refer to `updating and improving' health plan coverage. Accordingly, it maintains that these demands are nonmandatory subjects of bargaining.

Union Position

The Union asserts that its demands plainly deal with health benefits which are a mandatory subject of bargaining. According to the Union, the "vagueness doctrine" is applicable only where a demand is so worded that it cannot be determined whether it addresses nonmandatory as well as mandatory subjects. Here, it is alleged, the City has failed to suggest how the Union's demands could be construed to be nonmandatory. Therefore, the Union asserts, the City's objection should be denied.

Discussion

Section 12-307a of the NYCCBL expressly provides that the duty to bargain in good faith includes the subject of health benefits. The City and Union have negotiated a health benefit plan for employees which the Union now seeks to "update and improve". The Union specifies that it wishes to extend existing coverage to include (although not be limited to) diagnostic examinations and full treatment for line-of-duty injuries.

PERB has held that "only where a demand, as phrased, may reasonably be construed to be mandatory, will we so construe it".[99] If a demand is so vague that the other party might not understand what would be required of it, or so ambiguous that the demand could be construed to include nonmandatory subjects, PERB has found it to be nonmandatory.[100] Here, the City has not alleged, nor do we find, that the Union's demands, as phrased, might be extended to include nonmandatory subjects of bargaining. In the context of the existing contract provision, the demands

[99]City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

[100]Rochester Fire Fighters, Local 1071, I.A.F.F. (AFL-CIO) and City of Rochester, 12 PERB ¶3047 (1979)(vague demand); City of Rochester, supra, 12 PERB ¶3010 (ambiguous demand); City of Kingston and New York State Professional Firefighters Association, Inc., Local 461, 9 PERB ¶3069 (1976)(ambiguous demand).

to "update and improve" basic health plan coverage are not vague or ambiguous. Moreover, the identification of two specific changes that are sought supports the Union's contention that the demands plainly deal with health benefits, a mandatory subject of bargaining.

In City School District of the City of Corning and Corning Teachers Association, NYSUT, AFT, AFL-CIO, Local 2589, PERB held that changes in the kind and level of medical insurance benefit enjoyed by unit employees had to be negotiated with the union.[101] We agree, and conclude that the present demands are mandatory subjects of bargaining.

Firefighter Demand No. 34

> VACATION AND LEAVE - Art. XII
> Provide for annual leave of 35 work days for members with 3 years and over of service, and 29 work days for employees with less than 3 years of service; additionally provide for mandatory splits to be selected by Firefighters in order of seniority.

City Position[102]

The City argues that this demand encroaches upon its statutory managerial authority to determine the level of

[101] 16 PERB ¶3056 (1983).

[102] The City does not challenge the first section of this demand which seeks specific amounts of annual leave time.

manning in its agencies and to take all necessary action to carry out its mission in emergencies. It contends that it is clear from prior PERB and BCB decisions that demands seeking to provide employees with the option of taking vacation time according to seniority, or mandating the splitting of vacations are beyond the scope of collective bargaining.

Union Position

The Union argues that the Board in Decision No. B-16-81 squarely held that a demand for split vacations is a mandatory subject of bargaining.

Discussion

Initially, we find that the section of the instant demand which seeks the provision of a specific amount of vacation time to unit members in accordance with their seniority levels is a mandatory subject of bargaining. The subject of annual leave is a time and leave benefit which is clearly within the scope of collective bargaining pursuant to NYCCBL §12-307a(1).[103]

However, we note with respect to the second section of this demand, that the right of employees to negotiate over

[103] Decision Nos. B-16-81; B-3-75.

the procedure for obtaining time off must be reconciled with the employer's absolute right to determine and maintain its staffing requirements pursuant to the managerial rights clause in the NYCCBL.[104] We held in Decision No. B-16-81, that a demand seeking the right to split vacation time was mandatory because it addressed the scheduling of employees' leave time without interfering with management's authority to determine the total number of employees on duty at a given time. Alternatively, we also held in that decision that a demand seeking the guaranteed right to select vacation time in accordance with seniority was beyond the scope of collective bargaining because it limited management's right to establish and maintain the number of employees needed to deliver governmental service.[105]

Keeping the foregoing principles in mind, we find that the portion of the instant demand which seeks that "mandatory" vacation splits be granted in the order of

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[104] NYCCBL §12-307b; Decision Nos. B-16-81; B-10-81; B-12-79.

[105] See also, City of Yonkers and Uniformed Firefighters Association of the Paid Fire Department of the City of Yonkers, 10 PERB ¶3056 (1977) (demand seeking negotiation over the preferential order in which individual vacation time would be granted was deemed mandatory because it did not restrict the City's absolute authority to determine and maintain its staffing level); Fairview Professional Firefighters Association Inc., Local 1586, I.A.F.F. and Fairview Fire District, 12 PERB ¶3118 (1979) (demand involving vacation time bidding system was held bargainable because it did not interfere with City's absolute authority to determine its manpower level).

seniority is a permissive subject of bargaining. Although, as the Union contends, we held a demand seeking the option of splitting vacation time to be mandatory in Decision No. B-16-81, that demand did not seek to restrict the City's overall authority to deploy its personnel. The instant demand, which seeks to mandate that individuals be granted vacation time in the order of seniority, clearly interferes with the City's statutory managerial prerogative to determine the standards of services offered by its agencies, and is therefore beyond the scope of mandatory collective bargaining.

Firefighter Demand No. 35

Vacation and Leave - Article XII (New Section)
Resolve issues relating to vacation periods.

Firefighter Demand No. 37

Vacation and Leave - Article XII, Section 1
Restore flexibility re adjusted tour.

City Position

The City contends that Firefighter Demand No. 35, in its entirety, and Firefighter Demand No 37, with its reference to "flexibility," are vague and ambiguous and, therefore, asks they be deemed nonmandatory.[106]

[106] The City cites Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and Fairview Fire District,

Union Position

The UFA argues that since these demands involve either the scheduling of leave time, or an element of leave time (15 additional hours of leave referred to as the "adjusted tour"), they are mandatorily bargainable.

In response to the City's allegation, the UFA argues that PERB invokes the vagueness doctrine relating to bargainability only when a demand is phrased in such a way as to encompass both mandatory and nonmandatory subjects.[107] The Union maintains that since the City has failed to suggest how these demands encompass nonmandatory subjects, its challenge is without merit.

Discussion

The City argues that because both demands are, at least in part, vague and ambiguous they are outside the scope of mandatory collective bargaining. The Union denies the allegation and relies upon the premise that demands concerning scheduling and/or use of leave time are mandatory subjects of bargaining until the City can demonstrate how they might encompass nonmandatory subjects.

In Fairview Professional Firefighters Association, Inc.

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12 PERB ¶3083 (1979); City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

[107] The Union cites City of Rochester, 12 PERB ¶3083.

Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083 (1979), PERB considered and found nonmandatory the following union demand:

> That Article 16 (Work Schedule) be expanded to outline more specifically the present 4 group, 2 platoon system and that scheduled working hours not be altered except as provided for in the labor agreement (emphasis in original).

PERB reasoned that because the underscored language might call for unspecified changes in the work schedule, it could not be determined whether the demand would interfere with the employer's management right to set the number of firefighters to be on duty at any given time. PERB also held, in Rochester Fire Fighters Local 1071, IAFF and City of Rochester, 12 PERB ¶3047 (1979), that a demand "so vague that the City might not understand what would be required of it" is not a mandatory subject.

In a proceeding such as this, it is our policy to limit our holdings to the express terms of the demands placed in issue before the Board.[108] However, it is also our policy "to favor agreement and execution of contracts to define the rights of the parties."[109] Therefore, we have reasoned that when a demand is "unclear on its face," if we find that the circumstances are such adequately to put the City on notice

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[108] Decision No. B-16-81.

[109] Decision No. B-3-75.

of the Union's intent, it will not be precluded from consideration by the impasse panel on these grounds.[110]

In Decision No. B-43-86, we considered the following demand:

> Clarify existing clause [portal to portal pay] applies to Fire Marshals.

In that case, there had been prior litigation between the parties concerning applicability of the Portal to Portal pay clause to Fire Marshals, resulting in a finding that this provision did not apply to Fire Marshals. At the next round of collective bargaining between the parties, the Union sought to make clear that the Portal to Portal pay clause be applicable to Fire Marshals. We found that even though the demand was unclear "on its face," given the prior history between the parties, the City was on notice of the Union's intent and, therefore, the demand not so vague as to require its exclusion from bargaining.

In the instant matter, standing alone, neither demand clearly states the UFA's intentions nor specifies the changes sought. The Union also fails to offer any circumstantial evidence which can be construed as putting the City on notice of its intent in either case. Therefore, inasmuch as both demands arguably could encompass nonmandatory subjects, we are constrained to preclude them

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[110] Decision No. B-43-86.

from consideration by the impasse panel. This conclusion is consistent with City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979), in which PERB stated that "only where a demand, as phrased, may reasonably be construed to be mandatory, will we so construe it."

Firefighter Demand No. 36

> Vacation and Leave - Article XII, Section 1
> Require that chart will be promulgated at least 90 days prior to January 1 of each year.

City Position

The City argues that this demand interferes with its management rights under Section 12-307b of the NYCCBL to "determine the standards of service to be offered by its agencies; direct its employees; ... maintain the efficiency of governmental operations; ... and exercise complete control and discretion over its organization and the technology of performing its work."

Union Position

The Union denies the City's allegation, contending that the demand is merely for information. The Union claims that the Board has held demands which ask only for the posting of charts and similar information a mandatory subject of

bargaining.[111]

Discussion

The parties do not dispute that the posting of work schedules is a mandatory subject of bargaining. We made clear in Decision No. B-2-73, that a demand for "Posting Work Assignment Schedule" is a mandatory subject because it relates to working conditions.[112] In finding no infringement of management rights in that case, we noted that the Union sought no participation in the decision making process and only requested publication of information once the City had made its decision on the matter of work assignments. In the instant matter, the City contends that any demand that would require that the chart be promulgated within a defined period of time has an impact on its managerial prerogative. The Union denies the contention, stating that its demand relates solely to posting, and not the formulation of the chart.

We do not find merit in the City's argument that Demand No. 36 imposes a restriction on management rights. We see no such infringement in the demand. The Union has made clear that it seeks no input in the preparation of the

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[111] The Union cites Decision Nos. B-16-81; B-10-75; B-2-73.

[112] See also, Decision No. B-16-81.

annual vacation chart and asks only that it be posted once the City has made its decision. In our opinion, the Union simply requests information regarding a term and condition of employment in a timely manner. Inasmuch as the annual vacation chart at issue could provide that an employee be scheduled for such leave commencing on January 1st of the applicable year, we find the UFA's demand that this information be provided 90 days before the fact a reasonable request concerning a working condition within the meaning of Section 12-307a of the NYCCBL.

Accordingly, in the absence of any apparent infringement of a statutory managerial prerogative, we find the instant demand a mandatory subject of collective bargaining appropriate for consideration by the impasse panel.

Firefighter Demand No. 38
Fire Marshal Demand No. 46

> Vacation and Leave - Article XII, Section 2
> Provide that each employee shall accrue five (5) personal leave days annually, to be taken at the employee's option without restriction in the calendar year of accrual, and may be accumulated from year to year; further provide that upon leaving service employees may be compensated for unused personal days at then current rates of pay, to be included in pension calculations; further provide that accrued vacation days may be utilized in the same fashion as personal leave days if an employee exhausts his personal leave entitlement.

City Position

The City challenges that the instant demands infringe on management's right to establish manpower levels and schedule employees to the extent it proposes that personal days and vacation leave be taken at the employee's option. The City claims that both the Board and PERB have held that a demand seeking the use of paid leave without recognition of department exigencies is nonmandatory.[113]

Union Position

According to the Union, the Board has held that demands which "only address procedures for scheduling personal days and vacation time" are mandatory subjects of bargaining.[114]

Discussion

The parties do not dispute that personal days and vacation time are within the general subject of hours and, as such, is a mandatory subject of bargaining under the NYCCBL.[115] The City contends, however, that the bargainability of these demands are limited by another

[113] The City cites Decision No. B-16-81; Patrolmen's Benevolent Association of Newburgh and City of Newburgh, 18 PERB ¶3065 (1985).

[114] The Union cites Decision Nos. B-16-81; B-3-75.

[115] Section 12-307a of the NYCCBL.

statutory provision, the management rights clause.[116] The UFA, without responding to the City's allegation, simply argues that any demand concerning the regulation and proper use of leave is a mandatory subject.

Clearly, this is an example of demands concerning mandatory subjects of bargaining intertwined with management rights. As we have previously stated, where a demand has a dual character we shall follow our practice of advising the parties of the elements of the demand that are mandatory subject and the elements that are nonmandatory subjects of bargaining.

For the purposes of our discussion, we will delineate and evaluate each component of Firefighter Demand No. 38/Fire Marshal Demand No. 46 as follows:

(1) To the extent the demands seek to bargain over a specific number of paid leave days per employee per annum to be used as personal days, it is an appropriate and lawful subject of bargaining. We have long held that a union "has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation, sick leave, or other purposes (emphasis added)."[117]

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[116] Section 12-307b of the NYCCBL.

[117] Decision No. B-10-81. See also, Decision No. B-16-81.

(2) To the extent the demands require that employees may take paid leave at their option and "without restriction," they infringe on the City's statutory right Under Section 12-307b of the NYCCBL to determine the level of staffing required at any given time. In Decision No. B-16-81, we stated that a demand which "seeks an inflexible, absolute right to time off ... without recognition of the exigencies of the department, ... infringes on management's right to establish manpower levels and schedule employees and is, therefore, a nonmandatory subject of bargaining."[118] Accordingly, this element of these demands may not be considered by the impasse panel.

(3) To the extent the demands propose that unused personal days be accumulated from year to year, we find that inasmuch as the Union seeks to negotiate on the use of earned personal days, it is a mandatory subject of bargaining.[119] In Decision No. B-16-81, we found a similar union proposal, seeking for its members the right to accrue unused annual vacation time with no maximum limitation, mandatorily bargainable.

(4) To the extent the demands propose that "upon leaving service employees may be compensated for unused

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[118] See also, Decision No. B-10-81.

[119] Decision No. B-3-75.

personal days at the then current rates of pay, to be included in pension calculations," we note that the City interposes no specific objection. However, we find it incumbent upon us to point out that if we were to allow the parties to reach agreement on this aspect of the demands, the result would be in clear contravention of Section 431 of the Retirement and Social Security Law ("RSSL").[120] We have long held that parties may not bargain over a subject in such a way as to reach an agreement which would be inconsistent with a statutory requirement.[121] Therefore, this element of these demands are outside the scope of bargaining.

(5) Finally, the demands seek the use of accrued vacation days "in the same fashion as personal days if an employee exhausts his personal leave entitlement." Subject to the limitations enumerated above, inasmuch as the Union

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[120] Section 431 of the RSSL, in relevant part, provides:

> **Salary base for computing retirement benefits.** In any retirement plan or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:
>
> 1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked (emphasis added),
> 2. any form of termination pay.

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

seeks to negotiate on the use of earned vacation days, this aspect of Firefighter Demand No. 38/Fire Marshal Demand No. 46 is mandatorily negotiable.[122]

Firefighter Demand No. 40

Vacation and Leave - Article XII, Section 4C
Delete Phrase "with the approval of the Company Commander or Commanders" so that Firefighters have a contractual entitlement to make mutual exchanges of vacation time in full or in part within adjoining companies or paired companies.

Fire Marshal Demand No. 50

Vacation and Leave - Article XII, Section 4D
Delete phrase "with the Approval of the Chief Fire Marshal" so that Fire Marshals have a contractual entitlement to make mutual exchanges of vacation time in full or in part.

City Demand No. 5

Vacation and Leave - Article XII, Sections 4C and 4D (Mutual Exchanges of Vacations)
Delete.

City Demand No. 14

Side Letter on Early Relief - Attachment I

Delete.

Article XII, Section 4C of the 1984-87 collective bargaining agreement provides:

> All Firefighters shall have the right with the approval of the company commander or commanders involved to make mutual exchanges in full or in part of

[122] Decision No. B-3-75.

> vacation time within a company or adjoining companies. Present single companies shall be paired by the Department and the foregoing procedures shall apply between the paired companies.

Although Article XII, Section 4D does not appear in either of the contracts submitted by the City or the UFA, the parties agree that this provision currently grants to Fire Marshals the same rights to make mutual exchanges of vacation time as given to Firefighters, except to the extent that Fire Marshals require the approval of the Chief Fire Marshal.

Attachment I of the l984-87 collective bargaining agreement provides:

> The appropriate All Units Circular shall be amended to provide for early relief at 0800 hours or 1700 hours pursuant to existing departmental policy on early relief.

City Position

The City contends that the Union's demands concern a matter that falls within its statutory management's right under Section 12-307b of the NYCCBL to "direct its employees" and to "determine the methods, means and personnel by which government operations are to be conducted." The City maintains that this also includes the right to determine which employees will work together at a

particular time.

The City points out that since the Board previously found, in Decision No. B-16-81, that a demand for the right to arrange work time or time off is a nonmandatory subject, the UFA's attempt with regard to Firefighter Demand No. 40 and Fire Marshal Demand No. 50, to characterize the mutual exchange of vacation time as a "procedure governing the proper use of vacation leave" is without merit.

Moreover, in view of the Board's prior ruling, the City intends to delete Article XII, Sections 4C and 4D of the 1984-87 Agreement and Attachment I, which currently grants Firefighters and Fire Marshals the right to make mutual exchanges of vacation time ("mutuals") with the approval of the Company Commander(s) or Chief Fire Marshal, and hours of work ("early relief"), respectively.

Union Position

The Union notes that pursuant to Section 12-307a(4) of the NYCCBL, the City has a duty to bargain on time and leave benefits, including "time and leave rules which affect employees in the ... fire ... services." The Union asserts that in Decision No. B-16-81, the Board explained that this duty includes bargaining on "the regulation and procedure governing the proper use of leave." Thus, the UFA contends, because Firefighter Demand No. 40 and Fire Marshal Demand

No. 50 address a procedure governing the proper use of vacation leave, bargaining on the subject is within the meaning of the statute.

In response to the City's expressed intention to unilaterally delete Article XII, Sections 4C and 4D from the current contract in reliance upon Decision No. B-16-81, the UFA cites several PERB decisions where it held that granting Firefighters the right to exchange shifts among themselves,[123] and giving employees the right to select their vacation periods in a manner that does not alter pre-established levels of manpower,[124] are mandatory subjects of bargaining. The Union urges the Board to reconsider its prior decision inasmuch as it "is flatly inconsistent with PERB rulings."

Notwithstanding the above, the Union maintains that any managerial right the City could possibly be construed to have under the NYCCBL concerning the subject is reserved by the express requirements of Article XII, Section 4C and 4D, in that exchanges may only be made "with the approval" of

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[123] Greenville Uniformed Firemen's Association, Local 2093, IAFF and Greenville Fire DIstrict, 15 PERB ¶4501 (1981).

[124] Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3118 (1979); City of Yonkers and Uniformed Fire Officers Association of the Paid Fire Department of the City of Yonkers, 10 PERB ¶3056 (1977).

superior officers.

The Union also challenges the City's intention to unilaterally delete Attachment I from the contract on the ground that to do so would have impact on the length of the work day inasmuch as Early Relief permits an employee coming on duty to relieve another employee going off duty an hour before the end of his shift. The Union maintains that the Board has expressly held such matters to be mandatorily negotiable.[125]

Discussion

The Union explains that contract provisions which grant employees rights concerning mutuals and early relief do not infringe upon statutory management rights, as the City contends, because mutual exchanges of hours or tours result in nothing more than an even trade, member for member and do not interfere with the number of Firefighters on duty at any given time. The Union contends, therefore, that there is no impact on levels of manpower, which it claims is the only element of scheduling over which the City has a recognized managerial right. The City relies on our finding in Decision No. B-16-81, claiming that a demand for the right to make mutual exchanges of hours or tours is a permissive

[125] The Union cites Decision No. B-24-75.

subject of bargaining.

In Decision No. B-16-81, we reasoned that a demand which provides employees with the freedom to reschedule work time or time off "goes to the heart of the statutory managerial rights to schedule employees, to direct the workforce and to assign personnel."[126] Therefore, we found a demand of this nature to be a nonmandatory subject of bargaining.

The UFA does not dispute that both the City's challenge to its demands and their stated intention to delete Article XII, Section 4C and 4D and Attachment I from the contract are supported by our findings in Decision No. B-16-81. Rather, the Union urges that we reconsider our position on this matter in view of PERB's line of cases finding that demands relating to mutuals are mandatory subjects. The UFA contends that "PERB's doctrine on the bargainability of such practices must prevail" inasmuch as PERB has standing, pursuant to Section 212.2 of the Taylor Law, to bring an action for a declaratory judgment to overrule the Board if the provisions and procedures adopted by the City of New York, or the continuing implementation thereof, are not substantially equivalent to the provisions and procedures

[126] See also, Decision No. B-10-81.

set forth with respect to the Taylor Law.[127] Therefore, the Union argues, the Board is obliged to interpret the NYCCBL as PERB has construed the Taylor Law and find that mutual exchanges of time off is a mandatory subject of bargaining.

At the outset, we find that the cases cited by the UFA in support of their "substantial equivalency" argument are not relevant to the instant matter. These decisions do not account for the significant statutory and circumstantial distinctions that differentiate local public employee relations boards from the Board of Collective Bargaining, as expressed by PERB in Cityof New York and Patrolmen's Benevolent Association of the City of New York, Inc., 9 PERB ¶3031 (1976), aff'd, 9 PERB ¶3034. In that case, PERB heard a matter upon the exceptions of the City of New York ("City") and the cross-exceptions of the Patrolmen's Benevolent Association ("PBA"), to a decision of a hearing officer issued on January 15, 1976.[128] The City posed two

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[127] The Union cites In the Matter of Syracuse Hancock Professional Fire Fighters Association, 17 PERB ¶3105 (1984); Doyle v. City of Troy, 380 N.Y.S.2d 789, 51 A.D.2d 845 (3rd Dept. 1976); City of Amsterdam v. Helsby, 371 N.Y.S.2d 405, 37 N.Y.2d 19 (1975).

[128] In City of New York and Patrolmen's Benevolent Association of the City of New York, Inc., 9 PERB ¶4502, within the context of an improper practice charge alleging a refusal to bargain in good faith, a hearing officer disregarded some particulars of a scope of bargaining decision issued by the Board of Collective Bargaining (BCB Decision No. B-24-75), finding certain aspects of scheduling, contrary to the BCB's determination, mandatory subjects of bargaining.

exceptions to the hearing officer's determination. Its major position was that BCB Decision No. B-24-75 was dispositive of the issue and PERB is without jurisdiction to reach a contrary conclusion regarding employment that is subject to the NYCCBL. PERB was not persuaded by that argument and retained jurisdiction because, under PERB, scope of bargaining issues are normally resolved in the context of improper practice charges alleging refusals to bargain in good faith.[129] Notwithstanding their retention of primary jurisdiction, PERB nevertheless found that the hearing officer should have accepted the Board's determination as to the scope of bargaining questions at issue. In reaching that conclusion, PERB considered the following:

(1) In Section 212 of the Taylor Law, the State Legislature granted OCB singular status, namely, that its establishment does not require a prior approval by PERB - a requisite with respect to all other local boards throughout the State. Further, that Section 212 also provided that the NYCCBL, as enacted by New York City, is in full force and effect until there is a determination by a court of

[129] Between March 1973 and June 1978 the PERB had exclusive jurisdiction over improper practice proceedings until the New York State Legislature amended the Taylor Law [Section 205(5)(d)] to restore to OCB jurisdiction to decide and remedy improper practices allegedly committed by public employers and/or public employee organizations subject to the NYCCBL.

competent jurisdiction that such law is not in substantial equivalency with the Taylor Law.[130]

(2) PERB took notice of the unique negotiating problems confronting New York City , i.e., various mandatory subjects of bargaining are restricted to different levels of bargaining under the NYCCBL, and the expertise of OCB in dealing with such problems.

(3) PERB took note of PBA's role in the formulation of the NYCCBL and its membership in the Municipal Labor Council, through which it shares in the administration of OCB.

(4) Finally, PERB recognized the need of OCB to accommodate to the provisions of Section 971 of the Unconsolidated Laws which are uniquely applicable to New York City.[131]

Based on the above, PERB found that the opportunities for the PBA to seek relief from the PERB in a matter covered by the [NYCCBL] and already decided by the BCB were,

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[130] Thus, Section 12-307b, "Management Rights" upon which the Board relied in Decision No. B-24-75, is in full force and effect, there being no determination to the contrary.

[131] Section 971 of the Unconsolidated Laws establish unique provisions and procedures relating to tours of duty of New York City policemen. In Decision No. B-24-75, the Board held Section 971 of the Unconsolidated Laws, along with the management rights clause of the NYCCBL, to constitute an explicit prohibition so as to render a term and condition of employment a nonmandatory subject of bargaining if to reach any other agreement would violate an applicable statutory provision.

therefore, restricted, accepted the Board's determination on the scope issues in that case and reversed the decision of the hearing officer.

In view of the above, we do not find UFA's argument regarding "substantial equivalency" persuasive nor do we see it supported by authority. We take note that the relevant statutory and circumstantial elements of PERB's analysis remain in full force and effect. This conclusion is reinforced by the fact that it is now more than ten years since this Board was reinstated in jurisdiction over improper practice matters pursuant to the aforementioned amendment of Section 205(5)(d) of the Taylor Law.

As it is clear to us that Decision No. B-16-81 should be accorded the full weight of BCB decisional precedent, we sustain our finding therein, that demands which seek "that employees be free to reschedule work time or time off" infringe on statutory managerial rights. As we stated in Decision No. B-24-75, the management rights clause of the NYCCBL reserves to management certain prerogatives relating to terms and conditions of employment so as to render them nonmandatory subjects of bargaining.

In conclusion, since the City may not be compelled to bargain over nonmandatory subjects,[132] Firefighter Demand No.

[132] Decision No. B-7-72.

40 and Fire Marshal Demand No. 50 may not be submitted for consideration by the impasse panel. Further, the City may delete Article, XII, §§46C and 46D and Attaachment I without negotiating.

Firefighter Demand No. 41
Fire Marshal Demand No. 51

> VACATION AND LEAVE - Article XII, Section 5
> Amend to provide that excused time accorded to any other personnel employed by the City for any reason or purpose shall be granted equally to employees covered by this contract.

City Position

The City cites Section 12-311a(3) of the NYCCBL[133] as authority for its contention that it shall not be required to either confer a benefit or bargain mid-contract on "matters that have already been fully negotiated, regardless

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[133] NYCCBL Section 12-311a(3) provides:

> Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreement arose and (b) there shall have arisen a significant change in circumstances with respect to such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement.

of whether or not they are included in the contract."[134] The City also argues that the attainment of greater economic benefits by another union does not constitute a basis for a finding of practical impact, the other circumstance under which it claims this Board has required mid-contract bargaining. Finally, the City maintains that inasmuch as these demands are for parity, they concern a prohibited subject of bargaining.[135]

Union Position

The Union denies that Firefighter Demand No. 41/ Fire Marshal Demand No. 51 are, as the City contends, "parity demand[s] or [demands which] require midterm modification of contract terms." Rather, the Union characterizes them as "simply [demands] for a type of comparability of benefits."[136] As such, the Union relies on the theory that

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[134] The City cites Decision Nos. B-21-75; B-18-75.

[135] The City cites Decision Nos. B-11-79; B-10-75.

[136] The Union cites Decision No. B-10-75, where the Board held that a salary demand based, in part, on comparability bargaining is a mandatory subject, defining it as "the practice of reaching agreement on the wages of one group by comparing that group's duties, responsibilities and rewards with another group of employees asserted to be doing similar work." Therein, the Board stated that whereas a demand for lock-step parity is not a mandatory subject, "the practice of 'comparability bargaining' ... [is] traditional in collective bargaining in both the private and public sectors, and that it [is] expressly stated in the NYCCBL as only one of the criteria to be used by impasse panels in recommending settlements [Section 12-311c(3)(b)(1)]."

its demands are based on "comparability bargaining," and, therefore, are mandatorily negotiable.

Discussion

The Union's demands are essentially for an increase in time and leave benefits, a mandatory subject of negotiation.[137] However, as phrased, we also find the Union's demands, as phrased, to be ones for parity.

Our policy, "that lock-step parity clauses which interfere with the statutory collective bargaining rights of a unit not represented at the negotiations are unlawful under the NYCCBL,"[138] has developed within the context of wage demands. However, we apply equal treatment to the instant demands as they relate to dollar benefits, noting that PERB used a similar analysis in City of Buffalo and Buffalo Professional Firefighters Association, Local 282, I.A.F.F., 9 PERB ¶3008 (1976). In that case, PERB found a demand to correct any disparity concerning dollar-for-dollar benefits between the uniformed forces that occurs during the lifetime of the agreement, including uniform allowances, a demand for parity and, thus, nonmandatory.[139]

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[137] Section 12-307a of the NYCCBL.

[138] Decision No. B-11-79.

[139] See also, Greenville Uniformed Firemen's Association, Local 2093, I.A.F.F. and Greenville Fire District, 15 PERB ¶4501

In Decision No. B-10-75, we held that parity clauses are "incompatible with sound bargaining principles," citing with approval the City's position that:

> [A] parity clause ... would constitute an improper labor practice because it would interfere with the bargaining rights of employees in the bench mark title who were represented by a different union, not a party to the parity agreement; would require the City to make automatic and unilateral changes in terms and conditions of employment; and would involve the City in assisting the contracting union to limit, control or otherwise adversely affect bargaining in the unit of bench mark employees.[140]

We have found that clauses which guarantee pay parity and/or differentials between titles represented by different unions "antithetical to free and uncoerced negotiations because it fixes wages in such a way as to interfere with the bargaining rights of employees in another unit."[141]

In distinguishing parity clauses from the practice of "comparability bargaining," we held in Decision No. B-10-75 that:

> [I]nsofar as the demand seeks salaries in absolute dollar amounts, based in part, upon comparison with the salaries of any other group or groups

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(1981), where PERB held "[p]arity demands which require that specific benefits subsequently granted by the employer to another labor organization for employees in another unit will be given to the demanding union are nonmandatory."

[140] See also, Decision No. B-11-79.

[141] Id, at 9.

> of City employees, but without any provision for guaranteeing or maintaining a differential between salaries of unit employees and those of any other group, the demand is mandatorily bargainable (emphasis added).

Our endorsement of this practice is contemplated by the standards outlined in Section 12-311c(3) of the NYCCBL, which provides, in relevant part:

> (b) An impasse panel ... shall consider wherever relevant the following standards in making its recommendations for terms of settlement:
>
> (1) 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;....

Notwithstanding the Union's contention, in its answer, that the instant demands only request "comparability of benefits," on their face, the demands seek an inflexible, absolute guarantee of the same "excused time accorded to any other personnel ... for any reason or purpose," without regard to any of the comparability factors enumerated by the statute. Moreover, the UFA seeks a specific benefit that is, no doubt, in some cases yet to be negotiated by another

union representing City employees.[142] To this extent, these demands do trespass upon the negotiating rights of a union that is not a party to the parity agreement. Therefore, we find the Union's demands, as phrased, to be rendered nonmandatory.

Firefighter Demand No. 42
Fire Marshal Demand No. 52

> Vacation and Leave - Article XII, Section 6
> Amend to provide that compensatory days shall be taken at the absolute option of the employee.

City Position

The City challenges that the instant demands infringe on management's right to establish manpower levels and schedule employees to the extent they propose that compensatory time be taken at the employee's option. The City claims that both the Board and PERB have held that a demand seeking the use of compensatory time without recognition of department exigencies is nonmandatory.[143]

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[142] Compare with, Buffalo Police Benevolent Association and City of Buffalo, 20 PERB ¶4584 (1987), where PERB did not find a demand seeking equal treatment by the City when other City employees receive additional time-off by executive fiat to be a parity demand.

[143] The City cites Decision No. B-16-81; Patrolmen's Benevolent Association of Newburgh and City of Newburgh, 18 PERB ¶3065 (1985).

Union Position

The UFA argues that the City's challenge to these demands should be dismissed for failure to demonstrate how granting compensatory days at the option of employees has an impact on its right to establish manpower levels.

Discussion

The parties do not dispute that compensatory time falls within the general subject of hours and, as such, is a mandatory subject of bargaining under the NYCCBL.[144] The City contends, however, that the bargainability of these demands are limited by another statutory provision, i.e., the management rights clause.[145] The Union maintains that their demands are bargainable until the City "demonstrates" a sufficient basis for its challenge.

In our opinion, Fire Fighter Demand No. 42/Fire Marshal Demand No. 52 by their terms, has been rendered nonmandatory and are, therefore, not appropriate for consideration by the impasse panel. It has long been held that Section 12-307b of the NYCCBL reserves to the City the managerial right to schedule hours of work.[146] In Decision No. B-10-81, we

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[144] Section 12-307a of the NYCCBL.

[145] Section 12-307b of the NYCCBL.

[146] Decision No. B-4-69.

stated:

> The [Union] has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation, sick leave, or other purposes. But, once agreement is reached on these provisions, it is the City's management prerogative to determine the level of staffing to be provided, by means of work schedules, within the limitations of the agreement on hours and leave benefits.[147]

In Decision No. B-16-81, we considered a demand that compensatory time "be granted within thirty (30) days unless waived." Therein, we held that a demand which:

> [S]eeks an inflexible, absolute right to time off within a defined period of time without recognition of the exigencies of the department, ... infringes on management's right to establish manpower levels and schedule employees and is, therefore, a nonmandatory subject of bargaining.

Accordingly, inasmuch as these demands provide for the use of compensatory time at the sole discretion of the employees, which interferes with the City's right to determine the number of Firefighters and Fire Marshals who should be on duty at a given time, they are not mandatorily negotiable.

Firefighter Demand No. 44
Fire Marshal Demand No. 55

Vacation and Leave - Article XII (New Section)

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[147] See also, Decision No. B-16-81.

> Provides that each employee, upon separation from service, may take a vacation in cash at the then applicable straight time rates, or in time off, at the employee's option, to include his present year's entitlement and accrual; to be included in pension calculation.

City Position

The City's contends that its duty to bargain does not extend to these demands inasmuch as the Board has held that retired City employees are not "employees" within the meaning of Section 12-303e of the NYCCBL.[148]

The City also claims that to the extent the demands concern pensions, its obligations are fixed by state law governing retirement plans for Firefighters and the Taylor Law, Section 470 of the Retirement and Social Security Law ("RSSL") and Section 201(4) of the Civil Service Law ("CSL"), respectively. The City points out that the Board has held demands which would involve the breach of an obligation or duty fixed by law are prohibited subjects of bargaining.[149]

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[148] Section 12-303e of the NYCCBL provides:

> The term "municipal employees" shall mean persons employed by municipal agencies whose salary is paid in whole or in part from the city treasury.

[149] The City cites Decision Nos. B-24-75; B-5-75; B-7-72; B-11-68.

Union Position

The UFA contends that these demands are bargainable because they concern "procedures for the accumulation and use of vacation time," and are not about pensions, as the City contends.

The Union maintains that the Board, in explaining the City's obligation to bargain pursuant to Section 12-307a(4) of the NYCCBL, has held that:

> [T]ime and leave benefits mandatory subjects of bargaining, and includes a duty to negotiate on the regulation and procedure governing the proper use of leave.[150]

In further support of its position, the Union likens Firefighter Demand No. 44/Fire Marshal Demand No. 55 to ones for termination pay, arguing that PERB has held a demand to "cash out" vacation leave that was accrued and accumulated while employed indistinguishable from termination pay, both of which are mandatory subjects of bargaining.[151]

Discussion

The City would have us declare these entire demands as outside the scope of bargaining because they allegedly seek benefits for retired employees. The City correctly points

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[150] The Union cites B-16-81 at 114.

[151] The Union cites Lynbrook Police Benevolent Association and Incorporated Village of Lynbrook, 10 PERB ¶3115 (1977), aff'd, 12 PERB ¶7021.

out that in Decision B-21-72, we adopted a construction of Section 12-303e of the NYCCBL consistent with the Supreme Court's decision in Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 78 LRRM 2974 (1971), which concluded that "retired employees are not appropriately includable in the collective bargaining unit, within the meaning of the NLRA." The bargaining demand at issue in Decision No. B-21-72 provided:

> The City shall make [Welfare Fund] contributions for all present and future retired employees, so that benefits can be continued during retirement.

In that case, we found that retired City employees are not "employees" within the meaning of Section 12-303e of the NYCCBL and, therefore, "cannot be included in a unit with active employees for collective bargaining purposes."

However, we also stated therein that our decision would not preclude the negotiation of welfare contributions for active employees to the extent the phrase "future retired employees" in the demand was synonymous with active employees currently on the payroll who will at some time in the future retire. Applying that analysis to the instant matter, to the extent that these demands concern employees who are actively employed by the City as of the effective date of the contract currently being negotiated, we find the Union's right to negotiate on their behalf is uncompromised.

We next consider the City's contention that to the extent the demands concern pensions, bargaining would violate state law. We take note that Section 470 of the RSSL expressly prohibits negotiated changes between any public employer and public employee until July 1, 1989 with respect to any benefit provided by or to be provided by a public retirement system. We also note that Section 201(4) of the CSL excludes pension and retirement benefits from the definition of "terms and conditions of employment," declaring that any benefits so negotiated shall be void. Notwithstanding any preemptive effect that the foregoing statutory provisions may have, we take administrative notice that Section 431 of the RSSL specifically provides, in relevant part:

> **Salary base for computing retirement benefits.** In any retirement plan or pension plan to which the state or municipality thereof contributes, the salary base for the computation of retirement benefits shall in no event include any of the following earned or received, on or after April first, nineteen hundred seventy-two:
>
> 1. lump sum payments for deferred compensation, sick leave, accumulated vacation or other credits for time not worked (emphasis added),
>
> 2. any form of termination pay.

In view of the above, that part of the Union's proposals which would require, in the event an employee

opted for payment of accrued vacation leave upon separation, that it be included in the employee's pensionable base salary would violate an express legislative restriction on the subject. We have long held that parties may not bargain over a subject in such a way as to reach an agreement which would require a contravention of law.[152] Therefore, to this extent, Firefighter Demand No.44/Fire Marshal Demand No. 55 are outside the scope of bargaining.

We note that the City does not otherwise challenge the bargainability of the instant demands, which seek to create certain rights in employees concerning the use of or compensation for accrued vacation leave upon their ultimate separation from service. Therefore, we need only summarize that these demands address an appropriate subject for consideration by the impasse panel subject to the above limitation as to pension calculations.

[152] Decision No. B-5-75.

Firefighter Demand No. 45
Fire Marshal Demand No. 56

Vacation and Leave - Article XII (New Section) Provide that any medical leave for flu or virus ailment shall be classified as a line-of-duty injury after 72 hours from the granting of such leave.

City Position

The City claims that bargaining on these demands are prohibited because Section 12-127 of the New York City Administrative Code ("Code"), "establishes the rules governing line-of-duty injuries for firefighters" and any contrary agreement would be unlawful.[153]

Union Position

The UFA seeks to have designated any flu or virus ailment of more than 72 hours duration as an "illness directly traceable to the performance of duty" so that its members may avail themselves of economic benefits accorded to Firefighters and Fire Marshals injured in the course of duty. The Union asserts that entitlement to economic benefits associated with line-of-duty injuries, as a form of health and welfare benefit, is a mandatory subject within the contemplation of Section 12-307a of the NYCCBL.

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[153] The City cites Decision Nos. B-24-75; B-5-75; B-7-72; B-11-68.

Discussion

Section 12-127 of the Code provides, in relevant part:

> **City employees injured in the course of duty.** a. Any member of the uniformed forces of the fire ... department ... who shall be injured while actually employed in the discharge of ... orders of his or her superior officers in the ... fire house ... or as the result of illness traceable directly to the performance of ... fire ... duty, shall be received by any hospital for care and treatment when such facts are certified to by the head of the department. Unless otherwise provided in this section, such members shall be received by any hospital at the usual ward patient rates. The bill for such care and treatment at such rates, when certified by the superintendent or other person in charge of such hospital and approved by the head of the department concerned, shall be paid by the city.

The City challenges the demand on the ground that its obligations and duties on the subject are fixed by law. The UFA contends that the City has "mistakenly suggested" that these demands would contravene either the language or intent of Section 12-127 of the Code. The Union argues that since the express language of this statute neither limits its coverage to certain types of line-of-duty injuries nor precludes bargaining over contract language not inconsistent with its provisions, the cases cited by the City which stand for the proposition that bargaining on the matter is preempted by statute are inapplicable.

In Decision No. B-41-87, we stated:

> We do not agree with the assertion that a matter covered by statute is necessarily a prohibited subject of bargaining. It is well-settled that the requirement of good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment.[154]

We have also held that where a permissive bargaining demand would require a contravention of law, it is a prohibited subject of bargaining.[155] However, where it is clear that the inclusion of additional contractual provisions will not be inconsistent with statutory requirements,[156] or violate the intent of the statute,[157] bargaining will not be prohibited.

In the instant matter, we agree with the UFA that the classification of certain illness contracted by Firefighters and Fire Marshals as line-of-duty injuries is not preempted by the express language of Section 12-127 of the Code. However, we also note that the statute expressly confers discretion upon the "head of the department" to certify that the illness or injury was incurred in the performance of duty. Therefore, we are not persuaded that the intent of the legislature will not be derogated by the proposed

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[154] See also, Decision No. B-25-85.

[155] Decision No. B-5-75.

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

[157] Decision No. B-24-75.

demand, inasmuch as it would require that specific illnesses be classified as "presumptive evidence" of line-of-duty injuries, usurping this discretion.

In reaching this conclusion, we take administrative notice of another statutory provision that has relevance to the instant matter. Title 13, Chapter 3, entitled "Fire Department Pension Fund and Related Funds," §13-354 of the New York City Administrative Code, provides:

> **Certain disabilities of firefighters.** Notwithstanding any other provisions of this code to the contrary, any condition of impairment of health caused by diseases of the lung, resulting in total or partial disability to a member of the uniformed force, who successfully passed a physical examination on entry into the service of such department, which examination failed to reveal any evidence of such condition, shall be presumptive evidence that it was incurred in the performance and discharge of duty, unless the contrary be proved by competent evidence.

These statutes clearly indicate that legislators are concerned with the subject and have established standards for both the payment of hospital and medical treatment and guidelines for the Department's determination, including what constitutes "presumptive evidence" as to whether an injury was sustained in the line of duty. To this extent, the legislature has spoken on the matter.

In Police Association of New Rochelle, New York, Inc., and City of New Rochelle, 13 PERB ¶3082, PERB held that the

union's proposal to establish a medical review board to determine whether employees have job-related illness or injury was a mandatory subject of bargaining, and was not precluded by Section 207-c of the General Municipal Law ("GML") which dealt with payments to policemen who suffer job-related injuries. PERB reasoned that:

> [t]his statutory provision does not preclude the establishment of a procedure for the medical determination, either initially or on review, as to whether an illness or any injury is job-related (emphasis added).[158]

In that case, we note that PERB's ruling on the matter turned on the fact that the demand simply provided for a "procedure" to more properly effect the intent and general purpose of Section 207-c of the GML. This is to be distinguished from the instant demand, where the Union seeks to replace the judgment of the Department head with a contractual "presumption" under certain circumstances, contrary to the intent of the legislature.

Where it is clear that a demand relating to a mandatory subject is qualified by management prerogative, i.e., where the legislature has reserved certain discretionary power to

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[158] See also, Local 589, International Association of Firefighters, AFL-CIO and The City of Newburgh, 17 PERB ¶7506 (1984) (GML §207-a, pertaining to payment of salary, medical and hospital expenses of firefighters injured in performance of their duties did not preempt negotiations over procedures for implementing such law).

management, such a demand is subject solely to permissive bargaining.[159] As we have long held, while the NYCCBL does not prohibit bargaining on permissive subjects,[160] they may be submitted to an impasse panel only on mutual consent.[161]

Firefighter Demand No. 46
Fire Marshal Demand No. 57

> Vacation and Leave - Article XII (New Section) Provides all employees the opportunity for two (2) blood days per year without restriction on the number of employees involved.

City Position

The City challenges Firefighter Demand No. 46/Fire Marshal Demand No. 57 solely to the extent that allowing employees to take time off to donate blood without regard to Department limitations or exigencies infringe upon management's right under Section 12-307b of the NYCCBL to "direct its employees ... [and] determine the methods, means and personnel by which government operations are to be conducted."

Union Position

The UFA notes that under Section 12-307a of the NYCCBL:

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[159] Decision Nos. B-15-77; B-16-71.

[160] Decision Nos. B-70-88; B-7-77.

[161] Decision No. B-7-72.

> [P]ublic employers ... shall have the duty to bargain in good faith on ... hours (including but not limited to overtime and time and leave benefits)....

The Union further notes that Section 12-307a(4) specifically provides, in relevant part:

> [A]ll matters, including but not limited to ... time and leave rules which affect employees in the uniformed ... fire ... services shall be negotiated with the certified employee organization[] representing the employees involved.

Thus, according to the UFA, since the instant demands concern the rules and/or use of time and leave benefits, they are mandatory subjects of bargaining under the NYCCBL.

The Union explains that currently, there is a monthly restriction on the number of employees within each Battalion that may take days off to donate blood. The UFA asserts that its demands do not seek to remove all restrictions on when Firefighters or Fire Marshals may take blood days, only the monthly restriction as to the number of employees entitled to claim the benefit. Therefore, the Union denies that these demands infringe upon management rights, as the City contends.

Discussion

Firefighter Demand No. 46/Fire Marshal Demand No. 57 are classic examples of demands concerning a mandatory

subject of bargaining intertwined with management rights. As we have previously stated, where a demand has a dual character, we shall follow our practice of advising the parties of the elements of the demand that are mandatory subjects and of the elements that are nonmandatory subjects of bargaining.

It is undisputed that to the extent that the UFA seeks to bargain for a specific number of paid leave days per employee per annum for blood donation purposes, it is an appropriate and lawful subject for collective bargaining. However, the City argues that since the demands seek time off without regard to Department limitations or exigencies, they infringe upon the City's managerial right to establish through work schedules the level of manpower needed to operate the Department.

In Decision No. B-10-81, we stated:

> The [Union] has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation, sick leave, or other purposes. But, once agreement is reached on these provisions, it is the City's management prerogative to determine the level of staffing to be provided, by means of work schedules, within the limitations of the agreement on hours and leave benefits.[162]

In that case, we held that to the extent a demand seeks to interfere with the City's right to determine work schedules

[162] See also, Decision No. B-16-81.

and manpower levels, it is a nonmandatory subject of bargaining. PERB has also held demands that would restrict management control over scheduling or the extent of services to be provided to be nonmandatory.[163]

Accordingly, because the instant demands provide, in part, to altogether remove the current monthly restriction on the number of employees allowed to use this benefit within each Battalion, they infringe upon the City's exercise of its statutory right to determine the number of Firefighters and Fire Marshals on duty at any given time. Therefore, that part of Firefighter Demand No. 46/Fire Marshal Demand No. 57 is outside the scope of mandatory collective bargaining.

Firefighter Demand No. 47
Fire Marshal Demand No. 58

> Vacation and Leave - Article XII (New Section) Contractually clarify Department policy on vacation leave for member or spouse's childbirth or childcare (aside from medical leave for childbirth).

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[163] Patrolmen's Benevolent Association of Newburgh, New York, Inc. and City of Newburgh, 18 PERB ¶3065 (1985) (demand seeking to eliminate chief's overview of employee's use of personal leave days impinged on city's ability to determine manning levels and was, therefore, nonmandatory); Corning Police Department, Steuben County Chapter CSEA and City of Corning, 9 PERB ¶3086 (1976) (demand which would prohibit non-emergency shifts changes would compromise the city's right to determine the number of men who would be on duty at any time and was, therefore, nonmandatory).

City Position

The City asserts that Firefighter Demand No. 47/Fire Marshal Demand No. 58, "with [the] reference to 'contractually clarify' is vague and ambiguous" and, therefore, rendered a nonmandatory subject of bargaining.[164]

Union Position

The UFA notes that under Section 12-307a of the NYCCBL:

> [P]ublic employers ... shall have the duty to bargain in good faith on ... hours (including but not limited to overtime and time and leave benefits)....

The Union further notes that Section 12-307a(4) specifically provides, in relevant part:

> [A]ll matters, including but not limited to ... time and leave rules which affect employees in the uniformed ... fire ... services shall be negotiated with the certified employee organization[] representing the employees involved.

Thus, according to the UFA, since the instant demand concerns the rules and/or use of time and leave benefits, it is a mandatory subject of bargaining under the NYCCBL.

In response to the City's challenge that the demands are too vague, the Union explains:

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[164] The City cites Fairview Professional Firefighters Association, Inc. Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083 (1979); City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

> Currently, female Firefighters who give birth are granted parental leave following the birth of their children that is separate from vacation leave, while [male] Firefighters have only vacation leave available to them following the birth of their children.

The Union asserts that its demands, which seek to apply parental leave equally to both male and female employees, concerns "the regulation and procedure governing the proper use of leave." The Union contends that the duty to bargain on time and leave benefits includes a duty to negotiate on such matters.[165]

Discussion

Firefighter Demand No. 47/Fire Marshal Demand No. 58, concerning the Department policy governing vacation leave as it relates to childbirth/childcare, has been challenged by the City as so "vague and ambiguous" as potentially to encompass nonmandatory subjects. The City states, in particular, that the phrase "contractually clarify" renders the demand nonmandatory. The UFA denies the demands are vague. However, in its responsive pleadings, the Union explains what the current policy allegedly is and the changes it seeks.

In Fairview Professional Firefighters Association, Inc. Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083

[165] Decision No. B-16-81.

(1979), PERB considered and found nonmandatory the following union demand:

> That Article 16 (Work Schedule) be expanded to outline more specifically the present 4 group, 2 platoon system and that scheduled working hours not be altered except as provided for in the labor agreement (emphasis in original).

PERB reasoned that because the underscored language might call for unspecified changes in the work schedule, it could not be determined whether the demand would interfere with the employer's management right to set the number of firefighters to be on duty at any given time. In Rochester Fire Fighters Local 1071, IAFF and City of Rochester, 12 PERB ¶3047 (1979), PERB also held a demand "so vague that the City might not understand what would be required of it" is not a mandatory subject.

In a proceeding such as this, it is our policy to limit our holdings to the express terms of the demands placed in issue before the Board.[166] However, it is also our policy "to favor agreement and execution of contracts to define the rights of the parties."[167] In Decision No. B-43-86, we held a demand that was "unclear on its face," when cross-referenced to the full statement of the Union's demands, adequately to have put the City on notice of its intent.

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[166] Id.

[167] Decision No. B-3-75.

In the instant matter, we concede that these demands are unartfully drawn. However, the UFA's offered explanation of their intention demonstrates that it seeks bargaining on a Department policy and procedure governing the use of vacation time and parental leave within the meaning of Section 12-307a(4) of the NYCCBL. Moreover, it is clear to us that the Union is seeking equal application, to both male and female employees, of these time and leave benefits. Therefore, we find the matter addressed by Firefighter Demand No. 47/Fire Marshal Demand No. 58 a mandatory subject of collective bargaining.

Firefighter Demand No. 48
Fire Marshal Demand No. 59

Vacation and Leave - Article XII (New Section)
Provide that any employee who participates in a promotional examination shall be excused with pay, for any tour-of-duty scheduled on the day of such examination or the day prior to such examination.

City Position

The City challenges these demands on the following grounds:

(1) To the extent that it interferes with management's right under Section 12-307b of the NYCCBL to "determine the standards of selection for employment ... [and] the methods, means and personnel by which government operations are to be conducted," it infringes upon managerial prerogative.

(2) Civil service standards and procedures for examinations are reserved management rights.[168]

(3) To the extent the demand seeks time off "without regard to Department limitations or exigencies," it is outside the scope of bargaining.[169]

Union Position

The UFA characterizes Firefighter Demand No. 48/Fire Marshal Demand No. 59 as "simply [demands] for paid leave time" within the meaning of Section 12-307a of the NYCCBL.

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[168] Decision No. B-16-71.

[169] The City cites Decision No. B-16-81.

In response to the City's allegations, the Union denies that these demands have anything to do with either the selection process of personnel or the standards and procedures for examinations.

Discussion

The City alleges that both the nature and effect of the instant demands renders them nonmandatory. That is, the City contends, the demands seek to give employees certain rights concerning the personnel selection process, a subject that is reserved to management's discretion; and seek time off without regard to Department exigencies, constituting an encroachment upon the City's statutory right to establish manpower levels and schedule its employees. The Union denies the first contention but fails to address the second.

The City argues that "attendance at an examination is an integral part of the personnel selection process." In support of its position, the City cites Decision No. B-16-71, where we construed the phrases which reserve to the City the right to "determine the standards of selection for employment" and to "determine the methods, means and personnel by which government operations are to be conducted," to mean that:

> [C]ivil service standards and procedures for examinations are the methods and means which the City must use to select

personnel for appointment and promotion.

The relevant aspect of that decision, however, concerned the bargainability of a demand seeking that "Administration-wide and City-wide promotion lists to supplement departmental lists in filling vacancies by promotion" be used so that an employee will not be denied eligibility to take a promotional examination solely because of the absence of vacancies in his agency. Therein, we found, inter alia, that the City was not obliged to bargain with respect to its decision to hold either an open competitive examination or a promotional examination, which required exhaustion of departmental lists, for filling vacancies. This discretion, we held, was reserved to the City subject to guidelines set forth by the rules and regulations of the Civil Service Commission concerning the conduct of examinations for selection and promotion of personnel.

We do not find that case dispositive of the issue now before us. The instant demands do not concern either examination eligibility requirements or procedures for the conduct of promotional examinations. Rather, they address a form of time and leave benefit which, generally, as a function of hours, is a subject of bargaining within the

meaning of the NYCCBL.[170] In Decision No. B-10-81, we stated:

> The [Union] has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation, sick leave, or other purposes (emphasis added).

In this context, we next consider the City's allegation that inasmuch as these demands would allow "any employee who participates in a promotional examination" time off without recognition of Department limitations or exigencies, they infringe upon the City's statutory management's rights under Section 12-307b of the NYCCBL.

In Decision No. B-16-81, we considered a demand that compensatory time "be granted within thirty (30) days unless waived." Therein, we held that an otherwise bargainable demand which:

> [S]eeks an inflexible, absolute right to time off within a defined period of time without recognition of the exigencies of the department, ... infringes on management's right to establish manpower levels and schedule employees and is, therefore, a nonmandatory subject of bargaining.

PERB has also held demands that would restrict management control over the scheduling of paid leave, which in effect

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[170] Section 12-307a of the NYCCBL.

would be to restrict the nature of the services that may be offered by a public employer, are nonmandatory subjects of bargaining.[171]

Firefighter Demand No. 48/Fire Marshal Demand No. 59, by their terms, would give any number of employees the right to claim leave for this purpose at any one time. To this extent, because they interfere with the City's right to determine the number of Firefighters and Fire Marshals who should be on duty at a given time without regard to any Department limitations, we find that both demands are rendered nonmandatory.

Our conclusion herein, is reinforced by the fact that New York City Department of Personnel Policy and Procedure No. 657-86, issued on October 30, 1986, provides, in relevant part:

> **Excused Time for Examinations**
>
> A. Absences of permanent, provisional and temporary full-time employees shall be excusable, in the discretion of the Agency Head, upon submission of documentation satisfactory to the Agency Head, without charge to leave balances

[171] Patrolmen's Benevolent Association of Newburgh, New York, Inc. and City of Newburgh, 18 PERB ¶3065 (1985) (demand seeking to eliminate chief's overview of employee's use of personal leave days impinged on city's ability to determine manning levels and was, therefore, nonmandatory); City of Yonkers and Uniformed Fire Officers of the Paid Fire Department of the City of Yonkers, 10 PERB ¶3056 (1977) (held that employer's change in number of fire officers who may take a vacation at any one time was not a violation of City's duty to negotiate).

> for the following:
> (1) to take New York City Civil Service promotion and open-competitive examinations;....
>
> C. Leave may be granted by Agency Heads for test preparation courses held during work hours, where it has been ascertained by the Agency Head that the operations of the agency and its services to the public will not be adversely affected ...(emphasis added).

Personnel Policy and Procedure No. 657-86 is illustrative of the expressed reservation of the City's right, under Section 12-307b of the NYCCBL, to establish manpower levels and schedule its employees as it relates to this specific demand. It has long been held that the management rights clause of the NYCCBL reserves to the City certain prerogatives relating to terms and conditions of employment so as to render them nonmandatory subjects of bargaining.[172]

Firefighter Demand No. 51
Fire Marshal Demand No. 64

> SAFETY STANDARDS AND EQUIPMENT - Article XIII
> Require vehicle inspection in accordance with State Motor Vehicle Bureau Standards.

City Position

The City argues that a demand which seeks bargaining on a matter covered by statute that would involve the breach of

[172] Decision No. B-24-75.

an obligation or duty fixed by law is outside the scope of bargaining.[173] The City maintains that Section 308.5 of the Vehicle and Traffic Law ("VTL")[174] evidences the expressed intent of the legislature to reserve to the City the right to perform inspections which it considers necessary for the safe and proper operation of its vehicles and that to reach any contrary agreement would be unlawful.

Union Position

The Union argues that the instant demands neither seek to modify the law nor involve a breach of "an obligation or duty fixed by law." Rather, the Union claims that it seeks additional contract language which is not inconsistent with any statutory requirement or prohibition, concerning a mandatory subject of bargaining. The Union contends that the Board has not prohibited bargaining under these circumstances.[175]

The Union asserts that Firefighter Demand No. 51/Fire Marshal Demand No. 64 seek to establish a contractual

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[173] The City cites Decision Nos. B-24-75; B-5-75; B-7-72; B-11-68.

[174] Section 308.5 of the VTL, expressly excludes "fire vehicles" from the definition of "motor vehicle" for purposes of Article 5 of the VTL, entitled Periodic Inspection of Motor Vehicles.

[175] The Union cites Decision Nos. B-5-75; B-7-72; B-11-68.

standard for the inspection of fire vehicles where the legislature "simply chose" not to provide one. The UFA notes that the statute does not expressly prohibit the inspection of fire vehicles. The Union argues that inasmuch as the legislature has not defined a standard which its demand would modify or breach, the cases cited by the City which stand for the proposition that bargaining on the subject matter is preempted by statute are inapplicable.

In support of its position that the instant matter addresses a bargainable subject, the Union contends that "[t]he condition and safety of vehicles driven by Firefighters and Fire Marshals during the regular course of their duties not only constitutes a 'working condition' which Section 12-307a [of the NYCCBL] defines as a mandatory subject of bargaining, but also has an impact on the safety of employees." The latter contention, the Union asserts, is based upon the Board's finding in Decision No. B-16-81 that "issues of equipment safety ... [are] appropriate for consideration by [an] impasse panel."[176]

Discussion

We have previously held that in cases where some applicable statutory provision explicitly prohibits a public

[176] The Union cites Decision No. B-16-81 at 90.

employer from making an agreement as to a particular term and condition of employment,[177] or it is clear that a demand would require a contravention of law,[178] bargaining on such a subject is prohibited. However, to the extent that these demands only seek inclusion of a contractual standard for the inspection of fire vehicles which would conform to the inspection standards for other motor vehicles,[179] and does not otherwise contravene the express language of the statute, it is not a prohibited subject. Nonetheless, for the following reasons, we find the subject of these demands not mandatorily negotiable as the Union maintains, nor prohibited as the City urges, but a voluntary or permissive subject of collective bargaining.

The management rights clause of Section 12-307b of the NYCCBL reserves to the City the right to "maintain the efficiency of governmental operations ... determine the methods, means and personnel by which government operations are to be conducted ... [and] exercise complete control and

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[177] Decision No. B-7-72.

[178] Decision No. B-5-75.

[179] We take administrative notice that Section 308.6 of the VTL similarly exempts "police vehicles" from the definition of motor vehicles subject to periodic inspections. Therein, we further note that the statute requires the department operating such vehicles to submit a plan for periodic inspections which "shall be substantially equivalent to inspections required for other motor vehicles under this article."

discretion over ... the technology of performing its work." To the extent that these demands concern equipment, and would usurp the City's discretion over the methods, means and technology of performing its work, they infringe on the exercise of managerial prerogative and are rendered nonmandatory.[180] While the NYCCBL does not prohibit bargaining on nonmandatory or permissive subjects of bargaining,[181] we have held that they "may be negotiated only on mutual consent, and, likewise, may be submitted to an impasse panel only on mutual consent."[182]

We next consider the Union's reliance on our holding in Decision No. B-16-81, where we stated that "issues of equipment safety are appropriate for consideration by an impasse panel." It is true that we did refer a similar demand to the impasse panel in that case.[183] However, our decision in that case was unique for the following reasons.

In Decision No. B-16-81, the Correction Officer's

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[180] Decision Nos. B-43-86; B-16-75; B-3-73.

[181] Decision Nos. B-70-88; B-7-77.

[182] Decision No. B-7-72.

[183] In Decision No. B-16-81, Demand No. 22A stated:

> All Department vehicles are to be in proper working order with headlights, sirens, brakes, and radio communication systems, and all other mechanical parts functionable. Said vehicles are to be inspected in accordance with State requirements....

Benevolent Association ("COBA"), sought to bargain on several individual safety and security-related issues, including Demand No. 22A, which required department vehicles be in compliance with State motor vehicle inspection requirements. It is significant to note, however, that another COBA demand for the establishment of a Health and Safety Committee was submitted, by agreement of the parties, to the impasse panel with only the question of its potential jurisdiction remaining unresolved. Therein, we reasoned that it would be appropriate to refer all deadlocked demands "which may raise issues of equipment safety," including Demand No. 22A, to the impasse panel for its consideration in deciding the safety committee's jurisdiction. Although this referral was made prior to our determination of the existence of a practical impact, we did reserve jurisdiction over future questions of practical impact on safety resulting from the exercise of a managerial prerogative. We further reasoned that this approach was designed:

> [T]o allow the parties to negotiate, and if necessary the impasse panel to decide, the potential jurisdiction of a joint safety committee to consider safety issues arising from existing conditions that the Union seeks to change in its bargaining demands ...(emphasis added).

We find that it would not be appropriate to apply the same approach to the instant matter for the following

reasons. First, these parties have not agreed to submit the UFA's demand for the establishment of a joint health and safety committee to the impasse panel. Despite our finding herein that such a demand is a mandatory subject of collective bargaining, the fact remains that the mutual agreement of the parties regarding the establishment of the safety committee in Decision No. B-16-81 was a key factor in our decision to refer Demand No. 22A to the impasse panel therein. Second, we retained jurisdiction over future questions of practical impact, which included unresolved safety allegations in the event the impasse panel found them not to be within the safety committee's jurisdiction. Therefore, we believe that our holding in Decision No. B-16-81 is distinguishable and should be limited to the facts of that case, and we will consider the instant demand on its own merits and in the manner that is provided for under the NYCCBL.

Accordingly, we next consider the Union's allegation that the condition of fire vehicles has an impact on employee safety. Section 12-307b of the NYCCBL contemplates that to the extent the Union establishes that management decisions on equipment have a practical impact on the safety of unit employees, the Union possesses a right to seek the

alleviation of such practical impact.[184] This does not mean, however, that a Union need only claim a practical impact on safety in order to require the City to bargain.[185] The determination by this Board of the existence of a practical impact is a condition precedent to determining whether there are any bargainable issues arising from management's actions.[186] Furthermore, the question of whether a management action has had a practical impact on employees is a question of fact which may require the holding of a hearing.[187]

In the instant matter, the UFA alleges, in a conclusory fashion, that the "condition and safety of vehicles driven by Firefighters and Fire Marshals ... has an impact on safety." Otherwise, the record is devoid of any probative evidence to support a claim of practical impact on safety. We have long held that practical impact is a factual question and that the existence of such impact cannot be determined when insufficient facts are provided by the union.[188] Therefore, we must conclude that there is no basis

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[184] Decision No. B-43-86.

[185] Decision No. B-37-87.

[186] Decision Nos. B-43-86; B-36-86; B-16-74.

[187] Decision No. B-43-86.

[188] Decision Nos. B-37-87; B-38-86; B-27-80; B-16-74.

for a finding of practical impact to warrant a hearing in this matter.

Firefighter Demand No. 52

SAFETY STANDARDS AND EQUIPMENT - Art. XIII
Amend to provide that employees mentioned in §5 shall not operate apparatus until they have received proper training at a Division of Training Chauffeur/Tillerman Training School, have been properly qualified and have received a Fire Department license. Further provide that such employees qualify for and receive a New York State Class I driver's license as a result of such training.

Fire Marshal Demand No. 66

SAFETY STANDARDS AND EQUIPMENT - Art. XIII
Amend to provide that Fire Marshals shall not operate Department vehicles until they have received proper training in defensive driving and have received a certificate certifying successful completion of such training. Retain all other provisions of the 1984-1986 [sic] agreement.

City Demand No. 6

Delete first sentence of Article XIII, Section 5 (Training and Qualification of Chauffeurs and Tillerman).

The first sentence of Article XIII, Section 5 of the 1984-1987 Agreement provides that chauffeurs and tillermen shall have proper training and qualifications before operating firefighting apparatus. The remainder of Section 5 provides that seniority will be recognized in selecting chauffeurs and tillermen, "provided the senior applicant has the ability and qualifications to perform the work."

Firefighter Demand No. 52 would amend Section 5 to require that chauffeurs and tillermen receive training at a training school, be licensed by the Fire Department and

receive a Class I driver's license from the State.[189] Pursuant to Demand No. 66, Fire Marshals would receive training in defensive driving, and a certificate of successful completion of training would be required. In addition, the Union seeks the retention of "all other provisions" of the 1984-1987 Agreement.

City Position

The City asserts that the Union's demands involve subjects reserved to management pursuant to NYCCBL section 12-307b. According to the City, this Board has held that the adequacy of a training program and the level of training to be provided are management's prerogatives under the statute. The City points to Decision No. B-43-86, which dealt with a similar demand by this Union for training in defensive driving.

In response to the Union's argument that the City's proposed deletion of the existing contractual reference to proper training will have a practical impact on the safety of its members, the City asserts that the Union's

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[189]A Class 1 license is:

> valid for the operation of any passenger vehicle, any taxicab, any livery, any truck, any tractor, any truck-trailer combination, or any tractor-trailer combination. Vehicle and Traffic Law §501(2)(a) (McKinney Supp. 1989).

allegations are merely speculative and conclusory and, therefore, should be dismissed.

Union Position

In support of its demands, the Union argues that maneuvering firefighting vehicles at high speeds through heavy traffic on narrow city streets requires special skills and training in order to protect the safety of Firefighters and civilians. It alleges that as many as three traffic accidents a day involving firefighting vehicles is not uncommon.[190] The Union refers to an affidavit of Fire Marshal John F. Carney, dated July 30, 1986, which was submitted to this Board in connection with a scope of bargaining proceeding at the time of the last round of negotiations for Fire Marshals.[191] In this affidavit, Mr. Carney stated as follows:

> [a]s a Fire Marshal, I drive on a routine basis in circumstances requiring a higher than ordinary level of driving skills. I regularly respond to calls for assistance from other Fire Marshals or Firefighters, respond to the scenes of major fires, and respond to calls from Firefighters holding arson suspects. In each instance, I am

[190]Exhibit D to the Affidavit of Nicholas Mancuso includes a sampling of daily accident reports from November 1, 1988 through December 15, 1988, which also indicate the injuries sustained by Firefighters and civilians in such accidents.

[191]Docket No. BCB-884-86 (Decision No. B-43-86).

> required to respond as quickly as possible. This involves maneuvering through New York City traffic, often at higher than ordinary speeds, and requires a high level of skill in dealing with traffic, traffic signals, and pedestrians in order to avoid injury to myself, my partner, or others.

The Union argues further that the conditions under which Firefighters and Fire Marshals operate their vehicles are sufficiently hazardous to create a practical impact on their safety. In the event that the City's petition herein is granted, the Union therefore requests that the Board reconsider its refusal, in Decision No. B-43-86, to consider a safety impact claim and schedule a hearing on this issue.

Finally, the Union maintains that the City effectively acknowledged that the training of Firefighters has an impact on safety when it agreed to place the existing provision for proper training in the contract article entitled "Safety Standards and Equipment". The Union argues therefore that the City should not be permitted unilaterally to withdraw that provision from the Agreement.

Discussion

We have consistently held that training is a nonmandatory subject of bargaining.[192] In Communications

[192]Decision Nos. B-56-88; B-43-86; B-16-81; B-10-81; B-5-80; B-7-77; B-23-75; B-16-74; B-2-73; B-7-72; B-4-71; B-8-68.

Workers of America v. City of New York, for example, we rejected a demand for a fund to provide additional training and educational opportunities, reasoning that "the City has the management right to determine the quantity and quality of services to be delivered to the public, and, therefore, also the quantity and quality of the training required to achieve that service".[193] Similarly, in City of New York v. Uniformed Firefighters Association, we held that "questions concerning the level of training provided by the City are matters within the City's management prerogatives and are not mandatory subjects of bargaining".[194] We find no basis for departing from our prior decisions on this issue.

The Union's demands for "proper training" also seek to establish successful completion of such training, and certification, as pre-conditions for assignment to operate firefighting apparatus on department vehicles. To the extent that the demands thereby seek to impose pre-conditions, or qualifications, on the assignment of Firefighters and Fire Marshals, they are also nonmandatory subjects.[195] In Patrolmen's Benevolent Association v. City

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[193]Decision No. B-7-72 at 6.

[194]Decision No. B-43-86 at 16. This case involved demands filed by the UFA on behalf of Fire Marshals. See, Decision No. B-16-81.

[195]We have previously noted that qualifications are "preconditions, not conditions of employment. They define a

of New York, we held that the City had the right unilaterally to determine that experience in certain enumerated units of the Police Department was more valuable preparation for certain preferred investigative assignments and promotions than experience in other units.[196] We noted that:

> it is well-settled PERB law that a term or condition of employment is a mandatory subject of bargaining, but that the setting of qualifications for initial employment [Rochester School District, 4 PERB 4509, aff'd 4 PERB 3058 (1971)] or for promotion is not a mandatory subject of bargaining [Rennsselaer City School District, 13 PERB 3051 (1980), aff'd 15 PERB ¶7003, App. Div., 488 N.Y.S. 2d 883 (1982); Fairview Professional Firefighters Ass'n, 13 PERB 3083 (1979); West Irondequoit Board of Education, 4 PERB 4511, aff'd 4 PERB 3070 (1971)].

Additionally, we have held that it is management's right to require that employees be licensed by the State in order to be considered for certain professional positions. The acquisition of a license, like the accumulation of a certain type of experience, constitutes a qualification for employment or promotion which management may impose

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level of achievement or a special status deemed necessary for optimum on-the-job performance". Decision No. B-38-86 at 13. See, Decision Nos. B-24-87; B-7-87.

[196]Decision No. B-24-87, aff'd, Caruso v. Anderson, Index No. 17123/87, Sup. Ct., N.Y. Cty., IA Pt. 21, NYLJ, 11/9/87 (Saxe, J.), aff'd, App. Div., 1st Dept. (Slip op. 12/2/88).

unilaterally on its employees.[197] Just as the employer is under no obligation to negotiate with the representative of its employees when it seeks to establish qualifications for employment, we find that it is under no obligation to negotiate where a union seeks to have such qualifications imposed. Accordingly, the Union's demand that chauffeurs and tillermen qualify for and receive Fire Department and New York State Class I driver's licenses is a nonmandatory subject of bargaining.

With respect to the Union's claim that the hazardous conditions under which Firefighters and Fire Marshals are required to operate their vehicles give rise to a practical impact on safety, we note that a similar allegation was made by this Union in Docket No. BCB-884-86 relating to a set of training demands for Fire Marshals. In Decision No. B-43-86, we acknowledged that the necessity for Fire Marshals to drive

> at high speed through traffic creates a threat to their safety which might be ameliorated by ... driving training [However, we concluded,] it does not present a case of practical impact within the meaning of the NYCCBL. The concept of practical impact is included in NYCCBL §[12-307b] as a means of alleviating the adverse impact upon employees of a decision made by the

[197] See, Committee of Interns and Residents v. New York City Health and Hospitals Corporation, Decision Nos. B-38-86 (Chief Residents required to have New York State license).

> employer in the exercise of its statutory management prerogatives. It is not enough to allege a threat to employee safety; in order to avail itself of the practical impact procedures of the law, it is incumbent upon the Union to demonstrate that the alleged safety impact results from a management decision or action, or inaction in the face of changed circumstances. No such management decision or action is alleged by the UFA herein, nor are changed circumstances alleged.[198]

In the instant matter, the Union has submitted the 1986 affidavit of Fire Marshal Carney and an affidavit of Union President Mancuso, both of which describe dangers regularly involved in the routine operation of department vehicles under the conditions prevailing in New York City. The Union has also submitted examples of vehicle accident reports in order to illustrate the frequency with which such incidents occur and the resulting injuries to Firefighters and civilians. We are not persuaded, however, that the Union has made a sufficient showing to warrant a hearing on its safety impact claim. It has failed to establish that there has been any management action or any change in circumstances (such as a significant increase in the number of vehicle accidents) to which management has failed to respond. We recognize that the work of Firefighters and Fire Marshals is dangerous, but the Union must do more than

[198]Decision No. B-43-86 at 17-18.

simply refer to the hazards inherent in such work if it is to establish a safety impact claim.

Finally, with respect to the last sentence of Fire Marshal Demand No. 66, which seeks to retain "all other provisions" of the 1984-1987 Agreement, we find the demand nonmandatory because it is overbroad. On its face, this provision would require the City to continue into the new agreement both mandatory and nonmandatory provisions of the 1984-1987 Agreement. The City cannot be obligated to grant benefits that do not constitute mandatory subjects of bargaining, unless it has waived its statutory right not to do so.[199] There is no evidence of waiver here. To the contrary, the City has affirmatively indicated its intention to delete from the 1984-1987 Agreement certain provisions which it deems to constitute permissive subjects of bargaining.

Based upon all of the aforementioned considerations, we hold that the City may delete unilaterally the first sentence of Section 5 of Article XIII of 1984-1987 Agreement, as that sentence involves the nonmandatory subjects of training and qualifications for particular

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[199]Patrolmen's Benevolent Association of Newburgh, New York, Inc. and City of Newburgh, 18 PERB ¶3065 (1985). See, Decision No. B-11-68 ("fact that agreement [on a voluntary subject] has been reached and included in a contract cannot transform a voluntary subject into a mandatory subject ... for the latter is fixed and determined by law").

assignments. Because they also involve the subjects of training and qualifications for assignment, we further find that Firefighter Demand No. 52 and Fire Marshal Demand No. 66 are not mandatory subjects of negotiation and may not be submitted to the impasse panel.

Firefighter Demand No. 53

> SAFETY STANDARDS AND EQUIPMENT - Art. XIII
> Provide for the establishment of a safety committee to replace the existing Fire Department Safety Committee, with equal Union/Management representation. Further provide for the submission of deadlocked disputes to the arbitration machinery of the agreement within 30 days of the deadlock.

Fire Marshal Demand No. 67

> SAFETY STANDARDS AND EQUIPMENT - Art. XIII
> Provide for the establishment of a safety committee consisting of six (6) members, with equal Fire Marshal/Fire Department representation; one Department-designated member of the Committee to be from the Safety Division. Provide for the submission of deadlocked disputes to the arbitration machinery of the agreement within 30 days of the deadlock.

City Position

The City contends that Firefighter Demand No. 53 and Fire Marshal Demand No. 67 are vague and ambiguous because they do not clearly define the jurisdiction of the proposed safety committee. Since the demands do not identify the subjects that would be addressed by the committee, the City asserts that the jurisdiction of the committee might be extended to matters that are not mandatory subjects of

bargaining. Petitioner argues further that the heading - "Safety Standards and Equipment" - as well as the content of the demands reveals that the demands deal with nonmandatory issues.

The City also argues that the demands are not mandatory in that they would give the Union the right to submit nonmandatory subjects to interest arbitration, contrary to NYCCBL section 12-311c.[200] Finally, the City contends that Fire Marshal Demand No. 67 is nonmandatory insofar as it seeks to direct the identity of at least one of the management representatives on the committee.

Union Position

The Union denies that its demands are vague or ambiguous as to the jurisdiction of the committee, arguing that the demands, by their terms, are limited to safety issues. The Union also denies that the demands seek to compel interest arbitration on nonmandatory subjects. Referring to its response to a similar objection raised in connection with Fire Marshal Demand No. 83, the Union explains:

> [r]egardless of whether the procedure would be deemed interest or rights

[200]NYCCBL section 12-311c(3)(c) provides that "[t]he report of an impasse panel shall be confined to matters within the scope of collective bargaining".

> arbitration, the submission of an issue to arbitration would plainly have to be done within the framework of the Collective Bargaining Law. Within that framework, this Board has the power to determine substantive arbitrability and scope of bargaining issues, and to prevent issues that are exclusively within the scope of the City's management rights from going to arbitration. Accordingly, the City can prevent a non-mandatory subject of bargaining from going before an arbitrator by the usual methods of either filing a scope of bargaining petition or a petition challenging arbitrability.

Finally, the Union asserts that Fire Marshal Demand No. 67 does not direct the identity of a management representative on the proposed safety committee, but states only that the member shall be "Department-designated."

Discussion

The creation of a joint labor-management safety committee is a subject which PERB has addressed frequently, beginning with its decision in White Plains Police Benevolent Association and City of White Plains.[201] In White Plains, PERB held that a demand for two-man patrol cars for police officers was a nonmandatory subject of negotiations, but it also recognized that mandatorily bargainable safety implications might predominate over the nonmandatory manning

[201] 9 PERB ¶3007 (1976).

aspect of such a demand depending upon the area and time of assignment. Since, PERB concluded, it would be an exercise in futility to attempt to provide in a labor agreement for all possible eventualities, it recommended that the parties "could create a joint safety policy committee ... to consider issues of safety that relate to manning standards ..., [which] process could be made subject to the grievance arbitration procedure."[202], PERB noted that a demand to establish such a committee would be a mandatory subject of negotiations.

Following White Plains, PERB repeatedly held that demands for the creation of a joint committee to consider matters of safety for the members of a Fire Department, including the total number of employees reporting to a fire and the minimum number to be assigned to a piece of firefighting equipment, and providing for binding arbitration of issues not resolved by the committee, were mandatory subjects of bargaining.[203] The Appellate Division

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[202]Id. at 3011.

[203]E.g., White Plains Professional Firefighters Association, Local 274, I.A.F.F. and City of White Plains, 11 PERB ¶3089 (1978), aff'd ____ AD2d ____, 12 PERB ¶7019 (2d Dept. 1979), motion for leave to appeal denied, 49 NY2d 704, 13 PERB ¶7001 (1980); Uniformed Fire Fighters Association, Inc., Local 273, I.A.F.F. and City of New Rochelle, 10 PERB ¶3078 (1977), aff'd sub nom. City of New Rochelle v. Crowley, 61 AD2d 1031, 11 PERB ¶7002 (2d Dept. 1978); The International Association of Firefighters, Local 189 and City of Newburgh, 11 PERB ¶3087 (1978); City of Mount Vernon and Uniformed Fire Fighters

(Second Department) approved this approach, noting that PERB established "an eminently reasonable balance between the conflicting considerations involved" when it permitted negotiations over the establishment of a committee "to consider individual and specific factual situations that encompass safety considerations" while, at the same time, not forcing "management to negotiate general questions of manpower deployment under the guise of safety".[204]

This Board has not ruled on the negotiability of a demand for the establishment of a joint safety committee.[205] We have held, however, that a threat to employee safety resulting from a particular exercise of management prerogative constitutes the basis for a finding that a "practical impact" may attach to the exercise of that prerogative. In such cases, we stated, we would require

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Association, I.A.F.F., Local 107, 11 PERB ¶3049 (1978). See, International Association of Firefighters of the City of Newburgh, Local 589 and City of Newburgh, 10 PERB ¶3001 (1977), aff'd sub nom. International Association of Firefighters of the City of Newburgh, Local 589 v. Helsby, 59 AD2d 342, 399 NYS2d 334 (3d Dept. 1977); The Troy Uniformed Firefighters Association, Local 2304, I.A.F.F. and City of Troy, 10 PERB ¶3105 (1977).

[204]City of New Rochelle v. Crowley, 61 AD2d 1031, 11 PERB ¶7002 at 7004 (2d Dept. 1978).

[205]In Decision No. B-16-81, we noted that the parties had agreed to submit to an impasse panel a Correction Officers Benevolent Association demand to establish a joint health and safety committee and provide for deadlocked disputes to be submitted to the grievance-arbitration procedure. Because of the parties' agreement, we did not determine the negotiability of the proposal.

negotiations concerning the alleviation of practical impact prior to implementation of the proposed management decision.[206] This approach, like PERB's balancing approach, has the effect of preserving management's prerogatives while assuring that employees will be protected from unilateral employer action which threatens their safety.

Turning to the present demands, we find that the proposal to establish a safety committee consisting of an equal number of management and union representatives to consider matters affecting the safety of Firefighters and Fire Marshals, is a mandatory subject of bargaining. We have considered the City's objection that the reference to a "safety committee" is too vague because it does not clearly define the jurisdiction of the proposed committee. We do not agree. There is nothing in the language itself which would render the demands nonmandatory insofar as the jurisdiction of the committee is concerned. The demands clearly contemplate discussion of safety-related issues, which this Board and PERB have long held to be mandatory subjects of bargaining.[207] Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and

[206]Decision Nos. B-37-82; B-6-79; B-5-75.

[207]E.g., Decision No. B-5-75; City of Albany and Albany Police Officers Union, Local 2841, AFSCME, AFL-CIO, 7 PERB 3078 (1974).

Fairview Fire District,[208] as well as Rye Police Association and City of Rye,[209] cited by the City, are distinguishable from the case here, for in Fairview, the Union sought to submit to an interest arbitration panel a demand for a general health and safety committee to "cover all matters relating to the health and safety of the bargaining unit as prescribed and set forth by this Public Arbitration Panel" (emphasis in original), while, in Rye, the demand specifically defined the jurisdiction of the proposed safety committee to include nonmandatory subjects of bargaining, such as minimum manpower, guaranteed back up personnel to respond to emergency calls, and guaranteed adequate supervision on the road. The instant demands are silent as to the jurisdiction of the proposed safety committee and suffer neither the defect of overbreadth found in Fairview, nor the inclusion of patently nonmandatory language as in Rye. While the possibility that the jurisdiction of the safety committee might be extended to nonmandatory subjects exists here, it is not an inherent condition of the demands. In our view, the issue of the committee's jurisdiction in the instant matter involves the merits of the demand rather

[208]12 PERB ¶3083 (1979).

[209]17 PERB ¶4645 (ALJ 1984).

than its negotiability.[210]

The City's argument that the "heading" of the demand indicates that it refers to nonmandatory subjects is also rejected. "Safety Standards and Equipment" is the heading of Article XIII of the 1984-1987 Agreement, the article in which the new provision for a safety committee is proposed to be included. We do not consider it to be a part of the demand.

Two additional provisions of the Union's safety committee demands do involve nonmandatory subjects of bargaining, however. The provision that "one Department - designated member at the Committee ... be from the Safety Division" is nonmandatory because it would interfere with the City's statutory right to "determine the methods, means and personnel by which government operations are to be conducted."[211] As PERB has held, a union may demand that the employer be represented on a safety committee and that the employer's representatives be given appropriate authority. However, the union may not specify who should represent the employer.[212]

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[210]See, City of Schenectady and Schenectady Patrolmen's Benevolent Association, 21 PERB ¶3022 (1988).

[211]NYCCBL §12-307b.

[212]Somers Faculty Association and Somers Central School District, 9 PERB ¶3014 (1976).

We also find that the provision in these demands for "the submission of deadlocked disputes to the arbitration machinery of the agreement" is a nonmandatory subject because it might require the City to submit to final and binding arbitration on nonmandatory subjects of bargaining simply because the City voluntarily discussed such matters with the Union in the free-flowing, non-compulsory setting of a labor-management safety committee.[213] We note that PERB has held that a demand for a general safety committee which provides for grievance arbitration of complaints is mandatorily negotiable if it is limited to individual and specific safety concerns.[214] Confirming PERB's decision in Uniformed Fire Fighters Association, Local 273, I.A.F.F. and City of New Rochelle, the Appellate Division answered the city's concern that arbitration might be sought as to pure managerial questions which were unrelated to safety by asserting that such an attempt could be "repulsed at such time as problems [arose]

[213]Although the Union, in its statement of position, suggests that the procedure could be "interest or rights arbitration", the reference in the demands themselves to the "arbitration machinery of the agreement" appears to contemplate grievance arbitration.

[214]Uniformed Fire Fighters Association, Local 273, I.A.F.F. and City of New Rochelle, 10 PERB ¶3078 (1977), conf'd, 61 AD2d 1031, 11 PERB ¶7002 (1978); White Plains Professional Firefighters Association, Local 274, I.A.F.F., supra, 11 PERB ¶3089.

within the milieu of explicit and concrete situations".[215] We do not follow the decisions of PERB in this area because we believe that our statutory management rights clause must be read to protect the City from being required to submit nonmandatory issues to arbitration over its objection even in the narrowly defined context of "explicit and concrete situations".[216] Rather, in such cases, we would apply the general rule that if the definition of a grievance, by its terms, extends the grievance procedure to nonmandatory subjects of negotiation, or if it may do so, the grievance definition itself is a nonmandatory subject.[217] Since the

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[215]11 PERB ¶7002 at 7004.

[216]Of course, to the extent that the City may have limited its management rights through permissive bargaining and agreement thereon, it may be required to submit unresolved disputes on such matters to arbitration.

[217]In Pearl River Union Free School District and Pearl River Teachers Association, 11 PERB 3085 (1978), PERB held that a proposal that a grievance be defined to mean "[a]ny claimed violation, misinterpretation, or inequitable application of any existing laws, and rules and regulations of the Commissioner of Education, and/or the Board of Education, or of this agreement which relate to all matters involving any aspect of the employment relationship" was too broad to constitute a mandatory subject because it would extend the grievance procedure to matters that are themselves not mandatory subjects of negotiation. In City of Schenectady, supra, 21 PERB ¶3022, PERB held that a proposal that a grievance be defined as "a claimed violation, misinterpretation or inequitable application of the existing rule, procedures or regulation covering working conditions applicable to the members of the Department and ... include all of the provisions of this agreement" was nonmandatory because it extended beyond the four corners of the proposed agreement to include matters about which the parties might have no duty to negotiate.

provision for arbitration of deadlocked safety disputes in the instant demands is so broad that it might extend the parties' grievance procedure to nonmandatory subjects of negotiation, we conclude that it is nonmandatory and may not be submitted to the impasse panel.

Firefighter Demand No. 54
Fire Marshal Demand No. 68

SAFETY STANDARDS AND EQUIPMENT - Article XIII (New Section) Contractually assure that the City will comply with all applicable occupational safety and health and right-to-know laws.

City Position

The City argues that demands which seek bargaining on a matter covered by statute that either duplicates statutory benefits,[218] or requires compliance with the law,[219] are outside the scope of bargaining. The City contends that statutory provisions which afford protection mandated for employees by law, by virtue of being statutory benefits, equally, are prohibited subjects of bargaining.[220]

Union Position

In support of its position that a demand which seeks contractually enforced compliance with occupational safety and health and right-to-know laws is bargainable, the Union relies upon the Board having recently stated:

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[218] The City cites Scarsdale Police Benevolent Association, Inc. and Village of Scarsdale, 8 PERB ¶3075 (1975).

[219] The City cites Chateaugay Central School District and Chateaugay Chapter, NYSUT, Local 2557, 12 PERB ¶3015 (1979).

[220] The City cites County of Schenectady and Sheriff and Schenectady County Sheriff's Benevolent Association, 18 PERB ¶3038 (1985).

> We do not agree with the assertion that a matter covered by a statute is necessarily a prohibited subject of bargaining. It is well-settled that the requirement of good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment.[221]

The Union contends that since occupational safety and health concerns clearly relate to terms and conditions of employment,[222] a demand for health and safety protection that can be remedied through the contractual grievance and arbitration procedure is a mandatory subject of bargaining.

Discussion

For the reasons stated supra at pages 8-14, we reject the City's contention that demands are nonmandatory because they are redundant or seek compliance with existing law. Rather, we will determine the negotiability of any demand concerning a mandatory subject of bargaining which also relates to a matter covered by statute utilizing the test as set forth supra on page 9-10.

Essentially, the UFA's demand seeks a contractual remedy for alleged management acts which constitute

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[221] Decision No. B-41-87.

[222] The Union cites Scarsdale Police Benevolent Association, Inc. and Village of Scarsdale, 8 PERB ¶3075 (1975) (a demand that unit employees not be required to ride in unsafe vehicles a mandatory subject to the extent that it involves safety).

violations of all applicable occupational safety and health and right-to-know laws. As the basis for its contention, the Union asserts that Firefighter Demand No. 54/Fire Marshal Demand No. 68 are bargainable because any demand concerning occupational safety and health "clearly relates to terms and conditions of employment." Therefore, the Union does not specify any particular statute for which it seeks the additional protection of the contractual grievance and arbitration procedure, presumably, because its position is that all such laws concern mandatory subjects of bargaining.

We are unpersuaded by this argument and are constrained to find these demands nonmandatory in their entirety due to the UFA's failure to particularize the "applicable" law. In order to enable us to render a decision as to their status as mandatory subjects, it is incumbent upon the Union to do more than to imply that all such laws necessarily concern mandatory subjects of negotiation. Such an assumption arguably could result in an impermissible infringement of the City's statutory managerial prerogative conferred by Section 12-307b of the NYCCBL. We have long held that this clause reserves to the City certain management rights concerning terms and conditions of employment so as to

render them negotiable on a permissive basis only.[223] Therefore, while a statute may concern a term and condition of employment within the meaning of Section 12-307a of the NYCCBL, the bargainability of a demand relating to that statute may be limited by Section 12-307b of the NYCCBL.

For example, the New York State Administrative Code, Title XII, Part 800, Section 800.3 adopts, as the occupational safety and health standards for protection of the safety and health of public employees, certain standards of Title 29 of the Code of Federal Regulations ("CFR"). Included in the applicable CFR standards, Section 1910.156(c)(1) requires that:

> The employer shall provide training and education for all fire brigade members commensurate with those duties and functions that fire brigade members are expected to perform.

Following the Union's line of reasoning, this statute would be a mandatory subject of bargaining because it concerns the "safety and health of public employees." However, we have long held, pursuant to Section 12-307b of the NYCCBL, training procedures are a management right,[224] and demands for training are permissive subjects of

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[223] Decision No. B-24-75.

[224] Decision No. B-16-74.

bargaining.[225] Therefore, under the NYCCBL, a specific demand requesting compliance with Section 1910.156(c)(1) of the CFR would be rendered a nonmandatory subject of collective bargaining.

Inasmuch as the UFA has not provided sufficient information to enable us to make the initial determination as to the mandatory status of its demands, or as to any of the laws which it claims are applicable, we cannot, therefore, apply the aforementioned test concerning the negotiability of matters that are also covered by statute. Accordingly, we find that the instant demands, as phrased, are not appropriate for consideration by the impasse panel.

Firefighter Demand No. 55

> FACILITIES - Art. XIV
> §1: Require department to provide adequate decontamination facilities for protective clothing. Further amend last sentence to provide that if the Department does not correct a claimed violation within 72 hours the Union may file a grievance at Step III of the grievance procedure.

Fire Marshal Demand No. 70

> FACILITIES - Art. XIV
> §1: Retain provisions in 1984-1986 [sic] agreement except to additionally provide for adequate decontamination facilities for protective clothing. Further amend last sentence to provide that if the Department does not correct a claimed violation within 72 hours the Union may file a grievance at Step III of the grievance procedure.

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[225] Decision No. B-7-72.

Article XIV, §1 of the Agreement provides that all quarters will have adequate heating, hot water, sanitary and sanitation facilities. If the Department fails to correct any claimed violations of Article XIV, §1 within a reasonable time, the Union is authorized to file a grievance at Step III of the grievance procedure. Step III of the grievance procedure, which is currently in Article XX, §1 of the Agreement, is the last stage before arbitration.

The demands, which are similar in substance, would require the City to provide decontamination facilities in addition to continuing to provide the other facilities set forth in Article XIV. They would also require the Department to correct any violation of Article XIV, §1 within 72 hours rather than within a reasonable time.

City Position

The City characterizes the demands as equipment demands.[226] The City argues that NYCCBL §12-307b vests it with the exclusive authority to determine the nature of equipment used by its agencies. The City also relies on Rye Police Association and City of Rye[227] in which it alleges PERB held that a demand to compel a nonmandatory subject of

[226]The City cites Decision Nos. B-43-86; B-23-85; B-16-75; B-3-75.

[227] 17 PERB ¶4645 (1984).

bargaining to "interest" arbitration is, itself, outside the scope of bargaining.

Union Position

The Union relies on the Mancuso Affidavit, ¶19 which, in part, states that Firefighters are increasingly exposed to a number of toxins including polychlorinated byphenyls (PCBs). The Affidavit further states that the long-term health effects of exposure to the chemicals is still unknown, and the effects of these substances often do not manifest themselves until after prolonged exposure. It alleges that the toxic substances contaminate clothing and equipment, settle on the skin and are ingested into the body as a result of breathing toxic fumes. The Union contends that because the Department has not made contamination facilities available to those who have been contaminated, there has been an impact on the health of employees.[228]

Discussion

The Union seeks the following from the City in the instant demands: 1) the retention of Article XIV, §1; 2) the addition to Article XIV, §1 of a requirement that the City provide decontamination facilities; and 3) the amendment of

[228] The Union cites NYCCBL §12-307b.

Article XIV, §1 so that the City must correct a claimed violation of it within seventy-two hours rather than "within a reasonable time."

First, we note that Article XIV, §1 requires adequate heating, hot water, sanitary and sanitation facilities for Fire Marshals and Firefighters. We held in Decision No. B-43-86 that a Fire Marshal demand for cleanup facilities is a mandatory subject of bargaining. It would appear from the face of the instant demand that the services provided for in Article XIV, §1 are intimately connected with those facilities. Even if they were not, they appear to be associated with employee comfort. As such, they are conditions of employment and not equipment and are mandatory subjects of bargaining with respect to Fire Marshals and Firefighters.[229] The City's petition addresses only equipment demands and does not address this part of the Union's demands.

Second, the Union's demand with respect to decontamination facilities does not implicate a condition of

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[229] See Croton Police Ass'n and Village of Croton-on-Hudson, 15 PERB ¶4644 (1982) (demands for air conditioning and AM/FM radios in police cars primarily concerned with comfort were deemed mandatory subjects of bargaining); County of Onondaga and Deputy Sheriff's Benevolent Ass'n of Onondaga County, 14 PERB ¶3029 (1981) (demand with respect to comfort of uniform deemed mandatory subject of bargaining); Scarsdale Police Benevolent Ass'n and Village of Scarsdale, 8 PERB ¶3075 (1975) (demand for air conditioning in police car concerned with comfort and thus was a term and condition of employment).

employment. In Decision No. B-43-86, we found that a demand for clean-up facilities and facilities for the storage of clean clothing involved a working condition within the meaning of the NYCCBL in light of the fact that employees got very wet and dirty. In that case, we found that based on the particular circumstances of the case, which included the fact that there was a regular and traditional practice with respect to the facilities, the demand was one which related to working conditions. The Union makes no such allegations with respect to decontamination facilities.

Furthermore, as we have held in the past, demands regarding equipment are non-mandatory subjects of bargaining regardless of whether employee safety is implicated.[230] Thus, to the extent that the instant demands can be characterized as demands for equipment, they are also not mandatory subjects.

The Union contends, however, in the Mancuso Affidavit that there has been an increasing amount of toxic substances contained in building materials and as a result, they have been released in fires to which Firefighters and Fire Marshals are exposed. As noted above, the Union alleges that PCBs and other known contaminants fall on Firefighters' clothing, equipment and their skin. Firefighters also

[230] Decision Nos. B-47-88; B-43-86.

ingest and inhale these toxic substances. The effects of exposure to many of the toxins are unknown and of those that are known to science, the effects often do not manifest themselves until after exposure over a period of time. The Union contends that the Department has failed to make decontamination facilities available to Firefighters who have been exposed to toxins.

We have said that in order to avail itself of the practical impact procedures of the NYCCBL, as the Union seeks herein, a union must demonstrate that the alleged safety impact results from management's inaction in the face of changed circumstances.[231] In some circumstances, we have recognized that the potential consequences of the exercise of a management right are so serious as to give rise to an obligation to bargain before actual impact has occurred. However, the burden is on the Union to prove a threat to the safety of employees before we find there is an impact justifying the imposition of a duty to bargain.[232]

On the present record we cannot determine whether the City's failure to act has resulted in a practical impact on employee safety requiring the City to bargain over the impact. We are, nonetheless, persuaded that the Union has

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[231] Decision Nos. B-69-88; B-43-86.

[232] Decision Nos. B-69-88; B-31-88; B-37-82.

raised a substantial issue of safety impact which is sufficient to warrant a hearing. It is possible that new building materials are being used which would have a safety impact on Firefighters and/or that newly discovered evidence as to hazardous components of material long in use would suggest a similar conclusion. We take notice of the fact that as technology has advanced, the toxic effects of substances and products, which may have always existed are only now being ascertained. We therefore direct that a hearing be held in order to permit the parties the opportunity to present evidence upon which we may determine whether there has been any practical impact on the safety of the employees involved.

Finally, with respect to the third aspect of the Union's demands, we find that the subject demands do not seek, as the City suggests, the referral of a nonmandatory subject of bargaining to interest arbitration but rather to contract arbitration. Thus the City's reliance on PERB's holding in Rye Police Association, supra, is misplaced.

The portion of the demand which would require the submission to grievance procedures of disputes over the provision of adequate heating, hot water, sanitary and sanitation facilities to quarters is a mandatory subject of bargaining. As stated above, those facilities are conditions of employment. A demand for the arbitration of a

mandatory subject of bargaining is a mandatory subject of bargaining.

The provision for decontamination facilities is a nonmandatory subject of bargaining and, therefore, cannot be the subject of arbitration. Nonetheless, collective bargaining relating to the alleviation of the conditions allegedly requiring them may be mandated should we hereafter find that there is a practical safety impact on employees.

Firefighter Demand No. 56

FACILITIES - Art. XIV (Add)
§3: Requires acceleration of renovation projects and assure completion of one project before commencement of next. Further provide that security shall be provided on renovation projects by Firefighters without affecting or reducing minimum-manning requirements.

Fire Marshal Demand No. 72

FACILITIES - Art. XIV
New Section: Provide that any newly occupied Fire Marshal quarters shall be in conformance with building specifications for Firehouses, as well as with any other applicable laws, regulations or specifications.

Fire Marshal Demand No. 106

ATTACHMENT F
Clarify that Attachment applies to Fire Marshal quarters as well.

Attachment F is an undated letter from Robert Linn to Nicholas Mancuso. It provides that the parties agree that all fire companies which are adjacent to police stations will have access to heating and cooling controls located in police stations or that the companies will have separate controls. In the letter, the City also agrees to attempt to resolve difficulties with respect to heating and cooling controls with the police department and other City officials.

The letter further states that the parties agree that all fire companies will have adequate ventilation. Pursuant

to the letter, the City agrees to continue installing floor ventilation systems according to a schedule furnished by the Union and to continue maintaining the ventilation systems which have been installed.

City Demand No. 7

Delete Article XIV, §3 (Firehouse Renovations.)

Article XIV, §3 provides that issues regarding firehouse renovations will be referred to the quality of work life committee in the Fire Department

City Position

Relying on NYCCBL §12-307b, the City argues that it has the right to determine the methods and means by which it may conduct its operations including the right to determine equipment and facilities to be used in performing work duties. Thus, the City contends that the conduct of firehouse renovations as demanded in Firefighter Demand No. 56, the specifications for Fire Marshal quarters as demanded in Fire Marshal Demand No. 72 and the application of Attachment F to Fire Marshal quarters as sought in Fire Marshal Demand No.106 are managerial prerogatives.[233]

The City also objects to the component of Fire Marshal

[233] The City cites Decision No. B-16-81.

Demand No. 106 which requires that security at renovation sites be provided by Firefighters without affecting or reducing minimum-manning requirements. Relying in part on our decision in Decision No. B-43-86, the City argues that manning is a nonmandatory subject of bargaining.[234]

The City characterizes Fire Marshal Demand No. 72, as one in which the Union seeks the duplication of statutory benefits and compliance with the law.[235]

Finally, in support of its demand that Article XIV, §3 be deleted, the City argues that there is no authority for the Union's contention that the test for whether a demand is mandatory is whether it intrudes on the exercise of any managerial right.[236] The entire subject matter of renovation of facilities is outside the scope of collective bargaining.

Union Position

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[234] The City also cites Troy Uniformed Firefighters Ass'n, L.2304, IAFF and City of Troy, 10 PERB ¶3015 (1977); L. 294, IBT and City of Amsterdam, 10 PERB ¶3007 (1977); White Plains Police Benevolent Ass'n and City of White Plains, 9 PERB ¶3007 (1976); City of Niagara Falls and Niagara Falls Uniformed Fire Fighters Ass'n, L. 714, 9 PERB ¶3025 (1976); Scarsdale Police Benevolent Ass'n and Village of Scarsdale, 8 PERB ¶3075 (1975). It also cites Decision Nos. B-43-86; B-24-75; B-5-75; B-13-74.

[235] The City cites County of Schenectady and Schenectady County Sheriff's Benevolent Ass'n, 18 PERB ¶3038 (1985) and Village of Scarsdale, supra, 8 PERB ¶3075.

[236] The City cites Decision Nos. B-53-86; B-23-85; B-3-75; B-16-74. It also cites Chateaugay Central School District and Chateaugay Chapter, NYSUT, L. 2557, 12 PERB ¶3015 (1979).

The Union argues that Fire Marshal Demand Nos. 72 and 106 and Firefighter Demand No. 56 relate to work conditions. Relying on our decision in Decision No. B-43-86, the Union argues that this Board addressed the subject of Fire Marshal quarters and held them to be an issue of working conditions as that term is used in NYCCBL §12-307a. Indeed, the Union contends that Fire Marshal Demand No. 72 is "indistinguishable" from the demand which was addressed by this Board in Decision No. B-43-86.[237] The Union also argues that the City's argument that Fire Marshal Demand No. 72 simply seeks compliance with existing law is misguided.[238]

Finally, the Union argues that Article XIV, §3 which the City seeks to delete from the current Agreement, does not obligate the City to provide any particular facility or arbitrate any issue concerning facilities but merely to discuss the subject. Therefore, the Union contends, the section does not intrude on the exercise of a managerial right, and the City may not unilaterally delete it.

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[237] The Union refers to Demand No. 8 which reads as follows:

> Each Fire Marshal unit shall have their own quarters including individual locker facilities for cleaning and facilities for storage of equipment.

[238] The Union cites Decision No. B-41-87.

Discussion

Equipment purchasing and facility planning have been held by PERB to constitute nonmandatory subjects of bargaining. In Chateaugay Central School District,[239] the Union presented a demand seeking the following:

> When modifications to facilities (remodeling, building, etc.) or major equipment purchases are being considered, consultation with the teacher or teachers directly affected will be a matter of policy. In addition, teacher [sic] may voluntarily, or may be requested, to submit for the consideration of the [school] Board and Administration, recommendations, suggestions pertaining to modification or addition of facilities or equipment.

Finding that the demand required consultation with employees before making capital improvements, PERB held that "[d]ecisions regarding the making of capital improvements are a management prerogative that do not involve terms or conditions of employment" and as such, are not mandatory subjects of collective bargaining.

We have held, however, that the City's prerogative with respect to capital improvements is not always absolute.[240] In Decision No. B-43-86 we found that the Union demand for clean-up and storage facilities, while implicating

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[239] Chateaugay Central School District, supra, 12 PERB ¶3015.

[240] Decision Nos. B-43-86; B-2-73.

management's right to allocate use of its physical plant, was nonetheless mandatory. The fact that all Fire Marshals except one unit had such facilities taken together with the nature of Fire Marshals' work, established that the demand related to a working condition and was a mandatory subject of bargaining. The Union pleads no such allegations in support of Firefighter Demand No. 56 and Fire Marshal Demand No. 72.

The demand at issue in Decision No. B-43-86 is different than Firefighter Demand No. 56 and Fire Marshal Demand No. 72, neither of which is a demand for a condition of employment. Firefighter Demand No. 56 seeks to direct management's renovation of City-owned property by scheduling the renovation of certain projects. It does not seek a particular facility as the Union sought in its demand that we considered in Decision No. B-43-86. The instant demand clearly infringes on management's right to manage under NYCCBL §12-307b and is a nonmandatory subject of bargaining.

Firefighter Demand No. 56 is also nonmandatory to the extent it seeks to prescribe manning. NYCCBL §12-307b guarantees that the City has the right to "determine the methods, means and personnel by which government operations are to be conducted." In accord with the statute, we have held that management has the right to determine assignments

unilaterally.[241] In Decision No. B-12-79, for example, we found that a union demand that certain employees be assigned to one department in lieu of another infringed on management's prerogative. Similarly, the Union's demand "that security shall be provided on renovation projects by Firefighters" infringes on the City's right to assign personnel. We note the Union does not contest the City's arguments that the subject of manning, at least in the context of this demand, is a nonmandatory subject of bargaining.

The Union's contentions to the contrary, Fire Marshal Demand No. 72 is also dissimilar to the Union's demand considered by this Board in Decision No. B-43-86. The Union does not seek particular facilities but demands that existing facilities comply with applicable law. To the extent the Union seeks a contractual provision in Fire Marshal Demand No. 72 that Fire Marshal quarters conform to building specifications for firehouses, the Union's demand is one which directs the management of the City's property. The management of the City's property is within management's prerogative under NYCCBL §12-307b and not a mandatory subject of bargaining.

Fire Marshal Demand No. 106, rather than address a

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[241] Decision No. B-19-79.

condition of employment, directs management to supply a service in a particular manner. It also directs the City to continue installing floor ventilation systems in accordance to a schedule fixed with the union. As we noted with respect to Fire Marshal Demand No. 72, decisions with respect to the manner in which the City manages its property are management's decision and are nonmandatory subjects of bargaining.[242]

However, the portion of Fire Marshal Demand No. 106 which demands that Attachment F guarantee that Fire Marshal quarters have adequate ventilation, is a mandatory subject of bargaining. It would appear to be related to our finding in Decision No. B-43-86 that clean-up facilities are a condition of employment. Even if the Union's demand were not so related, like air conditioning,[243] ventilation is related to the comfort of employees. It is a condition of employment and is, as the Union argues, a mandatory subject of bargaining.

Finally, the City's proposed deletion of Article XIV, §3 is a nonmandatory subject of bargaining. Like the demand in Chateaugay Central School District, supra, which PERB

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[242] Chateaugay Central School District, supra, 12 PERB ¶3015.

[243] Croton Police Ass'n and Village of Croton-on-Hudson, 15 PERB ¶4644 (1982); Village of Scarsdale, supra, 8 PERB ¶3075.

found to be a nonmandatory subject of bargaining, Article XIV, §3 requires consultation with the Union before the City makes changes in its plant. It is a limitation on management's right to implement those changes under NYCCBL §12-307b and, as a consequence, is a nonmandatory subject of bargaining, thus the City may delete Article XIV, §3 without negotiation.

Firefighter Demand No. 57

> INCLEMENT WEATHER - Art XV
> Provide same standard suspending regularly scheduled outside activities and Saturday and Sunday multi-unit drill, to wit: a) when the THI reaches 78 or above, when the wind chill factor reaches 20 or below; and b) after 11:00 a.m. on Sundays.

City Demand No. 8

> Among the items that will be deleted . . .
> Article XV. (Inclement Weather)

The parties each challenge one another's demands concerning the performance of outdoor work during certain times and under certain weather conditions. The 1984-1987 Agreement provides that most regularly scheduled outside activities and multi-unit drills are to be suspended under specified inclement weather conditions, and that regularly scheduled activities will not be conducted after 11 a.m. on Sundays (Article XV.) Firefighter Demand No. 57 appears to

seek the continuance of the Article XV standards, except that the weather restriction applicable to multi-unit drills would be broadened. The City seeks to eliminate the provisions of Article XV altogether.

City Position

The City contends that under Section 12-307b of the NYCCBL, it has the right to maintain the efficiency of governmental operations, direct its employees, determine the methods, means and personnel by which governmental operations are to be conducted, and exercise complete control and discretion over its organization. In further support of its position, the City asserts that the PERB has held that a demand which seeks to make the performance of duties dependent upon weather conditions is a nonmandatory subject of bargaining. Finally, the City argues that, even though the Union alleges that the deletion of the inclement weather provisions will have a safety impact, its allegations are merely conclusory and speculative, and, therefore, must be dismissed.

Union Position

The Union maintains that if Firefighters are called to emergency fire duty after having spent an extended period of time in extreme heat or cold performing non-emergency outside work such as inspections or drills, they are much more likely to suffer injuries during the rigors of firefighting after having been "debilitated" by prolonged exposure to extreme weather conditions. According to an

affidavit submitted by the President of the Union, building inspections are among the group of regularly scheduled non-emergency activities that Firefighters must perform. He alleges that during a several-hour period, Firefighters ride in their firefighting apparatus to various locations in order to inspect buildings for compliance with fire codes. Since the apparatus is neither heated nor air conditioned, Firefighters receive no protection from extreme outside weather conditions while they perform the inspections. The Union concludes that, because exposure to extreme weather conditions during extended, non-emergency outside inspections has an impact on the safety of Firefighters who must sometimes engage in emergency fire service after a period of such activity, its demand is a mandatory subject of bargaining and the City does not have the unilateral right to delete existing provisions. The Union further contends that provisions built into Article XV sufficiently reserve a range of managerial discretion. According to the Union, the Article XV restrictions could not encroach on any managerial rights that the City could "possibly be deemed to have in this area." Finally, the Union asks that, should this Board find that the inclement weather provisions encompass a nonmandatory subject of bargaining, it schedule a hearing in order to establish the practical impact that would result from their modification or elimination.

Discussion

Inclement Weather Conditions as a Mandatory Subject of Bargaining

Although an inclement weather provision is now being brought before this Board for the first time, the PERB has previously issued two decisions concerning outdoor work during severe weather conditions. In Rochester Fire Fighters,[244] the union's demand would have barred the City from scheduling outside inspections and surveys during periods of inclement weather. In ruling the demand nonmandatory, the PERB held that "[a] City may decide unilaterally when inspections ought to be performed and whether they should be called off because of weather conditions. When it makes such a decision, it cannot be required to negotiate as to a demand that would prevent the performance of any services that it deems appropriate for the performance of its mission." In Fairview Firefighters,[245] the PERB reiterated that a weather-related demand whose effect "would prevent the District from providing certain services to its constituency when weather conditions are severe," is not a mandatory subject of

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[244] Rochester Fire Fighters, Local 1071, I.A.F.F. (Afl-CIO), and City of Rochester, 12 PERB ¶3047 (1979).

[245] Fairview Professional Firefighters Association, Inc., Local 1586, IAFF, and Fairview Fire District. 12 PERB ¶3083 (1979).

negotiation.

We follow the PERB's decisions and we hold that the City cannot be required to negotiate a demand that would require the City to withhold services which it deems appropriate for the performance of its mission. A contractual provision relating to inclement weather, or one that could otherwise impede the City from providing specific services during certain times of the day, is not a mandatory subject of bargaining.

Duty to Negotiate Over Impact of Elimination of the Inclement Weather Provisions

The final sentence of NYCCBL §12-307b qualifies the reservation of managerial prerogatives to the City by providing that questions concerning practical impact that managerial decisions have on employees are within the scope of bargaining. The concept behind the practical impact provision is to provide a means of alleviating the adverse effects upon employees arising out of a decision made by the employer in the exercise of its statutory management prerogatives.[246] Although the Union has no right initially to demand bargaining over a subject that is nonmandatory, it does have the right to seek alleviation through the

[246] See, Decision Nos. B-70-88; B-69-88; B-43-86; B-23-85; and B-18-75.

bargaining of a practical impact resulting from a management decision.

In 1975, we held that where a "proposed change by management is challenged as a threat to safety, it must, if there is a dispute as to bargainability, be submitted to this Board which, on the basis of the relevant evidence, will determine whether or not the proposed plan in fact involves a threat to safety.[247]

Although we are satisfied that the Union's pleadings in this case raise sufficient substantial issues as to whether there can be a practical impact on the safety of Firefighters if the existing inclement weather policy is changed, thus far, the City has given no indication that it intends to make such a change. Therefore, we hold an order for a practical impact hearing in abeyance until such time as management may change the present restrictions on Firefighters performing non-emergency outdoor work during periods of inclement weather.

Accordingly, we find that, while Firefighter Demand No. 57 is not a mandatory subject of bargaining, we also find that a change from the present policy may have a practical impact on safety. In the event that the City changes, or proposes to make a change in the current inclement weather

[247] Decision No. B-5-75.

policy, a hearing will be held on the Union's allegations of safety impact before a Trial Examiner designated by the Office of Collective Bargaining. However, the City may delete Article XV without negotiation.

Firefighter Demand No. 59

TRANSPORTATION - Art. XVII
Increase rate of reimbursement.

Fire Marshal Demand No. 75

TRANSPORTATION - Art. XVII
Retain provisions of 1984-1986 [sic] agreement except to provide for increase in the rate of reimbursement

Article XVII of the Agreement provides that when transportation to and from fires and in emergencies is not available, an employee may use his personal car and be paid $1.75 for that use within a reasonable time.

City Position

The City argues that the demand is vague and ambiguous, because it merely states that the Union seeks an increase in the rate of reimbursement with no further explanation.[248]

Union Position

The Union contends that its demand is not vague.

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[248] The City cites Fairview Professional Firefighters Association, Inc. L. 1586, I.A.F.F. and Fairview Fire District, 12 PERB ¶3083 (1979) and City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

According to the Union, PERB in Fairview Professional Firefighters Association, Inc., supra, held that a demand is only vague for purposes of collective bargaining, if it cannot be determined whether the demand covers non-mandatory as well as mandatory subjects of bargaining. The Union is demanding an increase in the rate of reimbursement for use of vehicles used for work which the Union claims is exclusively a matter of compensation.

Discussion

We note that PERB in Fairview Professional Firefighters Association, Inc., supra, held that the Union's demand was so vague that it could not be determined whether the demand dealt with an nonmandatory subject of bargaining. It did not hold, as the Union contends, that a demand is vague only if it could not ascertain the nature of the demand. There may be other situations in which a demand will not become a subject of bargaining because it is vague and ambiguous. Nonetheless, the Union's demand at issue is not vague and ambiguous by any standard.

PERB has held that a demand that employees receive reimbursement for the use of their personal vehicles for work is a mandatory subject of bargaining.[249] Thus, a demand

[249] City of Buffalo and L. 2651, AFSCME, 13 PERB ¶4548 (1980).

for reimbursement does not infringe on management's prerogative. nor is the demand so vague that the City cannot understand the nature of the demand.[250] The only issue raised by the demand is the rate of reimbursement sought by the Union. The rate is a monetary matter which, like compensation, is a proper issue for resolution by the impasse panel. We, therefore, reject the City's objection to the demand.

Firefighter Demand No. 60
Fire Marshal Demand No. 76

> TRANSPORTATION - Art. XVII
> Require City to reimburse and/or indemnify an employee for any expense or liability incurred as a result of use of personal car in course of employment.

City Position

The City argues that because the New York City Administrative Code, §15-119[251] provides for the

[250] Rochester Fire Fighters, L. 1071, I.A.F.F. and City of Rochester, 12 PERB ¶3047 (1977).

[251] NYCCBL, §15-119 provides the following:

> Whenever any member of the uniformed force of the [fire] department, while in the actual performance of his or her duty, shall lose or have destroyed any of his or her personal belongings, and shall present satisfactory proof thereof to the commissioner, such member shall be reimbursed to the extent of the loss sustained, at the expense of the city.

reimbursement for loss of property by members of the Fire Department, any agreement which would alter the parties' obligations as fixed by law is outside the scope of collective bargaining.[252]

Union Position

The Union contends that its demands seek two benefits: 1) reimbursement and/or indemnification for expense resulting from the work-related use of a personal car; and 2) reimbursement and/or indemnification for any liability arising out of the work-related use of a personal car. Relying on NYCCBL §12-307, as well as this Board's decisions, the Union argues that the statutory definition of wages is broad enough to include transportation-related expenses and benefits.[253]

The Union also argues that New York City Administrative Code, §15-119 provides reimbursement for the loss or destruction of personal property and is consequently more limited than the Union's demand. It argues that the cases cited by the City hold that bargaining over a subject that

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[252] The City cites Decision Nos. B-24-75; B-5-75; B-7-72; B-11-68. It also relies upon Rochester Fire Fighters, L. 1071, I.A.F.F. and City of Rochester, 12 PERB ¶3047 (1979) and Patrolmen's Benevolent Ass'n of Newburgh, N.Y. and Town of Newburgh, 18 PERB ¶3065 (1985), as well as Matter of Town of Greenburgh, 94 A.D. 2d 771, 462 N.Y.S.2d 718 (2d Dept. 1983).

[253] The Union relies on Decision Nos. B-23-75 and B-11-68.

involves the breach of an obligation or duty fixed by law is prohibited, not that bargaining is prohibited over demands for compensation-related benefits which supplement or complement those provided by law.

Discussion

Under the National Labor Relations Act the term "wages" has been broadly defined to include "direct and immediate economic benefits flowing from the employment relationship."[254] The Union seeks such a benefit herein.[255] In the absence of an express restriction, the City must bargain over the Union's demand.

The City contends that the New York City Administrative Code, §15-119 bars the City from bargaining over the instant demands. But the mere fact that a statute also addresses the subject matter of a demand does not in and of itself prohibit collective bargaining on the subject.[256]

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[254] W.W. Cross & Co., Inc. v. NLRB, 174 F.2d 875 (2d Cir. 1949), cited favorably in Decision No. B-23-75, n.11.

[255] See Board of Education, Union Free School District No. 3, Town of Huntington v. Associated Teachers of Huntington, 30 N.Y.2d 122, 5 PERB ¶7507 (1972) in which the Court of Appeals held that a public employer had the authority to negotiate with employees over the reimbursement for the loss of repair or replacement of personal property damage or,lost or destroyed in the course of employment. See also, Croton Police Ass'n and Village of Croton-on-Hudson, 16 PERB ¶3007 (1983).

[256] Decision No. B-41-87.

Administrative Code, §15-119 does not prohibit collective bargaining on the subject matter of the demand.

New York City Administrative Code, §15-119 provides only for compensation for the loss or destruction of employees' personal property. The Union's demands seek reimbursement for "expenses" and indemnification for liability incurred in the use of a car. Thus, the Union's demand not only supplements New York City Administrative Code, §15-119, but irrespective of the code provision, the Union's demand is a mandatory subject of bargaining.

Firefighter Demand No. 61
Fire Marshal Demand No. 77

> TRANSPORTATION - Art. XVII
> Provide that employees be given free passage on all City or MTA controlled transportation facilities and for all intra-City bridges and tunnels.

City Position

The City alleges that this is a prohibited subject of bargaining because only the Metropolitan Transportation Authority ("MTA"), which is a corporate entity separate from the City, is empowered to establish fares and tolls,[257] thus tolls and fares are obligations fixed by law.[258]

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[257] The City cites Public Authorities Law, §1266.

[258] The City cites Decision Nos. B-24-75; B-5-75; B-7-72; B-11-68.

The City also argues that NYCCBL §12-311c(3) prohibits an impasse panel from directing the City to support a recommendation which must be addressed to a third party, agency or official.[259] Finally, the City contends that part of the demand is non-mandatory to the extent the Union seeks free transportation for employees while off duty.[260]

Union Position

Relying on Public Authorities Law, §1205(2)[261] the Union argues that the City has the authority to permit free passage on MTA controlled transportation and facilities. It also contends that its demand relates to an economic benefit.[262] It attempts to distinguish City of Rochester,

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[259] The City cites Decision No. B-1-74.

[260] The City cites City of Rochester and Rochester Police Locust Club, 12 PERB ¶3010 (1977).

[261] Public Authorities Law, §1205(2) provides that:

> [u]pon written request of the mayor the authority shall permit reduced fares for one or more classes of transit facility users designated by the mayor upon the agreement of the city to assume the burden of the resulting differential, together with the attendant administrative costs of the authority, pursuant to procedures satisfactory to the authority.

The "authority" referred to in Public Authorities Law, §1205(2) is not the MTA but the New York City Transit Authority ("NYCTA").

[262] The Union cites Opinion of Counsel, 16 PERB ¶5007 (1983) (free tickets to athletic events and performances were deemed by

supra, cited by the City, alleging that the case concerned the protection to be afforded police officers who take action while off duty. The Union contends that an economic benefit is a mandatory subject of bargaining because it is compensation regardless of whether the benefit also accrues to employees while off duty.

Discussion

There are several entities which are the subject of the demand. The first is the MTA which is a an independent public benefit corporation. PERB held in Bridge & Tunnel Officers Benevolent Association and Triborough Bridge and Tunnel Authority[263], that a demand that the Triborough Bridge and Tunnel Authority ("TBTA") advise the NYCTA to afford free passage on NYCTA facilities to TBTA employees was non-mandatory. PERB found that because the TBTA was not being required simply to request an extension of a benefit under the control of another, but actually grant the benefit, which it could not do, the demand was not a subject of bargaining. Like the TBTA, the MTA is an entity separate and distinct from the City. It is under no legal obligation

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counsel to be economic benefits) and Onondaga-Madison Board of Cooperative Educational Services and Onondaga-Madison Employees General Ass'n, 12 PERB ¶4581 (1979) (free physical examinations considered mandatory subject of bargaining.)

[263] 15 PERB ¶4570 (1982).

to grant the City's request to provide free transportation to the City's employees. The demand is, thus, not a mandatory subject of bargaining.

Similarly, to the extent the Union seeks free passage on all intra-City bridges and tunnels, it is asking the City to provide a benefit which is under the control of the TBTA, which like the MTA, is a separate and distinct public corporation.[264] It is under no statutory obligation to provide free passage to City employees. Therefore, to the extent the demand seeks free passage on TBTA controlled facilities, it is also not a mandatory subject of bargaining.

The Union also seeks free passage for employees on City-controlled transportation facilities. PERB has held in the past that where a decision is made by an entity over which the City has control or by the City itself to provide services, it is a mandatory subject of bargaining.[265]

Pursuant to Public Authorities Law, §1205(2), the NYCTA "shall" provide reduced fares for users designated by the mayor provided that the City absorbs the cost of the reduced fares together with attendant administrative costs pursuant to procedures satisfactory to the NYCTA. Arguably, a fare

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[264] Public Authorities Law, §552 et seq.

[265] City of New York and Sergeant's Benevolent Ass'n of the City of New York, 9 PERB ¶3076 (1976).

could be reduced so that the employee would not have to pay any fare, provided the City absorbs the entire cost. The Union's demand is broad enough to include a demand for free passage on facilities owned and operated by the Manhattan and Bronx Surface Transit Operating Authority ("MBSTOA") which is a subsidiary corporation of the NYCTA.[266] Like the NYCTA, it must permit reduced fares for classes of omnibus users designated by the mayor provided that the City assumes the burden of the resulting differential, together with attendant administrative cost pursuant to procedures satisfactory to it.[267]

PERB has held in one case that the City was not required to negotiate with a union when the NYCTA withdrew free passage privileges to City employees. In City of New York and Sergeants' Benevolent Ass'n of the City of New York, supra, the NYCTA discontinued its practice of carrying non-uniformed police officers without charge. However, as PERB noted, the City had not requested the elimination of fares pursuant to Public Authorities Law, §1205.2, but that the NYCTA had unilaterally eliminated the fares. The instant demand would seem to require the City to utilize the procedure provided by the Public Authorities Law.

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[266] Public Authorities Law, §1203-a(2).

[267] Public Authorities Law, §1203-a(7).

For purposes of granting the Union's demand for reduced fares, therefore, it appears the NYCTA and its subsidiary are subject to the orders of the City, although they retain operational control and have input over the procedures regarding the implementation a fare reduction program. The Union's demand, to the extent it seeks free passage on NYCTA and City-owned facilities is a mandatory subject of bargaining.

Finally, to the extent the Union seeks free passage on City-controlled facilities for its employees while they are not on duty, its demand, like one for tuition reimbursement which PERB has held to be a mandatory subject of bargaining whether work related or not,[268] is a mandatory subject of bargaining.

Firefighter Demand No. 63
Fire Marshal Demand No. 81

> INDIVIDUAL RIGHTS - ART. XIX
> Substantial revision to ensure: a) protection of individual rights; b) independent adjudication; c) corrective flexibility.

[268] Town of Henrietta and Roadrunners Ass'n, L. 1170, CWA, 19 PERB ¶4625 (1986); Local 343, IAFF and City of Saratoga Springs, 17 PERB ¶3121 (1984). See also Westbury Water and Fire District, 13 PERB ¶3019 (1980) (use of employer's tools for personal purposes mandatory subject of bargaining); County of Onondaga and Onondaga County Chapter of the CSEA, L. 834, 12 PERB ¶3035 (1979) (twenty-four hour use of employer's car for any purpose mandatory subject of bargaining).

City Demand No. 10

> Among the items that will be deleted . . . The first paragraph of Article XIX, Sections 6 and 10 of that Article. (Individual Rights)

The parties have challenged one another's demands concerning employees' individual rights in disciplinary matters. Fire Marshal Demand No. 81/Firefighter Demand No. 63 seeks to expand upon the existing individual rights protections provided under Article XIX. The City indicates that it intends to restrict the existing individual rights provisions by deleting the preamble (the first paragraph), the section covering personal behavior during off-duty time (Section 6), and the section concerning improper questioning of an employee (Section 10).

City Position

The City maintains that the Union's demand, with its reference to "substantial revision," "individual rights," "independent adjudication," and "corrective flexibility" is vague and ambiguous. On that basis, it asks that the Union demand be deemed a nonmandatory subject of bargaining. The City also argues that, even if the demand does relate to disciplinary proceedings, the right to take disciplinary actions is specifically reserved to management by Section 12-307b of the NYCCBL. It then asserts, in the alternative,

that if the demand relates to statutory rights which require compliance with the law, it is also a nonmandatory subject.

The City supports its own proposal by arguing that management has the "unabridged right" to take disciplinary action, and that any attempt to limit this right is nonmandatory. Furthermore, according to the City, procedures used to investigate personnel are nonmandatory subjects of bargaining. The City concludes that the clauses which it seeks to discontinue are outside the scope of bargaining because they infringe on management's right to investigate alleged wrongs or seek to limit the procedures designed to investigate alleged wrongdoing.

Union Position

In support of its demand, the Union contends that the PERB has made clear that the vagueness doctrine should be invoked only when a demand is phrased in such a way as to encompass both mandatory and non-mandatory subjects of negotiation. According to the Union, demands relating to disciplinary proceedings and independent adjudication of disciplinary matters are mandatory subjects of bargaining, and the City has allegedly failed to suggest how the Union's demand could encompass a nonmandatory subject.

In challenging the City's intention to unilaterally alter the Individual Rights article, the Union asserts that

both this Board and the PERB have held that disciplinary proceedings are mandatory subjects of bargaining. The Union argues that, inasmuch as Article XIX relates to disciplinary procedures, the City may not unilaterally delete any of its provisions. Finally, the Union points out that the City "has failed to even suggest how [the preamble paragraph] would infringe on management's rights."

Discussion

With respect to the Union's demand, it is impossible for us to evaluate exactly what Firefighter Demand No. 63/Fire Marshal Demand No. 81 is intended to accomplish. "Corrective flexibility" holds no significance for us, nor can we tell exactly what "substantial revision" in "protection of individual rights" and "independent adjudication" refers to. If there is bargaining history behind this demand that would clarify it, the parties have not supplied it. Therefore, we find that the demand is not a mandatory subject of bargaining because it is too vague. The language may mean nothing more than that certain procedural safeguards should be revised, or it might call for an alteration in the standards that the City should apply in determining whether to initiate discipline.

Because the revisions are not specified, neither we nor the City can determine whether the demands would interfere with the right of management to take disciplinary action.

The City has stated its intention to unilaterally delete several sections of the existing provisions concerning individual rights of employees, which reads as follows:

> ARTICLE XIX - INDIVIDUAL RIGHTS
>
> It is the policy of the Fire Department of the City of New York to secure for all employees their rights and privileges as citizens in a democratic society, consistent with their duties and obligations as employees of the Fire Department and the City of New York. To further the administration of this policy, the following guidelines are established:
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> * * *
>
> **Section 6.**
>
> A. An employee shall not be questioned by the Fire Department on personal behavior while off duty and out of uniform except that the department shall continue to have the right to question an employee about personal behavior while off duty and out of uniform in the following areas:
>
> i. matters pertaining to official department routine or business;
>
> ii. extra departmental employment;
>
> iii. conflict of interest;
>
> iv. injuries or illnesses;
>
> v. residency;
>
> vi. performance as volunteer firefighter;
>
> vii. loss or improper use of departmental property.
>
> B. If an employee alleges a breach of subdivision A of this Section 6, he has the right to a hearing and determination by the Impartial Chairman within 24 hours following the claimed breach.
>
> To exercise this right, the employee

> must request such determination at the time when an official of the Department asks questions in an area which is disputed under subdivision A of this section. If the employee requests such determination, he shall not be required to answer such questions until the Impartial Chairman makes his determination.
>
> * * *
>
> **Section 10.**
> If the Department fails to comply with the provisions of this Article, any questions put to the employee shall be deemed withdrawn and the refusal to answer any such questions shall not be prejudicial to the employee. Withdrawal as herein described shall not preclude the Department from proceeding anew in the manner prescribed herein.

The underlying purpose behind Section 6, and behind Section 10 as it relates back to Section 6, appears to be the prohibition, with certain exceptions, against the questioning of employees about their off-duty conduct and activities, which can be a predicate for discipline pursuant to the provisions of Section 75 of the Civil Service Law.[269]

In several cases involving police unions, the PERB has held that the negotiation of "Bill of Rights" procedures relating to investigations being conducted for disciplinary violations are mandatory subjects of bargaining.[270] However, in several cases

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[269] See, Zazycki v. City of Albany, 94 A.D.2d 925, 463 N.Y. S.2d 614 (1983). Also see, Polett v. McGourty, 111 A.D.2d 1023, 490 N.Y.S.2d 337 (1985) and Stiles v.Phelan, 111 A.D.2d 591, 489 N.Y.S.2d (1985).

[270] Amherst Police Club Inc., and Town of Amherst, 12 PERB ¶3071 (1979), aff'd, 12 PERB ¶7006, 46 NY2d 1034, 416 N.Y.S.2d 586 (1979).

involving police unions, it has also held that procedural restrictions relating to criminal investigations are a nonmandatory subjects [271] because "[m]andatory collective bargaining cannot reach police department investigations of criminal conduct even if the criminal conduct is related to internal police department discipline."[272]

We agree that an employee who is being investigated for possible criminal conduct should not be in a position superior to any other citizen. However, because the Fire Department is not a law enforcement agency, we assume that the provisions of Article XIX, Sections 6. and 10., relate to matters of internal discipline. To the extent that these sections apply exclusively to investigations that are being conducted for disciplinary violations, they are mandatory and they may not be unilaterally deleted.

The City has not made its position clear with respect to the preamble paragraph, and we cannot, therefore, evaluate the City's assertion that it is nonmandatory. Thus, we find that it also may not be unilaterally deleted.

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[271] City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979); Town of Haverstraw and Rockland County Patrolmen's Benevolent Association, Inc., 11 PERB ¶3109 (1978); Patrolmen's Benevolent Association of Newburgh, New York, Inc. and City of Newburgh, 18 PERB ¶3065 (1985); and City of Schenectady and Schenectady Patrolmen's Benevolent Association, 21 PERB ¶3022 (1988).

[272] City of Newburgh, supra, at 3138.

Firefighter Demand No. 64
Fire Marshal Demand No. 82

GRIEVANCE PROCESS - Art. XX
Substantial revision to ensure: a) speedy resolution; b) participation by department representatives authorized to resolve issues; c) prompt issuance of decisions.

Firefighter Demand No. 66
Fire Marshal Demand No. 88

IMPARTIAL CHAIRMAN - Art. XXIV
Retain provision of 1984-86 (sic) agreement except so as to review status of Impartial Chairman.

Article XXIV of the 1984-1987 Agreement designates Milton Rubin as Impartial Chairman, and provides that he shall serve as arbitrator in all instances where the Agreement calls for arbitration, and be available to serve as mediator in all disputes between the Union and the City which arise under it.

City Position

The City argues that these demands are so vague that it cannot furnish an adequate response to them. Therefore, it maintains that they are beyond the scope of mandatory collective bargaining.

Union Position

The Union asserts that matters relating to the grievance arbitration procedure are mandatory subjects of bargaining. It argues that the City has failed to demonstrate that these demands are vague, and therefore maintains that they are within

the scope of mandatory collective bargaining.

The Union contends that Firefighter Demand No. 64/Fire Marshal Demand No. 82 is clear and unambiguous. It notes that part (b) is clear on its face, and that parts (a) and (c) plainly deal with timetables for the various steps in the grievance procedure.

The Union also maintains that the vagueness doctrine is inapplicable to Firefighter Demand No. 66/Fire Marshal Demand No. 88, as it can only be invoked when a demand might be construed to encompass nonmandatory subjects. The Union points out that Article XXIV of the expired collective bargaining agreement designates Milton Rubin as the Impartial Chairman and sets forth the various functions of that position which include mediation and arbitration. Therefore, it argues that since the City has failed to demonstrate how this demand might be construed to encompass a non mandatory subject, it must be found mandatorily bargainable.

Discussion

We note, as does the Union, that matters involving the grievance arbitration procedure are within the scope of mandatory collective bargaining because they affect employee working conditions.[273] Since we do not find these demands to be unduly

[273] See Decision No. B-37-86 (disciplinary procedures are conditions of employment); Hoosic Valley Central School District

vague, and in that they refer to a mandatory subject, we hold them to be mandatorily bargainable.

Firefighter Demand No. 64/Fire Marshal Demand No. 82 is not so vague on its face that the City is incapable of understanding what it seeks, or of responding to it. As the Union argues, this demand clearly and explicitly refers to the involvement of Department personnel authorized to resolve labor relations problems in the grievance-arbitration process, as well as the speedy resolution of grievances and prompt issuance of decisions.

Similarly, Firefighter Demand No. 66/Fire Marshal Demand No. 88 is not so vague as to be precluded from the scope of mandatory collective bargaining. Article XXIV of the 1984-1987 Agreement designates the Impartial Chairman and sets forth his duties. A demand seeking to review his status clearly relates to matters within the scope of mandatory collective bargaining and is therefore mandatorily negotiable.

Firefighter Demand No. 65

> LABOR-MANAGEMENT COMMITTEE - Art. XXI
> New Section:
> Provide for the submission of deadlocked disputes to the arbitration machinery within 30 days of the deadlock.

Fire Marshal Demand No. 83

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and Hoosic Valley Teachers Association, Local 2733, 11 ¶PERB 3065 (grievance procedure is a term and condition of employment) (1978).

LABOR-MANAGEMENT COMMITTEE - Art. XXI
Provide for the establishment of a Labor-Management Committee consisting of four (4) members, with equal Fire Marshal/Fire Department representation. Provide for the submission of deadlocked disputes to the arbitration machinery of the agreement within 30 days of the deadlock.

City Position

The City maintains that the Labor-Management Committee addresses subjects which are often non-mandatory subjects of bargaining. Therefore, according to the City, this demand is outside the scope of bargaining because it would subject non-mandatory subjects of negotiation to compulsory arbitration, in contravention of Section 12-311c. of the NYCCBL.

Union Position

The Union contends that the City's assertion is without merit. According to the Union, the submission of an issue to arbitration would still have to be done within the framework of the NYCCBL, and the Board of Collective Bargaining would still have the power to rule on substantive arbitrability and on scope of bargaining issues. The Union concludes that, inasmuch as the Board has the power to prevent issues that are exclusively within the scope of the City's management rights from going to

arbitration, the City can prevent a non-mandatory subject of bargaining from going before an arbitrator by filing either a scope of bargaining petition or a petition challenging arbitrability.

Discussion

The existing 1984-1987 Agreement provides for a six-member labor-management committee, with three appointees made by the Fire Commissioner and three by the Union President, that "shall consider and may recommend to the Fire Commissioner changes in working conditions of the employees, including, but not limited to, health and safety issues." (Article XXI.)

A new demand which seeks to create a similar committee for Fire Marshals, to meet periodically for the purpose of discussing matters of mutual concern, is a mandatory subject of bargaining to the extent that the matters to be considered by the committee are terms and conditions of employment. The parties could, for example, create a joint safety committee, operating under general guidelines, with the process subject to grievance arbitration. A demand to establish such a safety committee would be mandatory.

Our policy is not inconsistent with that of the PERB, which has repeatedly held that a demand seeking to establish a joint committee empowered to decide mandatory matters is a mandatory

subject of negotiation.[274] Therefore, to the extent that Fire Marshal Demand No 83. seeks to establish a joint labor-management committee with authority similar to that which already exists for Firefighters, we find the demand to be a mandatory subject of bargaining.

As Firefighter Demand No. 65 and the second part of Fire Marshal Demand No. 83 are worded, however, we find that the provision in these demands for "the submission of deadlocked disputes to the arbitration machinery within 30 days of the deadlock" is a nonmandatory subject because it might require the City to submit to final and binding arbitration on nonmandatory subjects of bargaining simply because the City voluntarily discussed such matters with the Union in the free-flowing, non-compulsory setting of a labor-management committee. We believe that the statutory management rights clause of the NYCCBL must be read to protect the City from being required to submit nonmandatory issues to arbitration over its objection.[275] Since the provision for arbitration of deadlocked disputes in the instant demands is so broad that it might extend the parties'

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[274] See, Somers Faculty Association and Somers Central School District, 9 PERB ¶3014 (1976), Fairview Professional Firefighters Association, Inc., Local 1586, IAFF, and Fairview Fire District, 12 PERB ¶3083 (1979) and Rye Police Association and City of Rye, 17 PERB ¶4645 (ALJ 1984).

[275] Of course, to the extent that the City may have limited its management rights through permissive bargaining and agreement thereon, it may be required to submit unresolved disputes on such matters to arbitration.

grievance procedure to nonmandatory subjects of negotiation, we conclude that Firefighter Demand No. 65, and the second part of Fire Marshal Demand No. 83 (the second sentence), are not mandatory subjects of negotiation.

Firefighter Demand No. 67
Fire Marshal Demand No. 85

DELEGATES - Article XXII
Provide for unlimited choice of vacation period for Delegates.

City Position

The City submits that this demand concerns the right to schedule work time and time off. It maintains that since this Board has held that any demand which seeks to negotiate such rights infringes upon the City's statutory managerial right to direct its employees and to determine the methods, means and personnel by which it conducts its operations, this demand is a nonmandatory subject of bargaining.

The City does not dispute the Union's contention that a demand relating to time and leave benefits is a mandatory subject of bargaining. It claims, however, that the instant demand "goes much further" as evidenced by the fact that "it seeks to allow [D]elegates to schedule their vacations for whenever they desire." Thus, the City argues, the demand concerns the scheduling of its workforce; not time and leave benefits as claimed by the Union.

The City further argues that the case cited by the Union in support of its claim, Patrolmen's Benevolent Association of Newburgh, Inc., and City of Newburgh, 18 PERB ¶3065 (1985), is inapposite. The Union is not demanding that the City negotiate over the order in which vacation preferences are granted; rather, it is demanding that Delegates be "totally free" to choose whatever vacations periods they desire. Clearly, the City submits, this would infringe upon its management right to schedule time off.

Finally, the City claims that this demand is not a mandatory subject of bargaining because it seeks a benefit solely for union Delegates without any indication of how the benefit will "enable the Union's officials to perform better, or more effectively, the work of representing the members of the bargaining unit."

Union Position

The Union claims that under Section 12-307a of the NYCCBL, the public employer has a duty to bargain in good faith on time and leave benefits. In determining the extent of this bargaining obligation, the Union asserts that this Board has held that "time and leave benefits [are] mandatory subjects of bargaining, and includ[e] a duty to negotiate on the regulation and procedure governing the proper use of leave."[276]

The Union, relying on PERB's decision in Newburgh, also

[276] Decision No. B-16-81 at 114.

claims that the City must negotiate over the order in which vacation preferences are granted, and over the question whether the vacation preferences of Delegates can take precedence over the vacation requests of other employees. In any event, the Union contends that the City has failed to demonstrate that the vacation choices of the small percentage of Firefighters and Fire Marshals that serve as Delegates would in any way interfere with the staffing needs of the Department.

Discussion

The City asserts that this demand interferes with its statutory management right to schedule its employees because it seeks to give Delegates an unlimited choice in their vacation periods. In support of its position, the City claims that contrary to the Union's assertion, PERB's decision in Newburgh does not support a finding that the instant demand is a mandatory subject of bargaining.

In Newburgh, PERB held that a demand which provided, in part, that the "selection of personal leave days [be] at the sole discretion of the employees" was a nonmandatory subject of negotiation because it "would interfere with the City's exercise of its right to determine the number of police officers who should be on duty at any time." PERB noted that in City of Yonkers and Uniformed Fire Officer's Association of the Paid Fire Department of the City of Yonkers, 10 PERB ¶3056 (1977), it stated that a public employer "may determine the number of unit

employees that it must have on duty during each of the vacation periods. Within that framework, it is obligated to negotiate over the order in which vacation preferences may be granted." With regard to the Newburgh PBA's demand, however, PERB determined that it went "beyond the framework within which the order of preferences for granting personal leave may be negotiated." Instead, "it would eliminate entirely management participation in the decision as to whether a particular employee could be spared from duty at the time sought for personal leave, and it would also eliminate all management control over the number of employees on personal leave at any one time."

We find that the language of the instant demand is similar to the demand in Newburgh insofar as it would eliminate entirely the City's participation in the decision whether a particular employee, in this case a UFA Delegate, could be spared from duty at the time he/she sought for vacation leave.[277] Thus, inasmuch

[277] In Decision No. B-16-81, we ruled on the bargainability of a demand which read as follows:

> (No Limit) - A member shall have the guaranteed right to take his vacation consistent with his selection by seniority and not hampered by any Department limit or exigency.

We stated that:

> The delineation between the mandatory and non-mandatory nature of a vacation schedule demand is clearly illustrated by [this] Demand. Therein, the Union seeks a procedure to govern preferences in the use of vacation

as the UFA's demand seeks an unlimited choice of vacation preferences for Union Delegates, we find that it would infringe upon the City's statutory management right to schedule its employees and to determine the number of employees on duty at a particular time. Therefore, it is a nonmandatory subject of bargaining.

> time (seniority) which is bargainable, but also seeks a guaranteed right to take a vacation "not hampered by any Department limit or exigency." This latter provision would interfere with management's right to establish and maintain the number of employees needed to deliver the governmental service. Therefore, we find the [this] Demand is a non-mandatory subject of bargaining.

Firefighter Demand No. 68
Fire Marshal Demand No. 86

DELEGATES - Article XXII
Provide release time for Delegate attendance at UFA-sponsored seminars.

City Position

The City asserts that in Decision No. B-22-75, this Board proposed a test to determine whether paid release time demands are mandatory subjects of bargaining. The test, according to the City, may be stated as follows: whether a demand for paid release time "significantly and materially affects the bargaining relationship" and whether it "serves to further the policy favoring sound labor relations." The City claims, however, that not all types of union activity will meet the test. For example, "union participation in electoral politics or in meetings or conventions relating to internal union matters do not have such a material and significant relationship to collective negotiations between the parties; and a demand for paid release time to engage in those activities would not be a mandatory subject of bargaining."

The City maintains that the Union's demand does not meet the test formulated by this Board and, therefore, it is not a mandatory subject of bargaining. First, the City contends that the Union's demand seeks a benefit solely for Union Delegates without any indication of how that benefit will "enable the

Union's officials to perform better, or more effectively, the work of representing the members of the bargaining unit." Secondly, the City alleges that there is "no demonstration that these UFA-sponsored seminars will 'significantly and materially affect' the bargaining relationship between [the City and the UFA]." On the contrary, the City claims that the Union anticipates that these meetings will be related to internal union matters.

Union Position

The Union claims that the UFA-sponsored seminars referred to in its demand provide delegates with information that is "essential to the fulfillment of their representational duties." In support of its claim, the UFA asserts that at these seminars Delegates receive information on the terms of the contract, its administration, the process of collective bargaining, and other information concerning the working conditions of Firefighters which "plainly furthers the collective bargaining relationship." Inasmuch as the City concedes that a demand concerning release time for union officials to participate in union activities that "significantly and materially affect the collective bargaining relationship" is a mandatory subject of bargaining, the Union contends that its demand is a proper subject of negotiations.

Discussion

We note at the outset that the subject of release time for union activities is addressed in Executive Order No. 75, as amended by Executive Order No. 6 (dated January 21, 1974).[278] It sets forth those activities to be performed by employee representatives without loss of pay or other employee benefits; as well as other union activities for which employee representatives shall be permitted to take time off without pay. Inasmuch as this management declaration of the right to release time is not in the form of a collective bargaining agreement, however, its terms are not in any way dispositive of the question

[278] Executive Order No. 75 (as amended), entitled Time Spent On The Conduct Of Labor Relations Between The City And Its Employees And On Union Activity, states in part as follows:

> ...Existing policy of the City, enunciated by the New York City Collective Bargaining Law, seeks to promote harmonious relations between the City and its employees by providing machinery for the conduct of collective bargaining negotiations, for the orderly presentation and redress of employees grievances, and by recognizing the right of employees to speak through designated representatives in other areas of employer-employee interest,
> ...Experience has shown that it is often necessary and desirable for both government and its employees to carry on during working time the activities directly incident to the practical application of this policy,
> ...To the extent that assigned working time necessarily and reasonably spent for these purposes serves to promote efficient operations and effective administration, and not to impede them, it is as much time devoted to the public interest as is the time spent in the performance of regularly assigned duties....

of the bargainability of this subject.

In Decision No. B-3-75, we stated that:

> The use of working time by employees for the conduct of labor-management relations can be considered a fundamental subject and an essential part of the right to bargain collectively ... The investigation and processing of grievances by union representatives and their participation in labor-management meetings and in the negotiation of collective agreements are part and parcel of the collective bargaining framework established by the New York City Collective Bargaining Law; as such, they can be considered terms and conditions of employment.

Thus, we held that insofar as the Union's demand dealt with the basic issue of release time for labor relations and union activities, it was a mandatory subject of bargaining.

In Decision No B-3-75, we did not reach the question whether paid release time was a mandatory subject of negotiations.[279] That question was presented, however, in Decision No. B-22-75 wherein we held that "A demand for paid release time to conduct union activities which significantly and materially affect the bargaining relationship and which serve to further the policy

[279] We note that in Decision No. B-3-75, the City challenged the bargainability of the Union's demand on the ground that it would require the City to bargain on paid time off for labor relations and union activities; when in fact, the Union's demand requested release time without pay. Once the true nature of the Union's demand was established, the City conceded that "to the extent that release without pay of an employee during working hours to perform any of the described activities [in Executive Order 75] is demanded, that plainly would be a legitimate subject for mandatory collective bargaining."

favoring sound labor relations is a mandatory subject of bargaining." (Emphasis added) We stated that "activities such as participation in negotiations and grievance proceedings and membership on labor management committees are activities which are significantly and materially related to a collective bargaining relationship and are necessary to sound labor relations between the parties."

Applying this standard to the facts and circumstances of the case herein, we find that the UFA's demand is a mandatory subject of bargaining. In so finding, we reject the City's assertion that the Union anticipates that these meetings will be related to internal union matters. On the contrary, we note that the Union claims that at these UFA-sponsored seminars Delegates receive information on the terms of the contract, its administration, the process of collective bargaining and other information concerning the working conditions of Firefighters. In any event, we note that the City has not presented any evidence to support its assertion or to contradict the Union's claim.

Firefighter Demand No. 69
Fire Marshal Demand No. 87

No Strike - Article XXIII
Delete

Article XXIII of the current collective bargaining agreement provides:

> The Union and the Employees shall not induce or engage in any strikes, slowdowns, work stoppages or mass absenteeism nor shall the

> Union induce any mass resignations during the term of the Agreement.

City Position

The City argues that these demands "seek[] to diminish the clear public policy of the state and would permit the Union leadership to send the wrong message to the membership." The City contends that to allow bargaining over the deletion of a "no strike" clause violates public policy and, therefore, is outside the scope of bargaining.

Union Position

The Union argues that the City's challenge to these demands is without merit because it offers no authority for its contention that a demand becomes a nonmandatory subject when "it send[s] the wrong message to the membership."

Discussion

The Union seeks to delete the language of Article XXIII and, presumably, to omit any such clause from the contract presently being negotiated.

Section 12-311e of the NYCCBL provides:

> Public employees and public employee organizations shall not induce or engage in any strikes, slowdowns, work stoppages, or mass resignations during the term of a collective bargaining agreement. A provision to that effect shall be included in all written collective bargaining agreements between public employers and public employee organizations. This subdivision shall

> not be construed to limit the rights of public employers or the duties of public employees and employee organizations under state law.

Accordingly, the inclusion of a no-strike clause in every agreement is mandated by the NYCCBL, and the question of inclusion or exclusion, therefore, clearly is not bargainable.[280]

Firefighter Demand No. 70

DETAILS TO OTHER UNITS/FIVE MAN MANNING - Art. XXV/Art. XXVI
Revise Articles XXV and XXVI to require minimum manning in all companies at all times.

City Demand No. 11

Delete Article XXVI [Five Man Manning]

City Demand No. 12

Delete Article XXVIA [Productivity Issues]

Article XXV of the 1984-1987 Agreement sets out the procedure for compensating Firefighters detailed to units other than those to which they are permanently assigned for their travel time. Article XXVI provides that all firefighting companies are to be manned by no less than five employees. Article XXVIA provides that certain companies shall be manned by either 5, 6 or 7 employees, as indicated therein.

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[280] Decision No. B-11-68. Accord, City of Albany and Albany Police Officers Union, Local 2841, AFSCME, AFL-CIO, 7 PERB ¶3078 (1974), where PERB held a demand concerning the inclusion of Section 204-a of the Civil Service Law not a mandatory subject of bargaining inasmuch as Section 204-a itself requires that it be included in the contract in haec verba.

City Position

The City argues that these demands interfere with its statutory managerial prerogative to "determine the methods, means and personnel by which governmental operations are to be conducted". It contends that this Board and PERB have both upheld management's right to unilaterally fix staffing requirements. Therefore, it maintains that they are not mandatory subjects of collective bargaining.

Moreover, the City vehemently disagrees with the Union's argument that the continuance of four man details results in a practical impact on workload and safety. It argues that only the Board can make a determination of the existence of a practical impact, and that "hearsay dicta" in a 1976 arbitration award, as well as statements made in an interdepartmental memorandum by a former Fire Chief are not only stale, but do not constitute the equivalent of a Board determination.

Furthermore, the City contends that there has not been a change in circumstances which warrants a current finding of practical impact, as the four man manning level has been in existence since the mid-1970s. It notes that the Union admitted its agreement to four man manning in certain companies during the 1976-1978 and 1978-1980 negotiations, and should be estopped from alleging a practical impact when there has been a ten year practice of maintaining these manning levels, coincidental with a period of declining fire activity.

With respect to City Demand Nos. 11 and 12, the City also asserts that in Robert Linn's letter to Nicholas Mancuso dated November 29, 1988, Mr. Linn specifically informed Mr. Mancuso that although the City intended to delete Articles XXVI and XXVIA from the successor agreement, it did not intend to change manning levels at the present time. Therefore, the City maintains that the Union's argument, which alleges a practical impact on safety and workload, is entirely misplaced in the absence of any coinciding managerial action to change existing conditions. The City warrants that in the event that it decides to change manning levels, it will comply with the procedures set forth by the Board for determining and negotiating over the alleviation of any resulting practical impact.

Union Position

With respect to Firefighter Demand No. 70, the Union initially explains that although Article XXVI, Section 1 of the expired collective bargaining agreement provides that "all companies" must be manned by at least five employees, manning in a number of companies was reduced to four men during the 1975 Fiscal Crisis by agreement between the parties. The Union notes that the City restored manning to most of the affected companies during negotiations for the 1976-1978 and 1978-1980 collective bargaining agreements, but asserts that 71 engine companies currently remain exempt from minimum manning requirements by a

continuing agreement between the parties.

The Union contends that the expired minimum manning provisions grant Firefighters critical protections in the areas of safety and workload while reserving to the City critical areas of flexibility. It notes that these provisions became an integral part of prior agreements as a result of "stormy negotiations" mediated by Eric Schmertz under the auspices of the Supreme Court of the State of New York over fifteen years ago. Consequently, it maintains that they are not analagous to simple voluntary agreements on permissive subjects, and because of their unique nature, must be complied with and may not be deleted unilaterally, regardless of the extent to which this Board has held manning to be a nonmandatory subject.

As an alternative argument, the Union asserts that this Board has held matters relating to manning to be within the scope of mandatory collective bargaining if they have a practical impact on the workload and safety of employees. It contends that the City may not unilaterally delete Articles XXVI and XXVIA of the Agreement, and must restore minimum manning levels to the 71 currently exempt firefighting companies, because manning levels have a "vital impact" on the workload and safety of Firefighters.

The Union maintains that the City has erroneously alleged that it is estopped from currently claiming the existence of a practical impact on safety and workload. Although it admits that the four man operating level has been in existence since 1975,

the Union contends that it vigorously objected to its initial implementation in over 200 firefighting companies. It asserts that it has sought to restore the minimum manning levels during each subsequent negotiating period, and has succeeded in doing so in all but 71 companies. Therefore, it maintains that it never acquiesced to four man manning levels and that the City's estoppel argument is invalid.

The Union also disputes the City's argument that a practical impact hearing is not currently warranted because the City has not proposed any immediate changes in manning levels. It points out that the City has in fact announced a spending plan for the next fiscal year which delineates its intention to reduce manning levels from five to four members in 65 firefighting companies if the state budget which was recently proposed by Governor Cuomo is passed. Therefore, the Union argues that the City's only possible reason for deleting the instant manning provisions is to make unilateral changes in manning levels which will have a practical impact on unit members.

Moreover, the Union asserts that Firefighter Demand No. 70 unavoidably raises the practical impact issue and calls into question both the City's refusal to restore minimum manning levels, and its attempts to delete the instant manning provisions from the Agreement. The Union also contends that the City is foreclosed from denying that manning decisions have a practical impact on Firefighters by its own admissions in a 1981 inter

office report and by factual findings of impact made in a 1976 arbitration proceeding.

The factual findings of impact to which the Union refers, were made by Impartial Chairman Eric J. Schmertz in a 1976 arbitration proceeding between the UFA and the City ("the Schmertz Award").[281] The Union maintains that the City is collaterally estopped from relitigating the factual determinations made in the Schmertz Award, and that the ruling it set forth, which upheld the reduction of minimum manning levels in certain companies, was a "contractual authorization for the [safety] impact" which did not diminish its factual findings.

The Union also points out that contrary to the City's categorization of the factual findings in the Schmertz Award as being "hearsay dicta", they were the result of nine days of adversarial proceedings during which the issues of workload and safety were thoroughly litigated in a manner that comported with basic due process. Moreover, it asserts that these findings were confirmed in a proceeding under CPLR Article 75 by the Supreme

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[281] The Schmertz Award provides in relevant part as follows:

> I was deeply impressed by the testimony of many fire officers, several of them of senior rank who sincerely and eloquently explained the difficulties and hazards involved in fighting serious fires with less than five men on each vehicle. Again the possibility of unreasonable danger is present, this time to the firemen themselves. . .

Court of the State of New York[282] and are currently binding on the City according to the principles of collateral estoppel.[283]

The Union also submits an inter office report written by a former Fire Department Chief in 1981 ("the 1981 report") which is based on the Department's own empirical study of the effectiveness of four man manning levels. It maintains that in this report, the Fire Department itself concluded that reduced manning creates a "dramatic increase in workload as well as extremely dangerous working conditions . . .", and requested a restoration of five man manning levels to the 71 exempt companies. The Union highlights the report's findings that due to the dramatic division of labor within a firefighting company, "simply with respect to the job of stretching the hose line, reduced manning increase[s] the stress on the individual member by more than 30% . . ." Additionally, the Union points to the report's finding that undermanned engine companies create extremely hazardous working conditions because (a) members of the nozzle team cannot be adequately relieved, (b) one man is often required to work alone, and most significantly, (c) because the company officer is forced to become actively involved in

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[282] New York v. Uniformed Firefighters Association, Order and Judgment, No. 04732/86 (Sup. Ct. N.Y. Co. Sept. 9, 1976)(modifying award in other respects).

[283] The Union cites Greenspan v. Doldorf, 87 A.D.2d 884, 449 N.Y.S.2d 535, 536 (2d Dept. 1982) (parties are collaterally estopped from relitigating factual findings made in an arbitration award).

firefighting, thereby neglecting his supervisory responsibility.

The Union furthermore alleges that the City has distorted its arguments concerning the relevance of Arbitrator Schmertz's factual findings and the 1981 report to the Board's present inquiry. It asserts that it has not suggested that this evidence rises to the level of a Board determination of practical impact under NYCCBL §12-307(b), but rather, has argued that it constitutes a sufficient factual record upon which the Board can make a determination of practical impact without necessitating the holding of a hearing.

Alternatively, the Union contends that even if the Board does not give preclusive effect to the 1981 report and the Schmertz Award, it has met its burden in establishing the existence of a practical impact. It asserts that the conclusions presented in these items constitute potent evidence of a practical impact because they are based on the inherent nature of firefighting and the nature of firefighting companies as operational units, rather than on variables which change over time. The Union also asserts that this is confirmed in the unrebutted affidavit of UFA President Nicholas Mancuso.[284]

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[284] Mr. Mancuso attests in relevant part to the following:

> While fighting fires, all members of . . . [a] team are fully occupied performing the tasks assigned to them, all of which are vital to the job of locating, confining and extinguishing fires, and assisting and rescuing trapped

Finally, the Union contends that the City's general denial of its specific and substantiated allegations of practical impact is insufficient to rebut their validity or to raise a triable issue of fact.[285] Accordingly, it concludes that on the face of the pleadings, the Board must determine that reduced manning

> civilians. The reduction of a single member from either an engine or ladder company results in an automatic tremendous increase in the workload of the rest of the team. Stretching out hoses in apartment buildings and operating a fully charged hose becomes significantly more difficult with one fewer member in an engine company. The weight and force of a fully charged hose is so great that using it to extinguish a fire is an extremely difficult job for a fully manned company. Ventilating and forcible entry becomes extremely difficult with one fewer member in an ladder company because each member performs discrete tasks that must be performed promptly in order to locate and contain a fire at its earliest stages and before it gets out of control. The urgency of getting the tasks done promptly places tremendous burdens on an undermanned engine company whose diminished numbers must not only struggle to perform their own tasks, but must also perform tasks that were previously performed by others. Reducing manning from four to five members increases each firefighter's workload by at least 30% . . . Reductions in manning also have a direct and dramatic impact on the safety of Firefighters. Undermanned companies necessarily take longer to perform their jobs, especially in the first few minutes after arrival at a fire scene . . . During that period Firefighters are focusing all their energies on locating and containing the fire before it gets out of control . . . The delays in locating and containing fires resulting from undermanned companies greatly increase the risk of serious injury and death to Firefighters . . .

[285] The Union cites Decision No. B-43-86, n.11 (a general denial is insufficient to rebut specific factual allegations).

levels result in a practical impact, the alleviation of which the City must negotiate, and which precludes the City from unilaterally deleting Articles XXVI and XXVIA from the collective bargaining agreement.

Discussion

We have held the subject of manning to be within the City's managerial prerogative and therefore beyond the scope of mandatory collective bargaining.[286] Although the bargaining history between the instant parties appears to present special and unique circumstances in their negotiation of manning levels, contrary to the Union's position, this history can have no effect on the current nonmandatory nature of the subject. Permissive subjects which are provided for in agreements are never, as a result, transformed into mandatory subjects for purposes of future negotiations.[287] Moreover, PERB has also found the subject of manning to be within management's rights.[288]

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[286] Decision Nos. B-23-85; B-35-82; B-6-79.

[287] Decision No. B-21-87; City of Newburgh and Local 589, International Association of Firefighters, 16 PERB ¶4573 (1983); Police Association of the City of Yonkers and City of Yonkers, 14 PERB ¶4516 (1981); Auburn Teachers Association and Auburn City School Enlarged District, 13 PERB ¶4614 (1980); Buffalo Police Benevolent Association and City of Buffalo, 13 PERB ¶4547 (1980).

[288] International Ass'n of Firefighters of the City of Newburgh, Local 589 and the City of Newburgh, 10 PERB ¶3001 (1977), aff'd sub nom. International Ass'n of Firefighters of the City of Newburgh, Local 589 v. Helsby, 59 A.D.2d 342, 399 N.Y.S.2d 334 (3d Dept. 1977); City of Niagara Falls and Niagara

However, we have held that when a managerial action, or inaction in the face of changed circumstances has a practical impact on the safety and workload of unit members, management has an obligation to negotiate over the alleviation of that impact.[289] It is solely within our jurisdiction to determine whether such a practical impact exists.[290]

We find, with respect to City Demand Nos. 11 and 12, that the Union has not demonstrated the existence of such a practical impact. A practical impact which imposes the duty to bargain over its alleviation, arises only when there is a clear threat to employee safety.[291] In Decision No. B-5-75 we were faced with a similar situation in which the City informed the PBA that it would not continue the provisions of a prior agreement concerning manning levels in patrol cars. We held in that case that only the practical impact of the City's decision was mandatorily negotiable and that the burden was on the PBA to show how the specific elements of any projected change in manning levels would affect employee safety. Therefore, we ruled that the City could refuse to reinstate a letter guaranteeing a certain formula for

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Falls Uniformed Firefighters Association, AFL_CIO, Local 714, 9 PERB ¶3025 (1976); White Plains Police Benevolent Association and City of White Plains, 9 PERB ¶3007 (1976).

[289] Decision Nos. B-43-86; B-23-85; B-16-8; B-6-79.

[290] Decision Nos. B-31-88; B-18-87; B-36-85.

[291] Decision No. B-37-87.

determining manning levels in patrol cars, but that any proposed change in the effective levels could be challenged by the PBA if it had a potentially deleterious affect on the safety of unit members.

Similarly, City Demand Nos. 11 and 12 which seek the deletion of Articles XXIV and XXIVA from the Agreement do not directly threaten employee safety because they do not seek a coinciding reduction in manning levels. Since manning is within the City's managerial prerogative, an inquiry into the practical impact of its decisions in this area is necessary only when it takes affirmative steps to change existing manning levels, thereby creating potentially dangerous working conditions for its employees. We note that in the instant case, the City has warranted that it will comply with standard Board procedures to determine and negotiate over the alleviation of a practical impact, if and when it decides to alter existing minimum manning levels. Consequently, we find that these demands are not mandatorily negotiable, and that the City may delete Articles XXVI and XXVIA from the Agreement without negotiation.

We also hold that the City's announcement of a plan to reduce minimum manning levels in 65 firefighting companies does not rise to the level of causing a practical impact on safety either. Since the implementation of this plan is conditioned on the promulgation of Governor Cuomo's proposed state budget, the City's publication of it does not definitively indicate that

there will be a change in existing manning levels. Therefore, any inquiry into the changes that would be enacted under the City's conditional fiscal plan would be premature at this point, as they do not present a clear threat to employee safety.

However, we reject the City's argument that the Union, not having demonstrated the existence of any changed circumstances, and because of its prior acquiescence to agreements which provided for reduced minimum manning levels, is now estopped from bringing a practical impact claim involving the current manning levels in 71 companies. In making this determination, we note that the Union initially agreed to the implementation of four man manning levels only in light of the 1975 Fiscal Crisis. Since that time it has vigorously opposed the maintenance of reduced manning levels and has succeeded in having the number of companies which operate at below minimum manning levels reduced from 200 companies to 71 companies. Therefore, in light of the fact that the Union has consistently fought to have standard minimum manning levels restored, and in that the extenuating fiscal pressures which caused the initial implementation of reduced manning levels have subsided, we hold that the Union is not estopped from raising a practical impact claim.

We reiterate our long-held position that it is within our exclusive non delegable jurisdiction to determine the existence

of a practical impact within the meaning of the NYCCBL.[292] Although both parties agree that the evidence submitted by the Union is not tantamount to a finding of practical impact made by this Board, they dispute the weight which it should be given in our consideration of this issue. The Union argues that the Schmertz Award and the 1981 report, respectively constitute factual findings and an admission of impact which are currently binding on the City, and preclude the necessity for conducting a hearing on this issue. The City, on the other hand, argues that both the Schmertz Award which it deems to be "hearsay dicta", and the 1981 report are stale.

We note that although the Schmertz Award is technically hearsay, this Board is not bound by the Federal Rules of Evidence, and has adopted a liberal approach to the admission of relevant evidence in proceedings within its jurisdiction. Since the Union has demonstrated that the findings in the Schmertz Award were based on reliable underlying facts, we will consider them in making our instant determination.

However, we disagree with the Union's contention that the City is collaterally estopped from denying the factual findings in the Schmertz Award. Collateral estoppel is a legal doctrine which binds two or more parties to a prior determination on an

[292] Decision Nos. B-31-88; B-43-86; B-36-86; B-37-82.

issue that is presently in dispute.[293] This is not the situation with which we are currently faced. The issue before Impartial Chairman Schmertz when he wrote the 1976 award, was whether the City had violated its collective bargaining agreement by implementing reduced minimum manning levels. We, on the other hand, are faced with the task of determining whether the maintenance of reduced manning levels has a practical impact on unit members within the meaning of the NYCCBL.[294]

Moreover, we disagree with the Union's assertion that the City failed to meet its burden in denying its allegations of practical impact. The City raises a valid objection to the Union's evidence by arguing that it is stale. Since both the Schmertz Award, handed down in 1976, and the 1981 report, were based on factual circumstances which may no longer be relevant, we are not convinced that they are dispositive in determining the existence of a practical impact in the present circumstances.

Therefore, we find that the above evidence together with the Mancuso affidavit constitutes sufficient grounds upon which to order a hearing, as expeditiously as the parties can arrange, on

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[293] See Black's Law Dictionary, 237 (5th ed. 1979).

[294] See Board of Education, Union Free School District No. 4 v. Public Employment Relations Board, 74 Misc.2d 741, 345 N.Y.S.2d 352 (Sup. Ct. 1973) (judicial finding that acts of "extreme provocation" did not exist for purpose of imposing fine for contempt of court order was not binding on PERB in its determination of whether they existed for the purpose of applying Civil Service Law §210(3) and imposing a penalty for participation in an illegal strike.)

the issue of whether a practical impact on safety and workload has resulted from the reduction of minimum manning levels in 71 companies. Should that proceeding result in a finding by this Board that a practical impact does exist, the City will be directed to negotiate over its alleviation.

Firefighter Demand No. 71

> LINE-OF-DUTY DEATH BENEFIT - Art. XXVII
> Amend to provide that in the event that an employee on active duty dies as a result of any job-related injury or condition, including but not limited to heart and/or lung disease, or as a direct result of a characteristic hazard of Firefighter duty, or as a result of any attempt on such employee's part to effect the rescue of any person from danger while on or off duty, or while taking any action on [or] off duty arising from his status as a Firefighter, a payment of $25,000 will be made to the estate of the deceased from funds other than those of the Retirement Fund in addition to any other payment which may be made as a result of such death.

Fire Marshal Demand No. 91

> LINE-OF-DUTY DEATH BENEFIT - Art. XXVII
> Amend to provide that in the event that an employee on active duty dies as a result of any job-related injury or condition, including but not limited to heart and/or lung disease, or as a direct result of a characteristic hazard of Fire Marshal duty, or as a result of any attempt on such employee's part to effect the rescue of any person from danger while on or off duty, or while taking any action on [or] off duty arising from his status as a Fire Marshal, a payment of $25,000 will be made to the estate of the deceased from funds other than those of the Retirement Fund in addition to any other payment which may be made as a result of such death.

Under the terms of the 1984-1987 Agreement, the City must provide a payment of $25,000 from funds, other than those of the

Retirement System, to the estate of an employee who dies "because of an injury incurred through no fault of his own while actually responding to, working at or returning from an alarm." The Union seeks to amend the existing contract language to expand the range of activities which, if they result in the death of a Firefighter or Fire Marshal, will render the estate of the deceased employee eligible to receive the lump-sum $25,000 payment.

City Position

The City asserts that these demands conflict with section 470 of the New York State Retirement and Social Security Law ("RSSL"), and with section 201.4 of the Taylor Law which prohibit

collective negotiations concerning retirement benefits.[295] The City also contends that these demands are pre-empted by sections 13-346 and 13-347 of the New York Administrative Code which already prescribe a death benefit.[296] The City concludes that the

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[295]Section 470 of the Retirement and Social Security Law provides as follows:

> Until July first, nineteen hundred eighty-nine changes negotiated between any public employer and public employee, such as terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries, shall be prohibited. Thereafter, such changes shall be made only pursuant to negotiations between public employers and public employees conducted on a coalition basis pursuant to the provisions of this article; provided, however, any such changes not requiring approval by act of the legislature may be implemented prior to July first, nineteen hundred eighty-nine, if negotiated as a result of collective bargaining authorized by section six of chapter six hundred twenty-five of the laws of nineteen hundred seventy five.

Section 201.4 of the Taylor Law provides, in relevant part, as follows:

> [t]he term "terms and conditions of employment" ... shall not include ... any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

[296]Section 13-346 of the New York Administrative Code prescribes "ordinary death benefits", and Section 13-347 prescribes "accidental death benefits", for "original plan

demands are prohibited subjects of bargaining as the obligations or duties addressed therein are fixed by law. In addition, the City objects to that aspect of the demands that would extend coverage to employees who die as a result of actions taken while off duty on the ground that such actions are outside the scope of employment.

Union Position

The Union argues that a lump-sum payment of a death benefit which it seeks here is distinguishable from a benefit provided pursuant to a retirement system. According to the Union, the benefit it seeks is analogous to a post-employment benefit for current employees which the Board has found to be a mandatory subject of bargaining. The Union also notes that PERB has found a demand for a death benefit to be mandatorily bargainable. However, the Union argues, even if its demands are construed to constitute retirement benefits, they are not precluded by the RSSL which expressly permits the negotiation of changes in existing benefits so long as they do not require the approval of the Legislature. Here, it is argued, the subject of the demands is available under existing law and would not require legislative approval. The Union maintains that the mere fact that a demand is "addressed" by existing law does not render it a prohibited

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members" of the Fire Department Pension Fund.

subject of bargaining. Finally, the Union denies that its demands contemplate that the covered off duty actions of employees would be taken within the scope of other employment which was the basis for PERB's finding in the City of Rochester case, relied upon by the City.[297]

Discussion

At the outset, we note that a demand to negotiate for a death benefit has been held to be a mandatory subject of bargaining.[298] The City argues, however, that the instant demands are prohibited subjects because they run afoul of the prohibition on pension bargaining found in the RSSL and Taylor Law and because they are pre-empted by the Administrative Code's provisions on death benefits. We disagree with both arguments.

As presently formulated, section 201.4 of the Taylor Law excludes "benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries" from the definition of "terms and conditions of employment," thus rendering such matters prohibited subjects of

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[297] City of Rochester and Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

[298] City of Kingston and New York State Professional Firefighters Association, Inc., Local 461, 9 PERB ¶3069 (1976); City of Albany and Albany Police Officers Union, Local 2841, AFSCME, AFL-CIO, 7 PERB ¶3078 (1974).

negotiation. Section 470 of the RSSL includes the same prohibition. We find that the Union's line-of-duty death benefit demands seek none of the above-enumerated benefits.

In Incorporated Village of Lynbrook and Lynbrook Police Benevolent Association,[299] PERB held that a demand for termination pay was not a prohibited "payment to retirees or their beneficiaries," noting that (a) it was not necessary that those who stood to receive termination pay would do so upon retirement;[300] (b) it was possible for an employee to receive the benefit of the termination pay provision without applying for retirement under the State Retirement System; and (c) section 431 of the RSSL prohibited the inclusion of such payments made at the time of retirement in the salary base for computation of retirement benefits. PERB reasoned that termination pay was related to the retirement system only by virtue of its effect upon final average salary base and that the statutory prohibition against the inclusion of such payments in the salary base for the computation of retirement benefits provided assurances against

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[299]10 PERB ¶3065 (1977).

[300]The disputed demand stated as follows:

> J. Termination Pay. On separation from service after twenty (20) years, for any reason, other than cause, or upon death in service of any employee ... such employee or his legal representative shall be entitled to cash payment for accumulated terminal leave ... [emphasis added].

10 PERB at 3114, n.2.

possible violation of the RSSL. PERB noted that, in addition to benefits provided by a public retirement system, section 201.4 of the Taylor Law prohibits the negotiation of "continuing payments after retirement which supplement pension payments." It reasoned, however, that termination pay is one lump-sum payment in a fixed amount made at the time of termination of service and is, in effect, a deferred payment for actual services rendered. Accordingly, PERB held, termination pay did not constitute a prohibited supplemental pension benefit.[301]

The death benefit demands in the instant matter share most of the aforementioned characteristics.[302] The benefit sought here would apply without regard to membership in the Fire Department Retirement Fund. Further, it is clear that such payments would not be included in the salary base for computation of retirement benefits since, by the terms of the demands, an eligible employee would have died while engaged in activity within the line of duty. We note additionally that these demands contain express

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[301]10 PERB ¶3065 at 3115, aff'd sub nom., Incorporated Village of Lynbrook v. New York State Public Employment Relations Board, 64 AD2d 902, 11 PERB ¶7012 (2d Dept. 1978), aff'd, 48 NY2d 398, 12 PERB ¶7021 (1979).

[302]While it may be that a death benefit cannot be considered to be deferred compensation for services rendered, as the amount thereof is not geared to length of tenure, this distinction is immaterial in light of the preponderance of analogous characteristics in the proposed benefit. Moreover, we note, the demand in Lynbrook provided that payment would be made "upon the death in service of any employee" as well as upon "separation from service".

language providing that payment will be made "from funds other than those of the Retirement Fund."

Sections 13-346 and 13-347 of the Administrative Code provide, respectively, for the payment of an ordinary and accidental death benefit to eligible members of the Fire Department Retirement Fund. Since the Code expressly provides for a death benefit, the City argues that it pre-empts collective bargaining. However, in order to pre-empt negotiations, a statute must not leave the public employer any discretionary authority with regard to the subject matter.[303] We do not find any language in the cited Code sections which would preclude the City from negotiating concerning an additional death benefit for Firefighters and Fire Marshals, whether or not they are members of the Retirement Fund. Therefore, we do not find that negotiations are pre-empted.

A holding that a matter is bargainable does not mean that the parties can negotiate in contravention of existing law.[304] In this regard, we emphasize that the present demands are not inconsistent with the benefits provided by the Administrative Code and specifically seek a payment "in addition to any other payment which may be made as a result of [the] death."

Insofar as the Union's demands seek to expand coverage of

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[303]Decision No. B-41-87; City of Kingston, supra, 9 PERB ¶3069.

[304]E.g. Decision Nos. B-5-75; B-7-72; B-11-68.

the existing contractual death benefit provision to include employees who die "as a result of any attempt on such employee's part to effect the rescue of any person from danger while ... off duty [emphasis added]," however, we find that the demand is overbroad. In City of Rochester and Rochester Police Locust Club, Inc., PERB held that a proposal that would entitle police officers engaged in off-duty police actions to the same rights and benefits as they would receive if such action had been taken while on duty was a nonmandatory subject of bargaining because the demand could include police action taken outside the geographic jurisdiction of the City and could extend to action taken within the scope of other employment.[305] Notwithstanding the Union's assertion here that its demands do not contemplate rescue actions within the scope of other employment, such a limitation is not apparent from the face of the demands. Since the City cannot be required to negotiate concerning matters that are not "terms and conditions of employment", we find that, to the extent the demands are not clearly related to matters within the scope of employment, they are nonmandatory.[306] The demand that line-of-duty death benefit coverage be extended to an employee who dies while taking off-duty action "arising from his

[305]12 PERB ¶3010 (1979).

[306]See, e.g., City of Kingston, supra, 9 PERB ¶3069 ("ambiguities are resolved against the parties making the demand").

status as a Firefighter [or Fire Marshal]" does not suffer from the same infirmity as this demand clearly contemplates action taken within the scope of employment.

Firefighter Demand No. 73

> PARKING - Art. XXIX
> Revise to require issuance of parking permits to each employee.

Fire Marshal Demand No. 94

> PARKING - Art. XXIX
> Amend to require provision of twelve (12) parking spaces and issuance of parking permits to each employee.

Fire Marshal Demand No. 107

> ATTACHMENT G:
> The existing provisions of the 1984-1986 [sic] agreement shall remain in effect for the term of the new agreement.

Under the 1984-1987 Agreement, the City must provide up to six parking spaces per company to "the maximum extent practicable and consistent with City policy" and it must issue parking permits for those spaces (Article XXIX.) In addition, the City must "use its best efforts forthwith to fulfill those obligations, and [it] will keep the Union fully apprised of its efforts to secure such parking." (Attachment G.)

The City challenges three Union demands relating to employees' parking facilities. Fire Marshal Demand No. 94 would expand from six to twelve the number of parking spaces per

company and reiterates the requirement that parking permits are to be issued to each employee. Firefighter Demand No. 73 is silent on the actual number of parking spaces, but it also reiterates the requirement that parking permits are to be issued by the City. Fire Marshal Demand No. 107 would continue the requirement that the City must use its best efforts to secure the agreed upon number of parking spaces.

City Position

The City asserts that the Union's demands would interfere with management's right to allocate its resources in accordance with its obligations to deliver municipal services as provided under Section 12-307b of the NYCCBL. According to the City, implementation of this demand would require "the costly alteration of City facilities and procurement of private property" to provide the parking spaces. It contends that the demands, therefore, are not bargainable.

Union Position

The Union maintains that its demands are unrelated to managerial rights, and are merely intended to increase the number of parking spaces available to employees. The Union notes that the City's managerial rights would continue to be protected through the proviso that the spaces and permits must only be furnished "to the maximum extent practicable and consistent with

City policy." According to the Union, the provision of free parking to employees is a mandatory subject of bargaining because it constitutes an economic benefit, and these demands concern nothing more than the extent to which free parking is available. The Union concludes by asserting that the City's claim that it lacks the resources to satisfy the demands is totally irrelevant to the legal issue of whether parking is a mandatory subject of bargaining.

Discussion

In Decision No. B-11-68, which dealt in part with a demand for free parking facilities by the Social Service Employees Union, we held that the demand was negotiable because it impacted upon employees who were required to use their automobiles for work. In Decision No. B-17-75, which concerned parking fees being charged by some of the colleges of The City University to employees who were not required to use their automobile for work, we still found that the demand for a joint committee to discuss parking rules and fees was bargainable. Both of these decisions followed an earlier PERB ruling which held that free parking is a term and condition of employment and therefore the unilateral imposition of a parking fee by the State at locations where free parking spaces had previously been provided constituted a violation of the State's statutory obligation to bargain in good

faith.[307]

Since 1975, the PERB has issued two additional decisions concerning employees' parking facilities consistent with earlier rulings. In County of Nassau,[308] where a change in facilities resulted in a partial loss of free parking, the PERB held that

> The availability of free parking while at work is a mandatory subject of negotiation because it is an economic benefit to the employees similar to the use of an employer's vehicle for commuting to an from work and the furnishing by an employer of working tools.

In County of Schenectady,[309] where expansion of a county jail facility resulted in the loss of employee parking spaces, the PERB held that the county's failure to bargain with the union over the relocation of available parking was an improper employer practice.

Two seemingly contradictory decisions are distinguishable. In Decision No. B-16-81, we held that a Correction Officers' demand for parking facilities was nonmandatory. That demand, however, sought to alter the specific location of existing parking facilities, rather than the provision of parking. We ruled that that demand went beyond bargaining for a benefit, and

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[307] State of New York and The Civil Service Employees Association, Inc., 6 PERB ¶3005 (1973).

[308] County of Nassau (Department of Drug and Alcohol Addiction) and Nassau County CSEA, 14 PERB ¶3083 (1981), aff'd, 15 PERB ¶7002 (NY Sup Ct, Nassau Co, Feb 26, 1982).

[309] County of Schenectady and Sheriff, and Schenectady County Sheriff's Benevolent Association, 18 PERB ¶3083 (1985).

we said that it would infringe "upon the City's rights and obligations with regard to incarceration of people convicted or accused of committing a crime." In State of New York,[310] the PERB ruled that the State's unilateral imposition of a parking registration fee on all vehicles that regularly use the SUNY Binghamton campus did not involve a mandatory subject of negotiation. The Board distinguished this case from its earlier decisions, however, by noting that "the action of the State was designed to and does affect a universe of which CSEA represented employees constitute less than 6% of the whole." The decision went on to explain that the fee "applies to the public at large in the same manner as it applies to unit employees, and is totally unrelated to employment status."

The instant demands seek to maintain the existing provisions concerning employee parking facilities, except that Fire Marshal Demand No. 94 would increase the number of spaces from six to twelve at each company. As such, the demand is not inconsistent with the principle established by this Board and by the PERB. The City's argument concerning the possible cost impact goes to the merits of the demand rather than to its bargainability. We therefore find the Union's demands to be a mandatory subject of bargaining.

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[310] State of New York (State University of New York at Binghamton) and Civil Service Employees Association, Inc., 19 PERB ¶2039 (1986).

Firefighter Demand No. 75

SCHEDULE A - JOB DESCRIPTION
Add "emergency medical treatment."

Firefighter Demand No. 76

SCHEDULE A - JOB DESCRIPTION
Amend to eliminate janitorial duties.

Fire Marshal Demand No. 96

SCHEDULE A - JOB DESCRIPTION
Assure that job description will not include janitorial or vehicle maintenance duties and that it shall be in conformity with Mayor's Executive Order #16.

Fire Marshal Demand No. 97

SCHEDULE A - JOB DESCRIPTION
Provide that Fire Marshals shall conduct candidate investigations for uniformed and civilian Fire Department personnel.

City Demand No. 2

JOB DESCRIPTION - Article V
Delete the phrase "as appears" in Article V, Section 1 (Job Description for Firefighters).

Fire Marshal Demand No. 15

JOB DESCRIPTION
Section 2 of the 1984-86 (sic) agreement shall remain in effect for the term of the new agreement.

Schedule A, which is annexed to and made part of the Agreement, sets forth the job description for "Full Duty Firefighter". Under the 1984-1987 Agreement, the City and the UFA agreed that the job description for Firefighter shall be "as

appears in Schedule A".

Although Fire Marshal Demand No. 15 refers to Section 2 of the 1984-1987 Agreement, it is not clear where in the Agreement this section appears. Article V refers to job descriptions; but appears to pertain only to the job description for Firefighter. In any event, we note that Article V does not include a Section 2.

City Position

The City challenges the bargainability of Firefighter Demand Nos. 75 and 76 and Fire Marshal Demand Nos. 96 and 97 on the ground that they seek to change the content of the job classification for Firefighter and Fire Marshal by adding to and deleting from their current job duties. The City claims that in Decision No. B-43-86, this Board held that the content of a job classification and the determination of which employees shall be assigned to perform particular jobs is an express management right.

The City claims that contrary to the Union's assertion, PERB's decision in Scarsdale Police Benevolent Association and Village of Scarsdale,[311] does not support a determination by this Board that the instant demands are mandatory subjects of bargaining. It maintains that this Board distinguished Scarsdale

[311] 8 PERB ¶3075 (1975).

PBA in Decision No. B-43-86, finding that the existence of the statutory management rights provision under the NYCCBL is a factor which renders PERB's ruling not dispositive of a case arising under the NYCCBL.

In any event, with respect of Fire Marshal Demand No. 96, the City maintains that in Fairview Professional Firefighters Association, Local 1586, IAFF and Fairview Fire District,[312] PERB held that "some repairs and maintenance of vehicles and apparatus are part of the inherent responsibilities of firefighters employed by the District." Therefore, it determined that a demand to remove these duties from the job specification was a nonmandatory subject of negotiation. Since the UFA's demand is "almost identical in nature to the one in Fairview," the City claims that it too is a nonmandatory subject of bargaining.

With respect to City Demand No. 2, the City contends that continuation of the words "as appears" in Article V of the Agreement would limit its managerial right to change the job description of Firefighters. In support of its position, the City notes that in Decision No. B-43-86, this Board specifically held that:

> It must be understood that in light of the City's statutory prerogative, the City may not be required to include such job description in the agreement which would limit the City's right unilaterally to change

[312] 12 PERB ¶3083 (1979).

> the content of the Fire Marshal classifications at any time, or otherwise limit the exercise of management's right under NYCCBL [Section 12-307b], unless the parties voluntarily agree otherwise.

Thus, the City maintains that the fact that it voluntarily agreed to negotiate on a nonmandatory subject of bargaining and, as a result, to include the words "as appears" in the prior Agreement, does not prevent it from deleting those words unilaterally once that Agreement has expired.

Finally, since Fire Marshal Demand No. 15 seeks to accomplish the same result as the words "as appears" referred to in City Demand No. 2, the City argues that, for the above stated reasons, this demand is not a mandatory subject of bargaining.

Union Position

The Union maintains that in Scarsdale PBA, PERB "squarely held" that "the job content of current employees is a mandatory subject of negotiations so long as the negotiations demand would not narrow the inherent nature of the employment involved." (Emphasis added) In the instant case, the Union argues, the addition of "emergency medical treatment" to the Firefighters' job description would be perfectly consistent with the "inherent nature" of the Firefighters' job which, it claims, "encompasses responses of a variety of types including emergency medical treatment." In support of its claim, the UFA asserts that Firefighters have long received "extensive initial training and

recurrent practice during scheduled drill periods in first aid and cardio-pulmonary resuscitation." Furthermore, since a Firefighter's job is to respond to fires and other emergencies, the Union argues that deleting janitorial duties from the current job description would not narrow the "inherent nature" of the job.

With regard to its demands concerning the job description for Fire Marshals, the Union claims that the exclusion of janitorial and vehicle maintenance duties and the inclusion of candidate investigation duties for Fire Department personnel "plainly has no impact on the inherent nature of the Fire Marshal's job." Therefore, the Union submits that these demands are mandatory subjects of negotiation.

With respect to City Demand No. 2, the UFA claims that the job description set forth in Schedule A does nothing to narrow the inherent nature of the Firefighter's job. Rather, it "describes the essential features of [that] job as it existed unchanged for many years." The Union contends that in announcing that it intends to delete the words "as appears" from Article V, the City is in effect attempting to remove the job description in its entirety from the Agreement. The Union asserts, however, that since the job description is a mandatory subject of bargaining, it may not be removed unilaterally by the City. Moreover, with regard to the City's reliance on Decision No. B-43-86, the Union submits that to the extent it held that job

descriptions are not mandatory subjects of bargaining, that decision "is flatly inconsistent" with the decision of PERB; and "the PERB decision must prevail."

Finally, the Union contends that the City's challenge to Fire Marshal Demand No. 15 is without merit because "[t]he demand is to continue a provision setting forth a job description for Fire Marshals that was developed and remains amendable by the Fire Department." Furthermore, the Union claims that "[i]n the very decision cited by the City [in support of its position, Decision No. B-43-86], the Board expressly held that such a demand is a mandatory subject of bargaining."

Discussion

The Union correctly points out that PERB has held that the job content of current employees is a mandatory subject of negotiations. It is not disputed that in Scarsdale PBA, cited and relied upon by the Union in support of its position, PERB rejected the employer's claim that an agreement on job content would restrict its managerial prerogative to structure a police department capable of performing all necessary work within the department. PERB concluded that the demand, which stated that "No member shall be assigned, directed, or ordered to do any type of repair on any Police patrol vehicle" would not narrow the inherent nature of the work of police officers. Therefore, it held that the demand was a mandatory subject of negotiations.

In a case decided subsequent to Scarsdale PBA, Waverly Central School District and Waverly Teachers Association, 10 PERB ¶3103 (1977), the issue before PERB was whether the employer committed an improper practice in violation of the Taylor Law by unilaterally establishing job descriptions for four positions and, according to the Union, thereby altering the job content of those positions. In support of its petition, the Union cited Scarsdale PBA, wherein PERB stated "that job content of current employees is a mandatory subject of negotiations so long as the negotiations demand would not narrow the inherent nature of the employment involved." (Emphasis added) PERB determined, however, that:

> [t]hat language must be read in the context of the issue there presented and decided; namely, that it is mandatory for an employer to negotiate as to a demand by a labor organization that employees be relieved of an assignment which is not an essential aspect of their basic employment function or of its related incidental tasks. We did not find that the content of job description characterizing the essential duties and functions, and the related incidental tasks, of particular employment categories or

> positions is a mandatory subject of negotiations. We do not believe that it is.[313]

Thereafter, in Fairview,[314] PERB applied its previously established test and the developing case law and determined that "some repairs and maintenance of vehicles and apparatus are part of the inherent responsibilities of firefighters employed by the District." Therefore, it held that a demand which "would permit an individual firefighter to avoid responsibility for the quality of such work by his own judgment that he is not capable of performing it" is not a mandatory subject of negotiation.[315]

We note, however, that under the NYCCBL it is well-settled that the determination of the content of a job classification is an express management right. In Decision No. B-7-69, we stated

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[313] In Windsor Central School District and Windsor Teachers Association, 17 PERB ¶4542 (1984), the PERB Administrative Law Judge (ALJ) determined that a public employer is under no obligation to negotiate or consult regarding a decision to change written job descriptions so as to reflect the "essential duties and functions of the particular position." Consequently, the ALJ held that the Union's demand, which would prohibit the District from modifying job descriptions without prior consultation with the Union, was not a mandatory subject of negotiation.

[314] 12 PERB ¶3083.

[315] In City of Saratoga Springs and Saratoga Springs Firefighters, Local 343, IAFF, 16 PERB ¶3058 (1983), PERB held that the Union's proposal, which would prohibit the fire department from assigning firefighters to such duties as painting, carpentry, plumbing, electrical, heating or mechanical work, or to ground maintenance or snow removal outside department buildings, was not a mandatory subject of negotiation absent a showing that all such duties were not within the inherent nature of firefighters' positions.

that:

> ... the City's decisions on matters relating to the direction of employees and determining the content of job classifications are not mandatory subjects of bargaining, [but] once the City in fact has bargained on such matters and reached agreement which has been embodied in a contract, the provisions of such contract are enforceable.

Moreover, we noted that "the fact that such agreement has been reached and included in a contract cannot transform a voluntary subject into a mandatory subject in subsequent negotiations, for the latter is fixed and determined by law."[316]

The City asserts, and we agree, that contrary to the Union's assertion, Scarsdale PBA does not support a determination by this Board that the instant demands are mandatory subjects of bargaining. We rejected that argument (presented by the UFA) in Decision No. B-43-86 on the ground that "the case before PERB did not involve a statutory management rights provision such as relied upon by the City in the present case." Additionally, we stated that "the existence of the management rights provisions of NYCCBL [Section 12-307b] is a distinguishing factor which renders the PERB ruling not dispositive of a case arising under the NYCCBL." Thus, inasmuch as the UFA has presented no evidence or arguments which would even support reconsideration of our decision in B-43-86, we find that Firefighter Demand Nos. 75 and 76 and Fire Marshal Demand Nos. 96 and 97 are nonmandatory

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[316] See also, Decision No. B-11-68.

subjects of bargaining.

With respect to City Demand No. 2, we find that inclusion of the words "as appears" in Article V of the 1984-1987 Agreement resulted in a limitation on the City's statutory management right to change the job description for Firefighter set forth in Article V and Schedule A annexed thereto. We further find, however, that the City voluntarily agreed to negotiate that limitation on its statutory management rights; and contrary to the Union's suggestion, the fact that it did so in one agreement does not transform a permissive subject into a mandatory subject of bargaining. Therefore, we conclude that the City may delete the words "as appears" from Article V without first bargaining with the Union.

Finally, with respect to Fire Marshal Demand No. 15, we note that both the City and the UFA rely on Decision No. B-43-86 to support their respective positions. The relevant demand at issue in that case stated as follows:

> Provide job description for Fire Marshal (Uniformed).

Although we noted that "the determination of the content of a job classification is an express management right,"[317] we concluded that the "UFA's request for inclusion of a job description does not constitute, per se, an impairment of the City's right to determine the content of job classifications." Accordingly, we

[317] Decision Nos. B-24-72; B-7-69; B-3-69.

held that the UFA's demand, as stated therein, was mandatorily negotiable.

We further stated, however, that:

> ...in light of the City's statutory prerogative, the City may not be required to include such a job description in the agreement in any way which would limit the City's right unilaterally to change the content of the Fire Marshal classification at any time, or otherwise limit the exercise of management's right under the NYCCBL [Section 12-307b], unless the parties voluntarily agreed otherwise.

Although the UFA argues that the demand at issue herein seeks only "to continue a provision setting forth a job description for Fire Marshals that was developed and remains amendable by the Fire Department," we find that the demand as worded may in fact limit the City's right to change unilaterally the content of the Fire Marshal classification. As a result, we find the Union's demand to be a nonmandatory subject of bargaining.

Firefighter Demand No. 77

> ATTACHMENT H
> Increase entitlement to allowance for cleaning and maintaining of personal equipment from one-half hour to one hour; additionally, provide for administrative time for Chief's Aids of one (1) hour under circumstances which such employees are also entitled to the foregoing.

Fire Marshal Demand No. 108

> ATTACHMENT H
> Increase entitlement to allowance for cleaning and maintaining of personal equipment from one-half hour to

one hour; additionally, provide for administrative time for Chief's Aids of one (1) hour under circumstances which such employees are also entitled to the foregoing. Amend by inserting "or Supervising Fire Marshal" after the term "Company Officer."

City Position

The City contends that Section 12-307b of the NYCCBL grants the City the right to determine the methods, means and personnel by which it conducts its operations. According to the City, a demand that would require certain time to be allotted to a particular function such as clean-up time "necessarily contravenes this right" and is, therefore, a nonmandatory subject of bargaining.

Union Position

The Union disputes the City's characterization of its demand, and asserts that the demand is concerned solely with compensation. According to an affidavit submitted by the President of the Union, when Firefighters return to their quarters after fighting a fire or after the end of their regularly scheduled tour of duty, they are allotted an additional paid half-hour to compensate them for the time necessary to clean themselves and store their equipment before leaving. The Union asserts that its demand seeks only to increase that compensation by increasing the amount of compensated time recognized for the performance of these activities.

Discussion

Attachment H of the 1984-1987 Agreement refers to an unspecified "existing allowance for cleaning and maintenance of personal equipment [that] shall accrue upon entry to that effect by the Company Officer in the Company journal." The Agreement is silent as to exactly what the "existing allowance" is. The parties' pleadings indicate, however, that Firefighters and Fire Marshals are entitled to a minimum compensation of an additional one-half hour whenever they return to their quarters at or after the end of their shift. We take notice that Article III, Section 3 of the 1984-1987 Agreement provides for the payment of overtime actually worked at a premium rate, and Section 4 provides for minimum recall pay at a premium rate.

The Union seeks to increase the allowance from one-half hour to one full hour, and to extend its coverage to Chiefs' Aides for their performance of administrative functions as well. The demand also seeks to name Supervising Fire Marshals as substitutes for Company Officers designated to make the journal entry that would authorize remuneration. The City argues that a demand which would have the effect of allocating a specific time for a particular function interferes with its managerial prerogative.

As we read this demand, the City misconstrues its focus. Although clean-up and equipment storage is the rationale behind it, entitlement is not automatic. Payment accrues only when

covered employees' hours of work exceed their normal work day. The decision to hold them beyond their regularly scheduled tours would continue to be a management prerogative. In other words, the Department could always avoid this payment as long as it found the means to ensure that covered employees would return to their companies sometime before the end of their tours.

Wash-up and clean-up payments are a part of wages and, as such, constitute a term or condition of employment for which an employer must bargain with the union. We find, however, that the section of the Fire Marshal's demand which would require the City to include Supervising Fire Marshals as persons designated to authorize payment of this compensation to be an infringement on the City's right to determine the personnel by which governmental operations are carried out.

We therefore find Firefighter Demand No. 77, and that portion of Fire Marshal Demand No. 108 which deals with entitlement to compensation, to be a mandatory subject of bargaining. We find that the portion of Fire Marshal Demand No. 108 which names Supervising Fire Marshals as persons designated to authorize payment of the compensation to be a nonmandatory subject of bargaining.

Firefighter Demand No. 78
Fire Marshal Demand No. 110

ATTACHMENT J

Amend to provide contractual entitlement to mutual exchange of tours by deleting the words "pilot" and "generally" in the first sentence. Further amend by deleting last paragraph.

City Demand No. 13

MUTUAL EXCHANGE OF TOURS
Delete the side letter regarding a pilot program on mutual exchange of tours.

Attachment J to the 1984-1987 Agreement consists of a letter from former Fire Commissioner Spinnato to Mr. Mancuso, President of the UFA, stating that during the term of the 1982-1984 Agreement, the Fire Department "shall maintain a pilot program on mutual exchange of tours which will generally permit one mutual exchange as an applicant every eight days and be based upon the general expectations that mutuals will be exchanged with the member's own unit and subject to the continued availability of appropriate variances."

The letter further provides that "[a]ny problems shall be resolved by the Labor-Management Committee."

City Position

The City challenges the bargainability of the Union's demand on the ground that it seeks to give employees the right to reschedule their work time. Such right, the City asserts, interferes with its management prerogatives, as provided under Section 12-307b of the NYCCBL, to direct its employees and to determine the methods, means and personnel by which governmental

operations are to be conducted. The City claims that in prior decisions this Board has recognized that the scheduling of an employee's tour, the assignment of personnel and the determination of which employees will work together at a particular point in time "goes to the statutory managerial right of the employer...." Moreover, it notes that in Decision No. B-16-81, this Board held that a demand that employees have the right to arrange a mutual swap of tours of duty is a nonmandatory subject of bargaining. Therefore, the City contends that this demand is not a mandatory subject of bargaining.

Union Position

The Union contends that Attachment J is a "letter agreement" in which the Fire Department agrees to maintain a program that permits a practice referred to as the mutual exchange of tours. Pursuant to this program, where two Firefighters are scheduled to be on duty on different days they may, within certain limits, trade their tours of duty with each other. The result, the Union asserts, is an even trade member for member with "no effect whatsoever on levels of manpower deployment City-wide or at a particular company at any point in time, the only area relating to work schedules over which the City has a recognized managerial right."

The Union contends that the mutual exchange of tours program is in essence a procedure that alters the length of time between

tours of duty. The Firefighter who "takes a mutual" on a day when he would ordinarily be working merely "increases the time off between the previous and next tours of duty." These "schedule adjustments", the Union submits, involve issues which this Board has determined to be mandatory subjects of bargaining, such as the length of the work day or work week, the number of appearances in a week or in a set of tours, and the length of time between tours of duty. The UFA does not dispute that in a prior decision this Board held that mutual exchanges are not mandatory subjects of bargaining. Rather, it argues that that decision "is flatly inconsistent with PERB rulings that mutuals are mandatory subjects"[318] and "[u]nder settled principles, PERB's doctrine on the bargainability of such practices must prevail." In support of its position, the Union states that in authorizing municipalities to enact their own collective bargaining laws, Section 212 of the Taylor Law requires that local laws so enacted be "substantially equivalent to" the Taylor Law. Consequently, the UFA claims that since this Board must construe the NYCCBL in

[318] In support of its assertion, the Union cites Greenville Uniformed Firemen's Association, Local 2093, IAFF and Greenville Fire District, 15 PERB ¶4501 (1981), wherein PERB held that the Union's proposal, granting firefighters the right to exchange shifts among themselves, was a mandatory subject of negotiations since it was a term and condition of employment affecting hours of work and compensation. Although the Fire District had the right to determine unilaterally the number of firefighters on duty at any given time, PERB stated that the manipulation of shifts and firefighters was a mandatory subject of negotiations.

a manner that is substantially equivalent to PERB's construction of the Taylor Law, its demand, "even to the extent of removing the Department's right to approve mutuals," is a mandatory subject of bargaining. In any event, however, the Union contends that the City may not unilaterally delete the provision as it exists in the 1984-1987 Agreement.

Discussion

The Union asserts that the length of time between tours of duty is a mandatory subject of bargaining. We note, however, that in Decision No. B-24-75 this Board stated that:

> The process by which swings (time off between tours) are fixed is a combination of bargaining on mandatory items and of managerial decisions. The average duration of a swing is determined by the results of bargaining on the hours and number of appearances required of an individual and by management decisions relating to manning, starting times and platoons. Thus, while the issue of time off between tours is bargainable, the negotiability of many details of this issue is limited by the above-noted factors.

Thus, we have recognized that swing periods is a "hybrid subject;" and whether a particular demand pertaining to the length of time between tours of duty is a mandatory subject of bargaining depends upon the actual language of the demand, as well as the circumstances within which the demand is made.

In any event, we find that contrary to the UFA's assertion, mutuals is not in essence a procedure that alters the length of time between tours of duty. Rather, we find that mutuals

concerns the City's managerial right to assign its employees, and to determine which employees will work together at a particular point in time. In Decision No. B-16-81, we ruled on the bargainability of a demand similar to the demand here at issue. That demand stated as follows:

> Any member requesting changes in his tours of duty, vacation or a transfer from one institution to another shall have the right to arrange to a mutual swap with another Correction Officer.

We determined that the "demand goes to the heart of the [City's] statutory managerial rights to schedule employees, to direct the workforce and to assign personnel" in that it seeks to give employees the right to reschedule work time or time off as well as the right to arrange the place of work. As a result, we held that the demand was not a mandatory subject of bargaining.

The UFA does not dispute that the City's challenge to its demands as well as its decision to delete Attachment J from the Agreement are supported by our findings in Decision No. B-16-81. Instead, the Union requests that we reconsider our position on this issue in view of PERB's determination that demands relating to mutuals are mandatory subjects of negotiations. The UFA contends that "[u]nder settled principles, PERB's doctrine on the bargainability of such practices must prevail." It notes that under Section 212.2 of the Taylor Law, PERB has standing to bring an action for a declaratory judgment to overrule the Board of Collective Bargaining if it assesses that the provisions and

procedures adopted by the City of New York, or the continuing implementation thereof, are not "substantially equivalent" to the provisions and procedures set forth in the Taylor Law.[319] Therefore, the Union argues, the Board of Collective Bargaining is required to interpret the NYCCBL as PERB has construed the Taylor Law; or more specifically, to find that the mutual exchange of tours of duty is a mandatory subject of bargaining.

At the outset, we note that the cases cited by the UFA in support of its "substantial equivalency" argument are not relevant to the instant matter. Those cases involved local public employment relations boards, which PERB recognized in City of New York and Patrolmen's Benevolent Association of the City of New York, Inc., 9 PERB ¶3031 (1976), aff'd, 9 PERB ¶3034 differ significantly from the Board of Collective Bargaining. In that case, PERB heard a matter upon the exceptions of the City and the cross-exceptions of the Patrolmen's Benevolent Association("PBA"), to the decision of a PERB hearing officer issued on January 15, 1976.[320] The City argued that the Board of

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[319] In support of its position, the Union cites In the Matter of Syracuse Hancock Professional Fire Fighters Association, 17 PERB ¶3105 (1984); Doyle V. City of Troy, 380 N.Y.S.2d 789, 51 A.D.2d 845 (3rd Dept. 1976); City of Amsterdam v. Helsby, 371 N.Y.S.2d 405, 37 N.Y.2d 19 (1975).

[320] City of New York and Patrolmen's Benevolent Association of the City of New York, Inc., 9 PERB ¶4502 was brought within the context of an improper practice charge alleging a refusal to bargain in good faith. The hearing officer disregarded some particulars of a scope of bargaining decision issued by the Board of Collective Bargaining (Decision No. B-24-75), finding certain

Collective Bargaining's decision in Decision No. B-24-75 was dispositive of the issues decided therein and, therefore, PERB is without jurisdiction to reach a contrary conclusion regarding employment that is subject to the NYCCBL. PERB was not persuaded by that argument because under the Taylor Law scope of bargaining issues normally are resolved in the context of improper practice charges alleging a refusal to bargain in good faith.[321] Thus, it retained jurisdiction over the matter. Upon consideration, however, it determined that the hearing officer should have accepted the determination of the Board of Collective Bargaining as to the scope of bargaining questions at issue therein. In reaching that conclusion, PERB considered the following factors. First, the singular status granted the OCB by the State Legislature in Section 212 of the Taylor Law, namely, that its establishment does not require prior approval by PERB - a requisite with respect to all other local boards throughout the State. Rather, Section 212 provides, in substance, that the NYCCBL as enacted by New York City is in full force and effect until there is a determination by the Supreme Court, New York

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aspects of scheduling, contrary to the Board's determination, to be mandatory subjects of bargaining.

[321] We note that between March 1973 and June 1978, PERB had exclusive jurisdiction over improper practice proceedings. In 1978, the New York State Legislature amended the Taylor Law [Section 205.5(d)] to restore the Office of Collective Bargaining's jurisdiction to decide and remedy improper practices allegedly committed by public employers and/or public employee organizations subject to the jurisdiction of the NYCCBL.

County, that such law is not in substantial equivalency with the State law practice and procedures.[322] Secondly, PERB noted the unique negotiating problems confronting New York City and the expertise of OCB in dealing with such problems. Thirdly, PERB noted the role of the PBA in the formulation of the NYCCBL and its membership in the Municipal Labor Committee, through which it shares in the administration of the OCB. Finally, PERB recognized the need of the OCB to accommodate to the provisions of Section 971 of the Unconsolidated Laws which are uniquely applicable to New York City.[323]

Based on these factors, PERB determined that the opportunities for the PBA to seek relief from PERB in a matter covered by the NYCCBL and already decided by the BCB were restricted. Thus, it accepted the Board's determination on the scope of bargaining issues and reversed the decision of the hearing officer.

In view of the above, we do not find the UFA's argument

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[322] Thus, we note that the statutory management rights provision, Section 12-307b of the NYCCBL, upon which this Board relied in Decision No. B-24-75, is in full force and effect inasmuch as there has been no determination to the contrary.

[323] Section 971 of the Unconsolidated Laws establish unique provisions and procedures relating to tours of duty of New York City policemen. In Decision No. B-24-75, the BCB held Section 971 of the Unconsolidated Laws, along with the management's rights clause of the NYCCBL, to constitute an explicit prohibition so as to render a term and condition of employment a nonmandatory subject of bargaining, if to reach any other agreement would violate an applicable statutory provision.

regarding "substantial equivalency" to be supported by the relevant authority. We note that the factors considered by PERB and relevant to its analysis remain in full force and effect today. Our conclusion is further reinforced by the fact that the Board now has jurisdiction to resolve improper practice charges alleging a refusal to bargain in good faith, pursuant to amendment of Section 205.5(d) of the Taylor Law.

Thus, since we have already determined in Decision No. B-16-81 that "mutual exchange demands" seek to give employees the right to reschedule work time or time off and, therefore, infringe on the City's statutory managerial rights, we find that the instant demands are also nonmandatory subjects of bargaining. Inasmuch as the Agreement contains such a clause, we note that the City voluntarily agreed to bargain on that issue, a permissive subject of bargaining, in the last round of negotiations. Therefore, it may remove the provision unilaterally upon the expiration of the Agreement, as the City proposes to do.

Firefighter Demand No. 79
Fire Marshal Demand No. 111

ATTACHMENT K:
Extend coverage to employees who have transferred from the New York State Fire and Police Department retirement funds. In addition, amend to provide that the transferred employees referred to in attachment K, as amended, shall be treated in the same manner as if they transferred from the Uniformed Service of the New York City Police Department for the purpose of including, but not limited to, calculating increments and longevity adjustments, taking of entrance and promotional exams, seniority, vacation reimbursement, retirement and pension.

Attachment K of the 1984-1987 Agreement reads as follows:

> Effective the date of approval of the 1984-87 UFA Agreement, employees who have transferred from the uniformed service of the New York City Department of Correction, the New York City Housing authority Police Department and the New York City Transit Authority Police to the Fire Department shall be treated in the same manner as if they had transferred from the uniformed service of the New York City Police Department for the purpose of calculating increments and longevity adjustments.

City Position

The City challenges this demand by noting that it contains several parts and contending that some of the parts are nonmandatory. It cites several PERB decisions which held that "a demand consisting of various parts, some of which are mandatory and some of which are nonmandatory, which is presented in such a manner as to reasonably indicate that it was to be negotiated as

a single entity is non mandatory in its entirety."[324] The City concludes that, because the PERB requires Board decisions to be "substantially consistent" with its own decisions,[325] the PERB rule should be followed and the entire demand should be held to be nonmandatory. The City does not address the demand on its merits.

Union Position

The Union argues that its demand is "plainly severable" and, should any portion of it be deemed nonmandatory, the City's challenge should be granted only with respect to that portion. In addition, the Union requests that if the demand is found to encompass nonmandatory subjects in a way that does not easily permit the severability of the nonmandatory components, in accordance with alleged past practice it be given leave to resubmit the demand within ten days in a form "consistent with the legal principles and findings declared by the Board."

On the merits, the Union contends that its demand would not effect eligibility standards for promotional examinations,

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[324] Pearl River Union Free School District and Pearl River Teachers Association, 11 PERB ¶3085 (1978); Civil Service Employees Association, Inc., Niagara Chapter, and Town of Niagara, 14 PERB ¶3049 (1981); and City of Oneida Police Benevolent Association, and City of Oneida, 15 PERB ¶3096 (1982).

[325] The Petition of Organization of Staff Analysts to Review Decision No. B-22-84 of the Board of Collective Bargaining of the City of New York, 18 PERB ¶3067 (1985).

retirement, or pension. According to the Union, the demand merely seeks to give credit to individuals for prior time in certain other titles. The standards themselves would be unaffected.

Discussion

The question of severability has been discussed above. In short, for reasons already explained, we have not followed the PERB rule covering demands with nonmandatory components, and we do not do so here.

The demand itself seeks to provide a variety of benefits for current employees who have transferred into the New York City Fire Department from police or from professional fire departments located elsewhere in the state. It appears to contain several discrete components as follows:

> a. Transfer of pension funds from the New York State Police and Fire Retirement System to the New York Fire Department Pension Fund and Related Funds.
>
> b. Transfer of seniority credit from state police or fire employment for the purpose of calculating salary increments.
>
> c. Transfer of seniority credit from state police or fire employment for the purpose of calculating longevity entitlement.
>
> d. Transfer of seniority credit from state police or fire employment for the purpose of determining eligibility for civil service entrance and promotional examinations.
>
> e. Transfer of seniority credit from state

police or fire employment for the purpose of calculating Department seniority.

f. Transfer of seniority credit from state police or fire employment for the purpose of calculating vacation reimbursement.

We shall categorize and analyze them accordingly:

Compensation-Related Demands

This category contains the components of the demand that are commonly regarded as "economic" proposals, and it includes the Union's salary increment proposal (b.); the longevity entitlement proposal (c.); and the vacation reimbursement proposal (f.).

We have long recognized that salary demands and demands for increased compensation are mandatory subjects of bargaining.[326] The proposals grouped under this category appear to be nothing more than a combination of schemes designed to increase the compensation entitlement for a certain class of employees, and are, therefore, mandatory. Our determination follows the PERB's ruling in Mamaroneck,[327] concerning salary increases based upon length of employment, where the PERB held that longevity pay increases reflecting service with other employers is a mandatory subject of bargaining.

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[326] Decision Nos. B-11-68 and B-4-69.

[327] Town of Mamaroneck and Town Of Mamaroneck Police Benevolent Association, 16 PERB ¶3037 (1983), aff'd, 107 A.D.2d 699, 484 NYS2d 53 (1985).

Seniority Proposal (e.)

Seniority is a mandatory subject of bargaining to the extent that a demand concerning seniority does not interfere with Civil Service law or with managerial rights.[328] The criterion used to determine the propriety of a seniority demand lies in the purpose for which it is to be used.

In this case, although no purpose is specified in the demand itself, we note that several provisions in the existing 1984-1987 Agreement are contingent upon seniority calculations, including salaries and vacation entitlements (Articles VI and XII), and transfer priority (Article XVII). For these limited purposes, we hold that the Union's seniority credit proposal is a mandatory subject of bargaining.

Civil Service Examination Eligibility (d.)

Seniority provisions appear throughout a number of sections of the Civil Service Law. The courts have affirmed that open competitive examinations (entrance examinations) may be weighted according to experience,[329] and the law expressly directs that "due weight" is to be given to seniority in promotional examinations (Civil Service Law §52.2.). Thus, as a matter of law, the City and its Civil Service Commission have been given

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[328] Decision Nos. B-4-69; B-4-71; and B-3-73.

[329] See: Fitzgerald v. Conway, 195 Misc. 397, 90 N.Y.S.2d 351 (1949), aff'd 275 A.D. 205, 88 N.Y.S.2d 649 (1949).

discretion to grant credit for seniority. Therefore, this portion of the Union's demand is nonmandatory, because it would interfere with the statutory rights reserved to the City.

Transfer of Pension Funds (a.)

Section 343 of the Retirement and Social Security Law provides detailed regulations governing the transfer of membership between retirement systems. Although membership transfers generally are allowed, there may be special or unique restrictions that could prevent the transfer of credit from the New York State Policemen's and Firemen's Retirement System into the New York Fire Department Pension Fund and Related Funds.

As we have previously said, a matter covered by statute is not necessarily a beyond the scope of mandatory bargaining, provided that the subject does not contravene the intention of a statute.

Therefore, to the extent that Section 343 of the Retirement and Social Security Law permits the transfer of credit between retirement systems similar to the transfer that the Union is seeking under this demand, its proposal is mandatory. To the extent that §343 does not permit such transfer, the Union's proposal is prohibited by §201.4. of the Taylor Law.

In summary, we find the compensation-related components, the seniority component, and the transfer of pension credit component, as limited above, of the demand mandatory, and the

civil service examination eligibility component nonmandatory.

Firefighter Demand No. 81

ADDITIONAL PROVISIONS
Provide for equitable distribution of assignment of probationary firefighters.

City Position

The City argues that this demand is beyond the scope of mandatory collective bargaining because it interferes with its statutory authority to "determine the methods, means and personnel by which governmental operations are to be conducted". It maintains that pursuant to that authority, this Board has upheld its right to determine personnel assignments unilaterally.

Union Position

The Union contends that this demand only relates to the distribution of Firefighters among the various firefighting companies and has no bearing on the City's ability to determine its manpower level at any given time. Therefore, it argues that it involves a mandatory subject of bargaining.

Discussion

This Board has long held that management has the right to

assign its employees unilaterally.[330] This demand seeks to restrict the City's ability to assign its personnel by mandating that probationary firefighters be "equitably distributed" among the various firefighting companies. Moreover, contrary to the Union's assertion, a limitation on the manner in which the City can deploy its personnel clearly affects the number of personnel it can assign at any given time. Therefore, we find this demand to be beyond the scope of mandatory collective bargaining.

[330] Decision Nos. B-35-82; B-16-81; B-10-81; B-19-79.

Firefighter Demand No. 82
Fire Marshal Demand No. 114

ADDITIONAL PROVISIONS:
Provide a mechanism for expediting applications for disability retirement.

City Position

The City asserts that this demand constitutes a prohibited subject of bargaining because it allegedly violates both Section 470 of the state Retirement and Social Security Law, which governs retirement plans for New York City Firefighters, and Section 201.4 of the Taylor Law, which prohibits negotiation of retirement benefits. According to the City, this Board has long held that prohibited subjects are those where the obligations or duties are fixed by laws, such as disability retirement, and any agreement to the contrary would be unlawful.

Union Position

The Union maintains that its demand has no bearing whatsoever on disability retirement contributions or levels of benefits. It simply seeks to expedite the process for applying for such benefits. Therefore, according to the Union, the mere fact that the demand relates to a subject covered by law is irrelevant to its bargainability because the demand does not conflict with the law. Furthermore, the Union contends, to the extent that the demand could possibly be construed to implicate

the statutory retirement system, it would still be bargainable because its implementation would not require an act of legislation.

Discussion

As we have already said in our discussion of preliminary issues above, a matter covered by statute is not necessarily beyond the scope of mandatory bargaining, provided that the subject has not been pre-empted or that an agreement would not contravene or be unenforceable under the provisions of the law. The latter proviso appears to apply to the instant demand, however.

Sections 13-352 and 13-353 of the New York City Administrative Code provide that a Firefighter covered by the New York Fire Department Pension Fund and Related Funds, or a person acting in his or her behalf, may apply directly to the Pension Fund medical board stating that the member is physically or mentally incapacitated for the performance of duty and should be retired. In ordinary disability cases, the medical board must report to the board of trustees of the Fund, and the board must retire the member "not less than thirty nor more than ninety days after the execution and filing of [the application]." In accident disability cases, the report must be made and the board must retire the member "forthwith."

The medical board is composed of three physicians, none of whom are Fire Department employees and none of whom are under the

control of management.[331] The trustees of the Pension Fund are made up of a twelve-member bipartite board.

We find, therefore, that the Union's demand for a mechanism to expedite disability applications is outside the scope of mandatory bargaining because it seeks a remedy that is beyond the capability of management to provide. If procedural delays are being encountered by members of the Fund in the disability application process, a means outside of mandatory collective bargaining must be found by the Union to address the problem.

Firefighter Demand No. 84
Fire Marshal Demand No. 122

LEGISLATION
Consider development of flexible investment options for employee contributions.

Firefighter Demand No. 85
Fire Marshal Demand No. 123

LEGISLATION
Provide minimum benefit for survivors of early-death retirees.

Firefighter Demand No. 86
Fire Marshal Demand No. 124

LEGISLATION
Provide for annual cost of living increase for retiree pensions directly proportionate to any percentage increase in the Consumer Price Index.

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[331] Section 13-323 of the Code provides that one of the physicians shall be appointed by the board and shall hold office at the board's pleasure, one shall be appointed by the commissioner of hospitals and shall hold office at the pleasure of the commissioner, and the third shall be appointed by the chief medical examiner of the city civil service commission.

Firefighter Demand No. 87
Fire Marshal Demand No. 125

LEGISLATION
Amend Section 12-380-C [sic] of Administrative Code to provide that City will pay contribution to New York fire department life insurance fund on behalf of retired members of the Fire Department.

Section 12-380 (c) of the Administrative Code provides that between one and three dollars will be deducted from the monthly pay or pension of Firefighters, officers or probationary officers which is paid to the credit of the New York Fire Department Life Insurance Fund. The Union proposes that the law be amended so that the City pays the sum contributed by the employees.

Firefighter Demand No. 88
Fire Marshal Demand No. 126

LEGISLATION
Amend §822 of the City Charter to provide that income earned by employees from employment outside the City shall not be subject to City income tax.

Section 822 of the City Charter provides that as a condition precedent to employment, all City employees must agree that if they are nonresidents of the City, they will pay to the City an amount equal to the New York City resident income tax less any city earnings of personal income tax imposed on them. The Union proposes that the Charter be amended to exclude income earned by employees from work performed outside the City.

Linn Letter, Dated November 27, 1988

Eliminate variable supplement benefit.

City Position

The City contends that the Fire Marshal Demand Nos. 122, 124 and 125 and Firefighter Demand Nos. 84, 86 and 87 are prohibited subjects of bargaining by reason of Retirement & Social Security Law, §470[332] and Civil Service Law, §201.4 which bar negotiations on pension benefits.[333] The City also contends that Fire Marshal Demand Nos. 123 and 125 and Firefighter Demand Nos. 85 and 87 concern benefits for already-retired employees who are not entitled to representation in negotiations.[334] Similarly, with respect to Fire Marshal Demand No. 123 and Firefighter Demand No. 85 the City argues that demands for death benefits for families

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[332] The text of the statute reads in relevant part as follows:

> Until [July 1, 1989] changes negotiated between any public employer and public employees, as such terms are defined in [Civil Service Law, §201], with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries, shall be prohibited. . . .

[333] The statute provides, in relevant part, the following:

> The term "terms and conditions of employment" . . . shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries.

[334] The City cites Lynbrook Police Benevolent Ass'n and Incorporated Village of Lynbrook, 10 PERB ¶3067 (1977) and Troy Uniformed Firefighters Ass'n, L.2304, IAFF and City of Troy, 10 PERB ¶3015 (1977) and

of deceased employees are outside the scope of bargaining.[335] Finally, the City objects to Fire Marshal Demand No. 126 and Firefighter Demand No. 88, because they would require the City to join with the Union in supporting legislation to amend Section 822 of the New York City Charter. The City argues that this Board[336] and PERB,[337] as well as NYCCBL §12-311[338] prohibit a bargaining demand calling for an employer to support legislation or a direction by an impasse panel to the City that the City support legislation.

The City argues, however, that its demand that the variable supplements fund be discontinued is a mandatory subject of bargaining, because it involves an economic benefit. It also

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[335] The City cites Police Ass'n of New Rochelle and City of New Rochelle, 10 PERB ¶3042 (1977) and City of Troy, supra, 10 PERB ¶3015.

[336] The City cites Decision Nos. B-16-81 and B-1-74.

[337] The City cites Rochester Fire Fighters, L. 1071, I.A.F.F. and City of Rochester, 12 PERB ¶3047 (1979).

[338] NYCCBL §12-311 provides, in relevant part, that:

> [i]f an impasse panel makes a recommendation on a matter which requires implementation by a body, agency or official which is not a party to the negotiation: (i) it shall address such recommendation solely to such other body, agency or official; (ii) it shall not recommend or direct that the municipal agency or other public employer which is party to the negotiations shall support such recommendation; and (iii) it may recommend whether a collective bargaining agreement should be concluded prior to such implementation.

argues that because the demand was "an integral component in the overall pattern settlement in this round of bargaining with other uniformed Unions," the impasse panel should consider it.

Union Position

The Union concedes that its demands are not mandatory subjects of bargaining, because they would require the City to support legislation. It argues that the City's demand to eliminate the variable supplements fund is also a demand for an agreement to support legislation to amend or repeal an existing legislative program and is, therefore, non-negotiable. It argues, however, that in the event that this Board finds that the City's legislative proposal with respect to the variable supplements fund is bargainable, then its legislative demands be found bargainable, as well.

Discussion

We have held in the past that NYCCBL §12-311 prohibits a direction by an impasse panel that the City support recommendations which must be addressed to a third party body, agency or official.[339] In Decision No. B-1-74, we found that a demand, similar to the instant demands, that the City and a union agree "to sponsor mutually agreed upon legislation to provide

[339] Decisions Nos. B-16-81; B-1-74.

certain improvements in pension benefits" would have involved a such a direction by an impasse panel, and was thus, not a mandatory subject of bargaining. We note that the topic of pension benefits was a prohibited subject of bargaining at that time.

Furthermore, PERB has also found that the content of legislation is not within the scope of negotiations and only becomes so under the Taylor Law when it is necessary to implement a collective bargaining agreement.[340] The instant demands are unconnected with the implementation of any particular term of a proposed collective bargaining agreement. The Union has admitted in the pleadings that its demands are directed at legislation and concedes that they are not mandatory subjects of bargaining. We, therefore, find that Firefighter Demand Nos. 84 through 88 and Fire Marshal Demand Nos. 122 through 126 may not be considered by the impasse panel herein.

We find that the City's demand with respect to the variable supplements fund also is not a mandatory subject of bargaining. The variable supplements fund was established pursuant to New York City Administrative Code, §13-383. Its enabling legislation

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[340] City of Rochester, supra, 12 PERB ¶3047. PERB relied in part on Civil Service Law, §204-a which provides, in relevant part, that any agreement between the parties must include in the body of the agreement a notice that any provision of the agreement which requires legislative action for its implementation will not become effective until legislative approval is given.

reserves "to the state of New York and [the legislature] the right and power to compel, modify or repeal" the provisions which establish the existence of and regulate the fund. To the extent that the Linn letter demands the elimination of the variable supplements fund, it seeks agreement on a matter over which neither party exercises any control.[341] An agreement on this demand would be nugatory, for only the legislature has the power to modify or eliminate the provision of the fund.

To the extent that the Linn letter may be construed as a demand that the Union join with the City in supporting legislation which would eliminate the variable supplements fund, the City's demand is not a mandatory subject of negotiations for one of the very same reasons asserted by the City in objecting to the Union's legislative demands.

As PERB held in City of Rochester, supra, "[l]egislation only becomes a matter of concern under the Taylor Law when it is necessary for the implementation of terms of collective agreement." This principle contemplates the possible need for the legislative implementation of substantive terms of collective bargaining agreements, such as the appropriation of funding for

[341] Moreover, we note, without deciding, that a demand to cause a change in the variable supplements fund may constitute an attempt to negotiate concerning ". . .payments to a fund or insurer to provide income for retirees, or payment to retirees or their beneficiaries" which would be a prohibited subject of bargaining, pursuant to Civil Service Law, §201.4 and Retirement and Social Security Law, §470. See Opin. State Compt. 78-527; Decision No. B-1-74.

wage increases. It does not contemplate the implementation of contractual provisions addressed solely to matters of legislative concern. In the present case, a demand relating to a benefit which the legislature created and which only the legislature may modify or eliminate, contemplates more than the mere implementation of a contractual benefit. Therefore, we adhere to our established policy that a demand to sponsor or support legislation is not a mandatory subject of bargaining and may not be submitted to an impasse panel.[342] The fact that a similar demand allegedly was an integral component of a settlement reached with other uniformed unions necessarily is irrelevant to our disposition of this issue.

We note, however, that both parties' legislative demands, to the extent they seek mutual support for legislation, remain permissive subjects of collective bargaining over which the parties may negotiate.

Firefighter Demand No. 90
Fire Marshal Demand No. 3

Recognition - Article I
Amend to provide that the City shall recognize the UFA as the sole collective bargaining agent for a unit consisting of all Firefighters (Uniformed) and a unit consisting of all Fire Marshals (Uniformed).

Under the 1984-1987 Agreement, Article I, entitled Recognition, states that the City recognizes the UFA as the sole

[342] Decision Nos. B-16-81; B-1-74.

collective bargaining agent for the unit consisting of all Firefighters (Uniformed) employed by the City.

City Position

The City claims that pursuant to Section 12-309b[343] of the NYCCBL, the Board of Certification has the non-delegable power and duty to determine units appropriate for purposes of collective bargaining. Since the Board of Certification is "the exclusive arbiter of the issues of appropriate units", the City argues that this demand is not bargainable.[344]

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[343] Section 12-309b of the NYCCBL states as follows:
> The board of certification, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
> (1) to make final determinations of the units appropriate for purposes of collective bargaining between public employers and public employee organizations, which units shall be such as shall assure to public employees the fullest freedom of exercising the rights granted hereunder and under executive orders, consistent with the efficient operation of the public service, and sound labor relations....

[344] In support of its position the City cites In the Matter of the Town of Greenburgh, 94 A.D.2d 771, 462 N.Y.S.2d 718 (2nd Dept. 1983), wherein the court vacated portions of an arbitration panel's award pertaining to the subject of "disciplinary charges" on the ground that it acted in excess of its power. The court noted that "[u]nder the Taylor Law ... discipline is a permissive subject of negotiation between public employers and employee associations because it is a term or condition of employment." It determined, however, that "[t]he Taylor Law does not apply ... to disciplinary procedures involving members of town police

Union Position

The Union does not dispute the City's claim that the Board of Certification has the authority to determine units appropriate for purposes of collective bargaining. Rather, it asserts that "nothing prevents or prohibits the UFA and the City from agreeing between themselves about appropriate units." Inasmuch as the City's sole argument is that the Board of Certification is the "exclusive arbiter" of unit determinations, the Union contends that it is without merit.

Discussion

The City does not dispute that a demand to negotiate a recognition clause, which sets forth the titles of the employees in the bargaining unit covered by the terms of the agreement, is a mandatory subject of bargaining. Rather, the City objects to the Union's demand on the ground that it seeks to use the recognition clause to change the current bargaining unit. The City asserts, and we agree, that it is within the exclusive statutory responsibility of the Board of Certification to make final determinations of units appropriate for purposes of

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departments in Westchester County because of the provisions of the Westchester County Police Act." Inasmuch as the statute pre-empted disciplinary matters involving members of Westchester County town police departments, the court held that the arbitration panel acted outside of its jurisdiction.

collective bargaining.[345] Therefore, we find the Union's demand to be a nonmandatory subject of bargaining.

Moreover, we note that in a recent decision, Decision No. 19-87, the Board of Certification denied a petition filed by the UFA in which it requested modification of its certification so that it could establish a separate bargaining unit for Fire Marshals. The Union argued that the Fire Marshal's duties had changed substantially since the position was established as a uniformed title in 1969; and that the evolution and change in the title "give rise to extraordinary circumstances which warrant a separate bargaining unit for the Fire Marshals." The Board of Certification determined, however, that the current unit consisting of Firefighters and Fire Marshals remains appropriate.[346] Furthermore, it stated that "in the absence of

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[345] We note that our decision is in accord with City of Binghamton and Binghamton Firefighters, Local 729, IAFF, 10 PERB ¶3092 (1977). In that case, PERB held that a change in a negotiating unit is not a mandatory subject of bargaining. Instead, PERB stated that "[s]uch a change may be sought through the institution of a representation proceeding, but not by the filing of an improper practice charge."

[346] In reaching this conclusion, the Board of Certification considered, among other factors, the following criteria set forth in Section 2.10 of the Revised Consolidated Rules of the Office of Collective Bargaining:

a. Which unit will assure public employees the fullest freedom in the exercise of the rights granted under the statute and the applicable executive order;
b. The community of interest of the employees;
c. The history of collective bargaining in

convincing proof that the current bargaining unit prejudices the collective bargaining status of the employees involved, the creation of an additional bargaining unit with which the City must deal would be in derogation of both the public interest and the legislative intent of the drafters of the NYCCBL."

Firefighter Demand No. 91

Vacation and Leave - Article XII (New Section)
Provide that if an employee's vacation leave is interrupted by death leave, such employee shall have the option to extend his current leave by the number of days interrupted by death leave or to take these days as vacation leave at some later point in the fiscal year.

Fire Marshal Demand No. 63

Vacation and Leave - Article XII (New Section)
Provide that if an employee's vacation leave is interrupted by death leave, such employee shall have the option to extend his current leave by the number of days interrupted by death leave or to take these days as vacation leave at some later point in the same or succeeding fiscal year.

City Position

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the unit, among other employees of the public employer, and in similar public employment;
d. The effect of the unit on the efficient operation of the public service and sound labor relations;
e. Whether the officials of government at the level of the unit have the power to agree or make effective recommendations to other administrative authority or the legislative body with respect to the terms and conditions of employment which are the subject of collective bargaining;
f. Whether the unit is consistent with the decisions and policies of the Board.

The City asserts that these demands encroach upon its statutory managerial right to determine the level of manning in its agencies; take all necessary actions to carry out its mission in emergencies; and determine the methods, means and personnel by which government operations are to be conducted, challenging that aspect of the demands which would give employees the right to take vacation at their discretion, without regard to Departmental limitations or exigencies.[347]

Union Position

The Union contends that Firefighter Demand No. 91/Fire Marshal Demand No. 63 concern the regulation or procedure governing both vacation and death leave and, as such, are mandatory subjects of bargaining.[348]

In response to the City's allegation that these demands give employees the right to take paid leave at their discretion, the Union reasons that the City "ordinarily does not have advance notice of an employee's need for death leave," as distinguished

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[347] The City cites Decision Nos. B-21-87; B-10-81; B-6-79; B-24-75; B-5-75; B-3-75; B-18-74; B-16-4; B-2-73; B-7-69; Fairview Professional Firefighters Association, Inc. and Fairview Fire District, 12 PERB ¶3118 (1979); City of Yonkers and Uniformed Fire Officers Association of the Paid Fire Department of the City of Yonkers, 10 PERB ¶3056 (1977); City of Kingston and New York State Professional Firefighters Association, Inc., Local 461, 9 PERB ¶3069 (1976); Scarsdale Police Benevolent Association, Inc. and Village of Scarsdale, 8 PERB ¶3075 (1975).

[348] The Union cites Decision No. B-16-81.

from compensatory time or vacation leave. Thus, it contends, allowing an employee to extend his prescheduled vacation by the number of days interrupted by death leave places no greater burden on the employer than an ordinary death leave request.

Discussion

The parties do not dispute that vacation and death leave fall within the general subject of hours and are, therefore, mandatory subjects of bargaining under the NYCCBL.[349] The City contends, however, that the bargainability of these demands are limited by another statutory provision, the management rights clause.[350] The UFA, in response, reasons that the City has shown no potential infringement on management rights given the fact that a need for death leave, ordinarily, cannot be anticipated.

In our view, the following two aspects of these demands render them nonmandatory subjects of bargaining: (1) employees would have the right, under certain circumstances, to extend prescheduled vacation leave without regard to department limitations or exigencies; and (2) if employees opt not to extend their vacations, the City must allow for the rescheduling of these days within a defined period of time (within the same fiscal year in the case of Firefighters or within the same or

[349] Section 12-307a of the NYCCBL.

[350] Section 12-307b of the NYCCBL.

succeeding fiscal year in the case of Fire Marshals).

It has long been held that Section 12-307b of the NYCCBL reserves to the City the managerial right to schedule hours of work.[351] In Decision No. B-10-81, we stated:

> The [Union] has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation, sick leave, or other purposes. But, once agreement is reached on these provisions, it is the City's management prerogative to determine the level of staffing to be provided, by means of work schedules, within the limitations of the agreement on hours and leave benefits.[352]

In Decision No. B-16-81, we considered a demand that compensatory time "be granted within thirty (30) days unless waived." We held that a demand which:

> [S]eeks an inflexible, absolute right to time off within a defined period of time without recognition of the exigencies of the department, ... infringes on management's right to establish manpower levels and schedule employees and is, therefore, a nonmandatory subject of bargaining (emphasis added).

We also stated that if the demand were drafted to seek use of compensatory time in a manner that recognized the exigencies of the Department, it would be bargainable.

The Union's argument that the nature of death leave ordinarily requires the Department to adjust staffing schedules

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[351] Decision No. B-4-69.

[352] See also, Decision No. B-16-81.

on very short notice does not negate the fact that giving employees the option to extend or not to extend their vacation would further hamper management control over the scheduling of personnel. PERB has also held demands having such an impact on management rights a nonmandatory subject of bargaining.[353]

Accordingly, because these demands contain the proviso that employees may extend or not extend their vacation leave at their discretion, they interfere with the City's right to determine the number of Firefighters and Fire Marshals who should be on duty at a given time and, thus, may not be submitted for consideration by the impasse panel.

Firefighter Demand No. 92

ADDITIONAL PROVISION
Assure that the City will fulfill its obligation to maintain an LSS quota of 401 firefighters pursuant to the Memorandum of Understanding between the UFA and the City dated September 17, 1969.

City Position

The City argues that this demand interferes with its statutory managerial prerogative to "determine the methods, means

[353] Patrolmen's Benevolent Association of Newburgh, New York, Inc. and City of Newburgh, 18 PERB ¶3065 (1985) (demand seeking to eliminate chief's overview of employee's use of personal leave days impinged on city's ability to determine manning levels and was, therefore, nonmandatory).

and personnel by which governmental operations are to be conducted . . . and exercise complete control and discretion over its organization and the technology of performing its work". Consequently, it maintains that it is beyond the scope of mandatory collective bargaining.

Union Position

The Union did not submit an answer to the City's challenge.

Discussion

We have long held that it is within the City's statutory managerial authority to determine its manpower level.[354] Moreover, permissive subjects which are provided for in prior agreements are not thereby transformed into mandatory subjects for purposes of future negotiations.[355] Therefore, the instant demand which seeks to limit the City's authority to determine and maintain its staffing needs, is beyond the scope of mandatory collective bargaining.

Firefighter Demand No. 94

ADDITIONAL PROVISION
Require that the City provide two emergency medical

[354] Decision Nos. B-35-82; B-16-81; B-10-81; B-19-79.

[355] Decision No. B-21-87; City of Newburgh and Local 589, International Association of Firefighters, 16 PERB ¶4573 (1983); Police Association of the City of Yonkers and City of Yonkers, 14 PERB ¶4516 (1981); Auburn Teachers Association and Auburn Enlarged City School District, 13 PERB ¶4614 (1980); Buffalo Police Benevolent Association and City of Buffalo, 13 PERB ¶4547 (1980).

vehicles to be manned by Firefighters for exclusive use in response to medical injuries suffered by Firefighters in responding to fires or other emergencies.

Fire Marshal Demand No. 74

MESSENGER DUTY - Art. XVI
Provide that any messenger duty performed by Fire Marshals shall be performed by limited services or light duty Fire Marshals using spare chiefs' cars.

Fire Marshal Demand No. 116

ADDITIONAL PROVISIONS
Provide for the establishment of limited service lines for Fire Marshals within the Bureau of Fire Investigation.

Fire Marshal Demand No. 117

ADDITIONAL PROVISIONS
Provide for the establishment of a mobile BFI Forensic Unit to be available on a 24-hour basis for exclusive use by Fire Marshals.

Fire Marshal Demand No. 118

ADDITIONAL PROVISIONS
Provide for the establishment of a BFI Firearms Discharge Incident team consisting of Fire Marshals to respond to and investigate all shooting incidents of Fire Marshals.

City Demand No. 9

Delete Article XVI [Messenger Duty]

Article XVI of the 1984-1987 Agreement provides that messenger duty to and from Department Headquarters is to be performed by four limited service firefighters using spare chief's cars.

City Position

The City contends that these demands restrict its authority to assign personnel and equipment. Therefore, it argues that they interfere with its statutory authority to determine the "methods, means and personnel by which governmental operations are to be conducted" and are beyond the scope of mandatory collective bargaining.

The City also maintains that contrary to the Union's assertion, PERB's holding in Fulmont Association of College Educators and Fulmont-Montgomery Community College[356] is inapposite to Fire Marshal Demand Nos. 74, 116, 117, 118 and Firefighter Demand No. 94. It contends that the decision in that case involved a specific determination by PERB that the provision of secretarial staff to college instructors was a term and condition of their employment, and is therefore irrelevant to these demands. However, it notes that even if Fulmont is applicable, Fire Marshal Demand No. 116 is still nonmandatory because it does not seek the provision of support services to full service unit members, as the deployment of limited service Fire Marshals is within the City's discretion.

Moreover, with respect to Firefighter Demand No. 94 and City Demand No. 9, the City asserts that contrary to the Union's contention, it has no duty to bargain over incidental modifications in the Firefighters' job description. It maintains

[356] 15 PERB ¶4654 (1982).

that the Board in Decision No. B-43-86, upheld its authority unilaterally to determine job classifications pursuant to the NYCCBL's management rights clause.

Union Position

The Union argues that with the exception of City Demand No. 9, these demands seek authorization for necessary support services, and are in fact, mandatory subjects of bargaining. It notes that PERB in Fulmont Association of College Educators,[357] found a similar demand by college instructors for secretarial support staff to be mandatorily bargainable.

The Union also contends, that Firefighter Demand No. 94 and City Demand No. 9 are mandatorily negotiable because PERB in Scarsdale Police Benevolent Association, Inc., and Village of Scarsdale,[358] held a demand involving the job content of employees to be a mandatory subject of bargaining to the extent it did not narrow the inherent nature of the employment involved. Since the Union maintains that the City has not explained how these demands narrow the inherent nature of the Firefighter job description, it asserts that the City's challenge to them is without merit.

Discussion

[357] Id.

[358] 8 PERB ¶3075 (1975).

We agree with the City, that PERB's decision in Fulmont Association of College Educators is inapposite to the negotiability of Firefighter Demand No. 94 and Fire Marshal Demand Nos. 74, 116, 117, 118. In that decision PERB held that a demand seeking the maintenance of secretarial services for college faculty was mandatorily negotiable because it directly involved the terms and conditions of faculty members' employment. We noted in Decision No. B-43-86, that PERB's decision in that case was based on a prior finding that the provision of secretarial services to college instructors was a term and condition of their employment.

Although the Union has alleged that these demands concern mandatory subjects of bargaining, it has not demonstrated to what extent, if at all, the provision of the services they seek affects the working conditions of unit employees. We do not deem its conclusory statements to be dispositive of this issue.[359]

Accordingly, we find that these demands do not affect working conditions within the meaning of the NYCCBL, but seek in one way or another to restrict the City's authority to assign its personnel and maintain the level of its equipment. We have long held these subjects to be beyond the scope of mandatory collective bargaining,[360] and therefore hold the instant demands

[359] Decision No. B-43-86.

[360] Personnel Assignnments: Decision Nos. B-43-86; B-23-85; B-35-82; B-16-81; B-19-79; Equipment: Decision Nos. B-43-86;

to be nonmandatory.

We note that even if we accepted the Union's argument that demands which seek the provision of support staff are mandatory subjects of bargaining, we would still find Fire Marshal Demand No. 116 to be a nonmandatory subject. As the City asserts, this demand does not mandate that unit members assigned to limited service lines be employed as support staff, because the deployment of personnel is within the City's managerial prerogative.[361]

Moreover, we reject the Union's argument, that in accordance with PERB's decision in Scarsdale Police Benevolent Association, Inc., the City must negotiate over the allegedly incidental changes in the Firefighter job classification sought in Firefighter Demand No. 94 and City Demand No. 9. PERB is not subject to a statutory management rights clause as provided in the NYCCBL.[362] Pursuant to that clause, this Board has held demands involving job classification and job content to be beyond the scope of mandatory collective bargaining.[363] Thus, the City may delete Article XVI of the collective bargaining agreement without negotiation.

B-10-81.

[361] Decision Nos. B-43-86; B-23-85; B-35-82; B-16-81; B-19-79.

[362] NYCCBL §12-307b.

[363] Decision Nos. B-43-86; B-16-81; B-10-81.

Fire Marshal Demand No. 18

2) that the same standard applied to determine whether a Firefighter is medically able to return to work or to perform light duty shall also be applied to Fire Marshals.

City Position

The City asserts that this demand is a nonmandatory subject of bargaining because it restricts management's right, pursuant to NYCCBL Section 12-307b, to determine when an employee is fit to return to work.

Union Position

The Union denies that its demand infringes on the City's exercise of management rights. It asserts that the demand merely seeks to have the same standard for determining duty status applied to Firefighters and Fire Marshals.

Discussion

The present demand concerns the standard to be used in determining a Fire Marshal's fitness to return to duty after an illness or injury and the type of duty to be assigned. Pursuant to Section 12-307b of the statute, we have held that management unilaterally may establish qualifications for employment[364] and determine assignments of work.[365] In City of New York and District Council 37, American Federation of State, County and Municipal Employees, AFL-CIO, for example, the union sought to negotiate concerning a demand that "all Motor Vehicle Operators who are `grounded' for medical reasons shall be retained in their positions and shall perform duties within their title which they are physically capable of carrying out." We held that the demand was not within the scope of mandatory collective bargaining because it sought a "significant variation of the job content and

[364]Decision Nos. B-24-87, aff'd, Caruso v. Anderson, Index No. 17123/87, Sup. Ct., N.Y. Cty., IA Pt.21, NYLJ 11/9/87 (Saxe, J.), aff'd, App. Div., 1st Dept. (slip op. 12/2/88); Decision Nos. B-38-86; B-4-74. Accord, Fairview Professional Firefighters Association, Inc., Local 1586, IAFF and Fairview Fire District, 12 PERB ¶3083 (1979); Police Benevolent Association of Hempstead, N.Y., Inc. and Incorporated Village of Hempstead, 11 PERB ¶3072 (1978); Mrs. Lloyd Herdle, et al., constituting the West Irondequoit Board of Education and West Irondequoit Teachers Association, 4 PERB ¶4511, aff'd, 4 PERB ¶3070 (1971).

[365]E.g., Decision Nos. B-56-88; B-23-85; B-37-82; B-35-82; B-16-81; B-4-71; B-4-69.

standards of selection, and thus infringe[d] upon those reserved management rights."[366] Similarly, we find that the determination of the standard to be applied in deciding whether an employee is medically able to return to work and what work he should do, given his medical condition, is a management prerogative. The Union here has not attempted to demonstrate otherwise. Rather, it simply seeks equal treatment for Fire Marshals and Firefighters in this regard. By requiring the City to apply the same standard with respect to one title as the other, however, the Union would usurp management's authority to determine either that the same standard should be applied or that a different standard would be more appropriate.

Since this demand intrudes upon the City's statutory prerogatives, inter alia, to "determine the standards of selection for employment; ... relieve its employees from duty ... for ... legitimate reasons; ... [and] "determine the methods, means and personnel by which government operations are to be conducted", we conclude that it is a nonmandatory subject of bargaining.

Fire Marshal Demand No. 79

VACANCIES - Art. XVIII
Provide that BHI (sic) shall post vacancies and transfers within the Bureau by Department Order.

[366]Decision No. B-4-69 at 4.

City Position

The City argues that this demand infringes on its statutory right to "direct its employees" and "determine the methods, means and personnel by which governmental operations are to be conducted". It also notes that PERB has held demands relating to employee transfers which interfere with an employer's managerial prerogative to deploy its staff to be outside the scope of mandatory collective bargaining.

Union Position

The Union maintains that contrary to the City's assertion, this demand has nothing to do with the deployment of personnel. It contends that this demand seeks the publication of information and that this Board has found similar demands to be mandatorily bargainable.

Discussion

We agree with the Union's contention that this demand is mandatorily bargainable because it merely seeks information, and does not interfere with the City's managerial prerogative to deploy its employees. In Decision No. B-2-73 we found a similar demand for the posting of work assignments to be within the scope of mandatory collective bargaining because it related to employee working conditions, and did not interfere with the City's

authority to assign personnel.[367] Consequently, we reject the City's contention that this demand interferes with its authority to deploy its personnel, and find it to be a mandatory subject of bargaining.

Fire Marshal Demand No. 80

VACANCIES - Art. XVIII
Provide that promotion of Firefighters to vacant Fire Marshal lines shall be made within 15 days.

City Position

The City argues that the implementation of this demand would interfere with its right to determine the "methods, means and personnel by which governmental operations are to be conducted" by requiring it to staff vacancies within a defined period of time. It asserts that PERB has held similar demands to be nonmandatory subjects of bargaining.

Union Position

The Union argues that this demand only concerns promotion procedures and has no bearing on the City's substantive decision to promote Firefighters. Therefore, it contends that it involves a mandatory subject of bargaining.

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[367] See also, Decision No. B-16-81; Genesee-Wyoming BOCES School Related Association and Genesee-Wyoming BOCES, 16 PERB ¶4531 (1983).

Discussion

We agree with the City's contention with regard to this demand. A limitation on the time period within which the City may promote its employees clearly constitutes a restriction on its authority to determine personnel assignments.[368] Since the assignment of personnel is within the City's statutory managerial prerogative,[369] we find the instant demand to be beyond the scope of mandatory collective bargaining.

Fire Marshal Demand No. 89

> DETAILS TO OTHER UNITS; FIVE MAN MANNING - Art. XXV; Art. XXVI
> Revise Articles XXV and XXVI to require safety manning in all Fire Marshal units at all times to effect that all Fire Marshal squads shall be manned by 12 Fire Marshals available to respond at the beginning of each tour. No less than 2 Fire Marshals may be assigned per car, per tour, per day, per field operation unit. Further provide that all existing units and any other newly-created field operation units shall be maintained open and operative at all times.

Article XXV of the 1984-1987 Agreement sets forth the procedure for compensating Firefighters detailed to units other than those to which they are permanently assigned for their travel time. Article XXVI provides that all firefighting

[368] Decision No. B-43-86; Schenectady Patrolmen's Benevolent Association and City of Schenectady, 20 PERB ¶4636 (1987); City of Rochester and Rochester Firefighters Association, Local 1071, IAFF, 18 PERB ¶4579 (1985); Professional Firefighters Association, Inc., Local 274, I.A.F.F. and the City of White Plains, 10 PERB ¶3043 (1977).

[369] Decision Nos B-35-82, B-16-81, B-10-81, B-19-79.

companies are to be manned by no less than five employees.

Fire Marshal Demand No. 98

ATTACHMENT A
Amend to assure against reduction in safety manning for Fire Marshals.

Fire Marshal Demand No. 99

ATTACHMENT A
¶¶1, 2 and 3: Amend to make applicable to Fire Marshals' duty vehicles.

Fire Marshal Demand No. 100

ATTACHMENT A
¶4: Amend by inserting the words "in firefighting companies or safety manning in Fire Marshal units" after the words "minimum manning".

Fire Marshal Demand No. 101

ATTACHMENT A
¶5: Amend by inserting the words "or Fire Marshals" after each appearance of the word "Firefighter".

Attachment A of the 1984-1987 Agreement sets forth guidelines which clarify the City's policies regarding the assignment of Firefighters to operate Department Vans and Spare Chief's Cars whereby minimum manning levels are reduced.

City Position

The City argues that these demands interfere with its statutory authority to "determine the methods, means and personnel by which governmental operations are to be conducted". It asserts that this Board has held the determination of manning levels to be within the City's managerial prerogative. Moreover,

the City contends that the Union has failed to allege any changed circumstances which warrant conducting a hearing to determine whether the instant demands have a practical impact on employee safety.

Union Position

The Union argues that these demands involve the safety of employees and should be submitted to this Board for a practical impact hearing. It also asserts that pursuant to Decision No. B-43-86 and the parties' stipulation in Case No. I-187-86 to carry over such demands and practical impact issues into negotiations for a successor to the 1984-1987 agreement, a hearing should proceed forthwith.

Discussion

This Board has long held demands involving manning levels to be within the City's statutory managerial prerogative.[370] PERB has similarly held the subject of manning to be within management's discretion.[371] However, where manning levels are

[370] Decision Nos. B-23-85; B-35-82; B-6-79.

[371] International Ass'n of Firefighters of the City of Newburgh, Local 589 and City of Newburgh, 10 PERB ¶3001 (1977),

found by this Board to have a practical impact on the safety of employees, management may be required to bargain over the alleviation of that impact.[372]

In Decision No. B-43-86 we defined a practical impact on safety as one which "arises from a management decision or action, or inaction in the face of changed circumstances". We also recognized in Decision No. B-37-87 that the existence of a clear threat to employee safety constitutes a per se practical impact which warrants the imposition of the duty to bargain before the actual impact has occurred.

Mere allegations of a safety impact do not constitute sufficient grounds to direct that a practical impact hearing be conducted.[373] Although these parties stipulated in Case No. I-187-87 to carry over practical impact issues into negotiations for a successor to the 1984-1987 collective bargaining agreement, the Union is not absolved from its obligation to demonstrate grounds which warrant conducting a practical impact hearing before we direct that one be held. Since it is within our exclusive non delegable jurisdiction to declare the existence of

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aff'd sub nom. International Ass'n of Firefighters of the City of Newburgh v. Helsby, 59 A.D.2d 342, 399 N.Y.S.2d 334 (3d Dept. 1977); City of Niagara Falls and Niagara Falls Uniformed Firefighters Association, AFL-CIO, Local 714, 9 PERB ¶3025 (1976); White Plains Police Benevolent Association and City of White Plains, 9 PERB ¶3007 (1976).

[372] Decision Nos. B-43-86; B-23-85; B-16-81; B-6-79.

[373] Decision Nos. B-37-87; B-38-86; B-23-85; B-34-82.

a practical impact,[374] the instant stipulation between the parties, reached in the course of negotiations for a 1984-1987 Agreement, can have no conclusive effect on our determination of the necessity for conducting a practical impact hearing in this matter.

The Union has not presented any evidence which demonstrates that issues covered in the instant demands will affect the safety of unit employees. Consequently, as we will not order a practical impact hearing on the basis of conclusory statements, we find that no grounds have been established for a finding of practical impact, and that these demands, which involve a nonmandatory subject, are beyond the scope of mandatory collective bargaining.

Fire Marshal Demand No. 103

> ATTACHMENT C:
> The existing provisions of the 1984-1986 agreement shall remain in effect for the term of the new agreement except as modified by UFA Demand Nos. 16 and 17.

This demand would require the City to continue to follow the recommendations contained in a report issued by the Fire Department Medical Practices Review Committee on July 28, 1978. (Attachment C.)[375] The report of the Review Committee dealt with

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[374] Decision Nos. B-31-88; B-18-87; B-36-85.

[375] With the exception that the provisions called for in the report would be supplemented by the creation of "satellite medical offices" (Fire Marshal Demand No. 16), and "improved

matters including the appropriate role of the Fire Department Medical Division and its physicians; a more specialized medical response to fire injuries; a more thorough and objective oversight of treatment by the Department medical officers; the elimination of routine fitness examinations prior to return to duty; programs and facilities for treatment of chronic back ailments, hypertension, cardiac care, and routine physical examinations; an improvement in the facilities and procedures at the medical clinic; the reorganization of the medical division; and an on-going evaluation of the medical care being provided by the Department.

City Position

The City contends that the Union's demand is nonmandatory because it infringes upon management's right to direct its employees, determine the methods and means by which governmental operations are conducted, maintain the efficiency over its organization and the technology of performing its work, and exercise complete control and discretion over its organization, as provided under Section 12-307b of the NYCCBL. The City also argues that, to the extent the demand seeks to increase the duties of the Bureau of Health Services employees, such matters have been determined by the PERB to be outside the scope of

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monitoring and recordkeeping . . . regarding employees exposed to hazardous chemicals or materials" (Fire Marshal Demand No. 17).

bargaining.

Union Position

The Union contends that its demand is bargainable because it involves circumstances that have a direct impact on the health and safety of Firefighters. According to the Union, inasmuch as medical and health care treatment has a practical impact on Firefighters' health and safety, its demand is a mandatory subject of bargaining.

Discussion

The Union's position is based upon its belief that, because the provisions of the report of the Medical Practices Review Committee arguably can have an impact on Firefighters' health and safety, "consequently [their continuation] is a mandatory subject of bargaining." The City bases its position on its managerial prerogatives, and it argues that this demand would undermine its statutory authority to organize and conduct its operations.

We find that virtually all of the recommendations contained in the Medical Practices Review Committee's report infringe upon areas that are exclusively reserved to management through §12-307b of the NYCCBL, and are, therefore, nonmandatory subjects of negotiation. However, although §12-307b provides the City with

broad managerial rights, its authority is not absolute. The delegation of power under this section is qualified by the proviso that questions concerning the practical impact that managerial decisions have on employees are within the scope of bargaining.

We have rendered a number of decisions concerning practical impact since the term was first dealt with in Decision No. B-9-68. In 1975, when we said that where a "proposed change by management is challenged as a threat to safety, it must, if there is a dispute as to bargainability, be submitted to this Board which, on the basis of the relevant evidence, will determine whether or not the proposed plan in fact involves a threat to safety."[376] However, as a condition precedent to our consideration of all practical impact claims, we have consistently required that the details of the impact must be specified. A claim cannot be supported by mere conclusory allegations.[377] In other words, although a union has no right initially to demand bargaining over a subject that is nonmandatory, once it has shown that a management decision has or can result in practical impact, it gains the right to seek alleviation through bargaining.

With regard to the instant demand, the Union has failed to

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[376] Decision No. B-5-75.

[377] See: Decision Nos. B-69-88; B-43-86; B-37-82: B-2-76; B-5-75; and B-3-75.

meet this burden because it has neither alleged nor demonstrated how the elimination of the text of the Medical Practices Review Committee's report could have an effect on the health or safety of Firefighters and Fire Marshals. To begin with, the extent to which the Committee's recommendations currently are being followed, if they are being followed at all, has not been made clear. Second, both parties apparently are satisfied with the present practices, and neither suggest that the Department may be contemplating a change in them. Finally, the Union has not spelled out the effect that allegedly would occur even if management were to institute unilateral changes.

Based on the above considerations, we find that Fire Marshal Demand No. 103 is not a mandatory subject of bargaining, and we further find that there is insufficient basis to support a claim of practical impact on employees health or safety.

Fire Marshal Demand No. 105

> ATTACHMENT E:
> Amend by inserting the words "or Fire Marshal" after the words "Firefighter first grade."

City Demand No. 15

> Among the items that will be deleted . . . The side letter on delegate transfers.

The parties have challenged one another's demands concerning

protection against involuntary transfer for a certain class of Union delegates. The 1984-1987 Agreement provides that "A delegate who is a Firefighter first grade and who has served as a delegate for six months shall not be involuntarily transferred because of his activities protected under the Taylor Law and the NYCCBL as a delegate on behalf of the Union." (Attachment E.) Fire Marshal Demand No. 105 seeks to expand the coverage in order to make it apply to Fire Marshals as well as to Firefighters. The City seeks to eliminate Attachment E in its entirety.

City Position

In support of its position, the City argues that Attachment E merely repeats and mandates that which is already required under the Taylor Law and the NYCCBL: that an employee cannot be transferred for engaging in protected activity. Therefore, according to the City, Attachment E is nonmandatory because a contract provision which duplicates statutory benefits or requires compliance with the law is redundant.

Union Position

The Union maintains that the mere fact that a contractual provision deals with a subject that is addressed by law does not automatically render the provision nonmandatory. In support of its position the Union cites Board Decision No. B-47-87, wherein we held:

> We do not agree with the assertion that a matter covered by statute is necessarily a prohibited subject of bargaining. It is well settled that the requirement of good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment.

According to the Union, inasmuch as Attachment E neither conflicts with existing law nor infringes on any managerial right, and because it does no more than provide that delegates may not be transferred for unlawful reasons, it may not be unilaterally deleted from the contract by the City.

In support of its own demand, the Union contends that its proposal merely seeks to clarify that Attachment E applies equally to Firefighters and Fire Marshals. The Union maintains that neither can be transferred because of their lawful, protected union activities and, consequently, the demand does not infringe on any realm of lawful managerial discretion.

Discussion

Section 12-306 of the NYCCBL makes it an improper employer practice to interfere with the administration of a public employee organization, or to discriminate against an employee for the purpose of encouraging or discouraging participation in the activities of the organization. We have previously said that any transfer motivated by a discriminatory intent would constitute a

violation of §12-306.[378]

For reasons that we explained in our discussion of preliminary issues above, we do not agree with the City's position that simply because a matter is covered by statute necessarily makes it a nonmandatory subject of bargaining. The requirement of good faith bargaining can extend to matters covered by law when they relate to terms and conditions of employment, provided that they are not pre-empted or do not contravene the intention of a statute.

A second consideration raised by this demand, however, concerns its potential for promoting participation in union activity. We have recognized that the unqualified insulation of union delegates against transfers might be viewed by many unit members as an encouragement of active participation in internal union activities.[379] Such encouragement would also be in violation of §12-306.

In this case, however, the side letter makes clear that its coverage is limited to those transfers resulting from "activities protected under the Taylor Law and the NYCCBL as a delegate on behalf of the Union." Thus, the demand narrowly relates to the performance of delegate duties and it does not violate §12-306 of the NYCCBL.

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[378] Decision Nos. B-46-88 and B-42-82.

[379] Decision No. B-21-79.

We find, therefore, that the provisions of Attachment E of the 1984-1987 Agreement do no more than require compliance with the NYCCBL concerning retaliatory transfers for union activity, and, as such, encompass a mandatory subject of negotiation.

Fire Marshal Demand No. 119

> ADDITIONAL PROVISIONS:
> Provide that the City shall distribute to each Fire Marshal all BFI Directives, Legal Bulletins, BFI Training Bulletins, NYC Police Department Operational Orders and any other similar publications which may relate to Fire Marshal duties.

City Position

The City contends that the Union's demand is a nonmandatory subject of bargaining because it infringes upon the City's rights to determine the methods, means and personnel by which government operations are to be conducted, and it would interfere with the City's authority to exercise complete control and discretion over its organization, as prescribed under Section 12-307b of the NYCCBL (the statutory management rights clause.) According to the City, it has the unilateral right to decide what materials are distributed to its employees, and, therefore, any demand that would interfere with its right is nonmandatory.

Union Position

The Union argues that its demand seeks only to provide each Fire Marshal with copies of publications relating to their duty that the City already has in its possession. Therefore, according to the Union, the demand would have only a "marginal" effect on the conduct of the City's operations because it would not required the City to create something that did not previously exist. The City would merely have to distribute copies of material that it already has. The Union concludes that this would not be a "material infringement" on the City's managerial rights.

Discussion

Although this demand seeks the allocation and distribution of written materials, it is, essentially, a demand for a specific type of equipment. We have repeatedly held in prior decisions that the allocation of City equipment is a subject exclusively within the area of management prerogative as set forth in Section 12-307b of the NYCCBL, and that demands for equipment constitute nonmandatory subjects of bargaining.[380] The fact that the equipment sought under this demand takes the form of written documents and literature rather than apparatus, accessories, or turnout, does not vitiate the prescription that we have established. Even if, arguendo, the Union is correct in its

[380] See, Decision Nos. B-43-86; B-23-85; B-16-81; and B-16-74.

contention that the infringement would be only "marginal," the relative degree of infringement is beside the point. A demand for publications is still a demand which would affect the allocation of equipment, and, as such, is an infringement on management's prerogatives to determine the mission of the agency and the equipment necessary to accomplish that purpose. We therefore hold Fire Marshal No. 119 to be nonmandatory.

Fire Marshal Demand No. 120

ADDITIONAL PROVISIONS
Provide that all new Fire Marshals shall receive the same training as NYC Police Department personnel regarding street tactics, criminal procedure law, penal law, criminal investigation.

City Position

The City argues that the determination of the extent of training received by its personnel is within its statutory managerial prerogative. Therefore, it contends that this demand is beyond the scope of mandatory collective bargaining.

Union Position

The Union maintains that the City does not have the absolute discretion to determine the type of training that is appropriate for its employees. Consequently, it argues that the City's challenge to this demand is without merit.

Discussion

This Board has held on many occasions that demands involving the training of personnel are within the City's statutory managerial prerogative to "maintain the efficiency of governmental operations; . . . and exercise complete control and discretion over its organization and the technology of performing its work".[381] We have delineated certain limited exceptions to this general rule in situations where, for example, training is required by an employer as a qualification for continued employment, improvement in pay and/or assignments,[382] or where a practice of employer encouragement of participation in training programs exists.[383] However, since the Union has not presented any evidence demonstrating that any of these circumstances exist in the instant case, we find this demand to be beyond the scope of mandatory collective bargaining.

Fire Marshal Demand No. 121

ADDITIONAL PROVISIONS:
Revise the process for awarding of departmental recognition for meritorious acts involving police actions taken by Fire Marshals; such actions to be evaluated by one merit board comprised solely of BFI personnel.

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[381] NYCCBL §12-307b; Decision Nos. B-43-86; B-16-81; B-7-77; B-23-75.

[382] Decision Nos. B-43-86; B-2-73; B-8-68.

[383] Decision Nos. B-43-86; B-2-73.

City Position

The City contends that the Union's demand is a non-mandatory subject of bargaining because the City has the right unilaterally to determine the standards and criteria for employment evaluation. The City further alleges that this demand interferes with its right to determine the standards of selection for employment, direct its employees, and maintain the efficiency of its operations, as provided under Section 307b of the NYCCBL. According to the City, any demand that seeks to create a jointly developed system for recognizing meritorious acts and mandating who should make the decision would infringe upon management's right to evaluate its employees and is a non-mandatory subject of bargaining. Finally, the City asserts that it has the sole right to establish the qualifications for promotion.

Union Position

The Union argues that departmental awards for meritorious acts result in credits that can be used for obtaining promotions by the recipients. According to the Union, inasmuch as this Board has held that promotional standards are bargainable, this demand, which relates to standards for promotion, is a mandatory subject of bargaining.

Discussion

A demand seeking the creation of a joint Fire Marshal - BFI management committee to meet periodically for the purpose of discussing matters of mutual concern, such as promotional

criteria, would be a mandatory subject of bargaining to the extent that the matters to be considered by the committee are terms and conditions of employment. As worded, however, the mandate of the committee sought by Fire Marshal Demand No. 121 would infringe upon management's right to recognize and grant awards to employees who have performed meritorious acts.

The Union correctly points out that we have held promotional standards to be bargainable.[384] However, its argument that the work of the committee it is proposing would be related to promotional standards, because awards for meritorious acts result in credit that can be used for promotion, relies on too tenuous a connection. A Union demand seeking to give relatively more or less weight to awards for meritorious acts in promotional decisions may be bargainable, or the Union might be entitled to bargain over standards and procedures that underlie promotional decisionmaking in general, but it may not interfere, directly or indirectly, with management's prerogative to decide whether to grant meritorious service awards on an individual basis. This demand, as framed, is not a mandatory subject of bargaining.

City Demand No. 6

Delete Article XIII, Section 4 (Vehicle Replacement) and Section 6 (Mask Service Unit)

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[384] Decision No. B-2-73.

Article XIII, Section 4 of the 1984-1987 Agreement institutes a ten year replacement policy for all first line firefighting vehicles. Article XIII, Section 6 provides for the assignment of six additional Firefighters to the Mask Service Unit.

Union Position

Although the City contends that it has no intention of making any changes in the areas governed by the instant contractual provisions, the Union argues that the only possible reason the City may have for deleting them is to alter the managerial policies and procedures to which they apply. It notes that the City, in its notice informing the Union of intended deletions from the current contract, only states that it has no intention of implementing changes in manning levels. Therefore it argues that the assertion in the City's pleadings that it will maintain the standards currently set forth in the subject provisions, is not credible.

Moreover, the Union makes specific allegations that these deletions will result in a practical impact adverse to the safety of unit employees. It contends that the City has expressly acknowledged the relation of these sections to firefighter safety by placing them in the contract Article entitled "Safety Standards and Equipment".

With respect to Article XIII, Section 4, the Union asserts that the failure of a fire engine's water pumper can result in

delays that permit a fire to rage out of control, thereby placing Firefighters at an increased risk of sustaining physical injury. It also argues that the failure of tower or aerial ladders can prevent the rescue of trapped Firefighters as well as civilians, and seriously endanger Firefighters who use them.

With respect to Article XIII, Section 6, the Union contends that "self contained breathing apparatuses" are critical to Firefighters' work conditions because they routinely work in "heavy smoke" situations. It maintains that smoke inhalation is a common cause of work related injuries and that during periods of heavy fire activity, tremendous burdens are placed on employees of the Mask Service Unit who must recharge depleted air tanks. The Union also asserts that this contractual provision was negotiated as a result of prior instances of understaffing which led to shortages in air tanks.

City Position

The City contends that these contractual provisions deal with subjects that are not mandatorily bargainable (the provision of specific equipment and maintenance of staffing levels). It also asserts that prior negotiations over permissive subjects do not transform them into mandatory subjects.

Moreover, the City argues that the Union's allegations of a practical impact are vague and conclusory. It maintains that in order to demonstrate the existence of a practical impact, the Union must prove that the alleged impact results from a

management action, or inaction in the face of changed circumstances. The City asserts that since it is merely deleting the instant provisions, and has no intention of changing any of its current policies or practices in these areas, the Union has failed to demonstrate the existence of a resulting safety impact on its membership, and its challenges must be dismissed.

Discussion

We have long held matters pertaining to the maintenance of equipment and deployment of personnel to be within the City's statutory managerial prerogative.[385] The City correctly argues that the prior negotiation of, and agreement upon, permissive subjects does not transform them into mandatory subjects.[386] Therefore, the instant demand involves a subject which is beyond

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[385] Personnel assignments: Decision Nos. B-43-86; B-23-85; B-35-82; B-16-81; B-19-79; Equipment: Decision Nos. B-43-86; B-23-85; B-10-81.

[386] Decision No. B-21-87; City of Newburgh and Local 589, International Association of Firefighters, 16 PERB ¶4573 (1983); Police Association of the City of Yonkers and City of Yonkers, 14 PERB ¶4516 (1981); Auburn Teachers Association and Auburn Enlarged City School District, 13 PERB ¶4614 (1980); Buffalo Police Benevolent Association and City of Buffalo, 13 PERB ¶4547 (1980); Buffalo Police Benevolent Association and City of Buffalo, 13 PERB ¶4547 (1980).

the scope of mandatory collective bargaining.

However, where managerial action involving a nonmandatory subject results in a practical impact on employee safety, the employer is required to negotiate over the alleviation of that impact.[387] In this case, we reject the Union's allegations that the deletion of the subject contractual provisions will result in a practical impact on the safety of unit members.

We have held that a practical impact arises from a managerial action, or inaction in the face of changed circumstances which constitutes a clear threat to employee safety.[388] The City maintains that although it intends to delete the instant contractual provisions, it will retain the standards which they have promulgated. Therefore, we find that the City may delete the instant contractual provisions because such an action does not constitute a clear threat to employee safety.

The credibility of the City's stated intention to maintain the level of services provided for in the instant contractual provisions is irrelevant to our determination. The duty to bargain over a practical impact on safety arises only when that impact is in danger of being realized. Only if and when the City acts to alter current procedures with respect to servicing firefighting vehicles and staffing the Mask Servicing Unit, will

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[387] Decision Nos. B-31-88; B-35-82.

[388] Decision No. B-43-87.

inquiry into the effect of the City's action on the safety of Firefighters, and whether any such effect rises to the level of a practical impact, be appropriate.

City Letter Dated April 19, 1988

> Any employee hired on or after July 1, 1988 shall be a resident of the City of New York at the time of such appointment or shall establish city residence within ninety (90) days after such appointment and shall maintain City residence as a condition of employment.

Union Position

The Union maintains that the City's demand is nonmandatory because it "clearly has no relation whatsoever to 'wages,' 'hours,' or 'working conditions'" as required by Section 12-307a of the NYCCBL. According to the Union, the location of an employee's residence has nothing to do with his or her working conditions while on the job. It rejects the City's argument by noting that the City cites no authority in support of its position.

City Position

The City contends that its residency demand is a condition of employment because, in order for employment to continue, an employee would be required to maintain a residence within the City. Therefore, the City argues, the demand "clearly" relates

to a term and condition of employment.

Discussion

The parties have not pinpointed the class of employees who would fall under the residency restriction that this demand would impose. However, on its face, the proposal seems to contain a pre-employment and a post-employment component, and we shall consider it in this light.

Residency Requirement for Current Employees

The City seeks a provision whereby any Firefighter or Fire Marshal hired after June of 1988 would have to become a resident of New York City within ninety days. Presumably, if accepted, the provision would have retroactive application.

The PERB has issued a number of decisions holding that the imposition of a residency requirement on current employees is a mandatory subject of bargaining.[389] However, even though a subject is mandatory, it may be excluded from collective bargaining if its particular subject matter has been limited by

[389] Local No. 650, AFSCME, AFL-CIO, and City of Buffalo, 9 PERB ¶3015 (1976); Auburn City Unit, Cayuga County Chapter, Civil Service Employees Association, Inc., and City of Auburn, 9 PERB ¶3085; and Board of Education of the City School District of the City of New York, and United Federation of Teachers, Local 2, AFT, AFL-CIO, 13 PERB ¶3006 (1980).

the plain and clear meaning of a statute.[390]

Section 12-120 of the New York Administrative Code provides, as a condition of employment, that all persons not exempted by provisions of the Public Officers Law must reside within the City. The Public Officers Law does provide such an exemption for New York City Fire Department members, however, as long as they live within the state, either within a county contiguous to the City, or within a non-contiguous county that is not more than thirty miles from the nearest City boundary line.[391] Therefore, as a matter of law, City Firefighters and Fire Marshals are protected against the imposition of a residency requirement, and their employee organization cannot be made to bargain over a waiver of their members' statutory right. Accordingly, we find that the City's demand, as it pertains to current employees, is a prohibited subject of bargaining.

Residency Requirement for New Hires

Under Sections 12-303 and 12-305 of the NYCCBL, the authority of a public employee organization to negotiate with a public employer, and the concomitant obligation of the public

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[390] Syracuse Teachers Association, Inc., v. Board of Education, Syracuse School District, 35 N.Y.2d 741, 361 NYS2d 912 (1974). Also see, our discussion of matters covered by statute in the Preliminary Issues section above.

[391] Public Officers Law, §30, subdivisions 4-b. and 5.

employer to bargain over terms and conditions of employment, is limited to current employees who are in its bargaining unit. A Union has no standing to negotiate for potential employees, except to the extent that the terms and conditions of employment that are negotiated for current employees will be applied to future employees if and when they are hired.[392]

We find, therefore, that it is beyond the authority of the instant parties to agree to any part of the City's demand, as it would pertain to future employees.

[392] See, City of Peekskill and Peekskill Police Association, 12 PERB ¶3100 (1979).

DETERMINATION

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

DETERMINED, that the respective demands of the Uniformed Firefighters Association and the City of New York, the negotiability of which was challenged in the scope of bargaining petitions filed by the City on November 30, 1988 and December 16, 1988, and the Union on December 27, 1988, are within or without the scope of mandatory collective bargaining between the parties to the extent set forth in the specific rulings contained in the foregoing decision, which are incorporated by reference herein; and it is further

ORDERED, that hearings be held before a Trial Examiner or Trial Examiners designated by the Office of Collective Bargaining on those issues specified in the foregoing decision as raising questions of practical impact on employee safety and/or workload of sufficient substance to warrant the holding of such hearings.

Dated: New York, New York
February 24, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

JEROME E. JOSEPH
MEMBER

DEAN L. SILVERBERG
MEMBER

Note: City Member Edward Silver did not participate in the Board's discussion or in the decision of this matter.