UFA v. City, NYFD, 47 OCB 63 (BCB 1991) [Decision No. B-63-91 (IP)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of the Improper
Practice Proceeding between

Uniformed Firefighters Association
of Greater New York,
Petitioner,

-and-

City of New York and the Fire
Department of the City of New York,
Respondents.
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Decision No. B-63-91

Docket No. BCB-1398-91

INTERIM DECISION AND ORDER

On July 15, 1991, the Uniformed Firefighters Association of Greater New York ("the union") filed a verified improper practice petition alleging that the Fire Department of the City of New York ("the Department") violated the New York City Collective Bargaining Law ("NYCCBL") by unilaterally implementing a mandatory subject of bargaining. The City submitted an answer on July 31, 1991. The Union filed a reply, an affidavit and a copy of an arbitrator's award on August 14, 1991. On August 26, 1991, the City requested permission to file a document it called an Amended Answer/ Surreply. The Union objected to the City's submission of the Amended Answer/Surreply by letter dated September 5, 1991. The City urged, acceptance of its Amended Answer/Surreply in a letter dated September 10, 1991.

A draft of a decision in this case was considered by the Board of Collective Bargaining at its meeting on October 23, 1991. A portion of the draft relied upon decisions of the New York State Public Employment Relations Board ("PERB") which were cited by the parties in their pleadings. During the Board's deliberation, a City Member requested that the parties be asked to submit additional briefs on the question of whether the cited decisions of PERB supported the draft's conclusion that reimbursement of transportation expenses incurred in the course of the employer's business was a mandatory subject of bargaining.

On October 24, 1991, the Trial Examiner assigned to the case wrote the following letter to the parties:

> At its meeting on October 23, 1991, the Board of Collective Bargaining considered the referenced case, and requested that the parties submit additional arguments concerning the question of whether reimbursement of transportation expenses incurred by employees in the course of the employer's business is a mandatory subject of bargaining.
>
> Please submit a brief discussing this issue, on or before November 8, 1991, referring specifically to decisions rendered by the New York State Public Employment Relations Board. No requests for extensions of time in which to file the brief will be granted.

The parties filed additional briefs within the prescribed time. By letter dated November 19, 1991, the Union objected to the City's Memorandum of Law on the grounds that it was unresponsive to, and went beyond the scope of, the question presented.

Background

On June 7, 1991, the Union requested bargaining on the issue of transporting firefighters, detailed to other units during their regular tour of duty, back to their assigned unit. The Union's letter stated:

> the Collective Bargaining Agreement is silent as [to] this specific point, which has never before been addressed, and [because] this matter clearly concerns a condition of employment, it is our position that this subject constitutes a mandatory subject of bargaining.

By letter dated June 25, 1991, the City's Office of Labor Relations informed the Union that, "inasmuch as the parties are currently engaged in collective bargaining negotiations on the prospective agreement, the issue will be considered as included within those negotiations." The Union's attorney responded, in a letter dated June 28, 1991:

> ... this matter is a subject of mid-term mandatory collective bargaining, not related to the current negotiations for a collective bargaining, and requires separate and immediate bargaining; in our view, your failure to act accordingly would constitute an improper practice...

On July 2, 1991, the Union issued "Communication Bulletin #11 of 199111 to its membership. The bulletin stated, in relevant part:

> In light of the Department's latest "Friday Night Special" regarding details to other units, be advised that the U.F.A. specifically disagrees with the position that the Department is not responsible for transportation on details.
>
> Pending ultimate resolution of the issues surrounding details, and pending further direction, the U.F.A. advises its members as follows:

1. Do not arrive at your assigned unit prior to 0900 or 1800 hours;

2. Request Department transportation to every detail;

3. If transportation is refused, request advance compensation f or public transportation. YOU CANNOT BE REQUIRED TO ADVANCE THIS COST OUT OF YOUR OWN POCKET.

4. If advance compensation for public transportation is refused, begin WALKING to your detail;

5. The U.F.A. advises its members not to use their private vehicles for transportation to details. You will not be compensated for same, nor will you be insured by the City in the event of an accident AND YOU CANNOT BE REQUIRED TO USE YOUR OWN VEHICLE.

The U.F.A. dedicates this GREAT WALKATHON to the cause of Unionism, and in protest of the stupidity of the Fire Department administration

On July 10, 1991, the parties met to negotiate the Union's demands regarding transportation of firefighters. These issues included reimbursing travel costs to firefighters detailed to other units, providing transportation by the Department for detailed firefighters, portal -to-portal pay, and obtaining free mass transit passes for firefighters. After exchanging proposals and counter-proposals, the City offered reimbursement of travel costs within thirty days to detailed firefighters using public transportation; reimbursement of twenty-three cents per mile to detailed firefighters using their own cars; an assurance that the City would request from the Transit Authority mass transit passes for firefighters; and immediate arbitration on the issue of portal-to-

portal pay. The Union rejected this offer. The parties agreed to submit the issue of portal-to-portal pay to immediate arbitration, and a hearing was scheduled to take place on July 12, 1991.

On July 11, 1991, the Department issued an order to all units concerning transportation. The relevant portion of the order states:

> Members who are detailed to another quarters more than one mile... from their assigned quarters DO NOT HAVE THE OPTION OF WALKING. Such members may use public transportation or, as always, members have the option of using their private vehicles... Members using public transportation can submit a request for reimbursement.
>
> All Officers are hereby directed that whenever they order a member on a detail to a quarters more than one mile... from the member's assigned unit, and the member will travel on Department time, they MUST give the member a direct order not to walk... Members should be informed at the same time that they will be reimbursed for the cost of public transportation in accordance with established procedures.
>
> If a member, after being given a direct order NOT to walk, indicates that he/she is going to walk, the Company Officer shall make [a Journal Entry indicating that the firefighter had been ordered not to walk, had been advised that he or she would be reimbursed for the cost of public transportation, and had informed the Officer that he or she intended to walk, contrary to direct orders].
>
> After making this Journal Entry Company officer shall make notification to Battalion and Division. Company officer shall also forthwith forward an unusual occurrence report indicating facts and identifying unit to which the member was being detailed.
>
> This procedure is effective 1800 hours July 11, 1991 until further orders. (All emphasis in the original.)

On July 12, 1991, the issue of portal-to-portal pay was submitted to arbitration. On the same day, the Department issued the following order to all units:

> In accordance with the directions of the impartial arbitrator Milton Rubin the order entitled "Details to Other Quarters" from the Chief of Department dated July 11, 1991 is held in abeyance until 1800 hours July 17, 1991.

The arbitrator issued a decision regarding portal-to-portal pay on August 6, 1991.

Positions of the Parties

The Union's Petition

The Union alleged that the City unilaterally implemented a change in a mandatory subject of bargaining when the Department ordered firefighters to pay for their transportation in connection with their employment and, in particular, with regard to detailing of firefighters to quarters other than their assigned quarters. The Union seeks to have the order of July 11, 1991, rescinded or, in the alternative, to require the Department to rescind the order and bargain on the issue.

The City's Answer

The City asserts that it did not violate its obligation to bargain. The City maintains that it negotiated on this issue, considered and responded to the Union's proposals, and offered

counter-proposals. The City relies on Matter of Columbia County,[1] and Matter of Westchester County Medical Center[2] to support its argument that the Union must show bad faith on the part of the City to prove a violation of the obligation to engage in bargaining. The City states that the Union has not alleged bad faith on the part of the City.

The City maintains that this Board does not have jurisdiction to consider the instant claim because the issue of providing transportation to detailed firefighters is covered in the collective bargaining agreement between the parties. It cites Decision Nos. B-24-87 and B-39-88 to argue that the Board may not consider an underlying contractual claim of the unilateral alteration of a term and condition of employment. The City also argues that the petition asserts a claim in a vague, speculative and conclusory manner, and does not identify the provision in the Department's order which it claims violates the NYCCBL. Therefore, the City argues, the Union has failed to state a valid claim of improper practice.

In any case, the City argues, there has been no unilateral change regarding a mandatory subject of negotiation. The City asserts that the Union has not shown how the Department's order has changed a term and condition of employment. Citing Matter of

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[1] 10 PERB 4513, aff'd 10 PERB 7018 (1977).

[2] 12 PERB 4591, aff'd 13 PERB 3038 (1980).

Deer Park Union Free School District,[3] it concludes that because the Union has not identified how the order in question changes any term and condition of employment, it has not demonstrated that an improper practice has been committed.

The City asserts that formulating a procedure to reimburse travel expenses is a management right and is, therefore, not subject to bargaining. The City argues that § 12-307b of the NYCCBL gives the City the right to determine the means and personnel by which government operations are to be conducted, and to exercise complete control and discretion over its organization and the technology of performing its work.

The City claims that "the order at issue was submitted to arbitration" on July 12th. The City asserts that during the arbitration hearing, the Union alleged that the Department's order violated the collective bargaining agreement. It was because the Union raised the issue, the City maintains, that the Department issued its subsequent order holding the original order in abeyance.

The Union's Reply

Relying on County of Chautauqua v. Sheriff's Employee Association[4] and County of Tompkins v. CSEA,[5] the Union argues that reimbursement of expenses incurred by employees engaged in their

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[3] 15 PERB 3104 (1982).

[4] 22 PERB 4565, aff'd 22 PERB 3060 (1989).

[5] 17 PERB 4575 (1984).

job duties is a term and condition of employment, and thus is a mandatory subject of bargaining. It also cites Decision No. B-4-89, in which, it maintains, the Board held that reimbursement of travel expenses incurred during the course of employment is a mandatory subject of bargaining.

The Union asserts that the Board has jurisdiction over the instant dispute because Article XV of the collective bargaining agreement, cited by the City, refers only to transportation to and from fires and in emergencies. The Union states that it neither alleged a contractual violation, as petitioner did in Decision No. B-24-87, nor cited a contractual provision as evidence of a change in the terms or conditions of employment, as was alleged in Decision No. B-39-88.

The Union maintains that the issue of transportation to details "was not framed or submitted to the arbitrator; nor was said issue decided on at arbitration.” It submits a copy of the award that was issued on August 6, 1991, by the arbitrator hearing the issue of portal-to-portal pay.

In its answer, the City raises as an affirmative defense the claim that petitioner had not demonstrated that the Department's order changed a term and condition of employment. In response, the Union submitted an affidavit by its attorney supporting its claim that the order in dispute constituted a new practice by the Department that changed a term and condition of employment.

In addition, the Union raises an issue for the first time. It maintains that because the order of July 11 was issued before impasse was declared, its implementation constitutes an improper practice within the meaning of the NYCCBL.

The City's "Amended Answer/Surreply"

The City subsequently submitted an additional document, with a letter stating:

> The petition contains one conclusory statement alleging that the City failed to bargain over the issuance of an order, to which the City answered. Subsequently a Reply was submitted which contains sixteen paragraphs in support of the Petition, evidence which subsequently arose after the submission of the Answer, i.e., the Rubin Arbitration-Award, and a five paragraph Attorney's Affirmation. The City now requests the opportunity to address such new evidence and new allegations.

The City's additional submission enlarges on its claim that it had negotiated with the Union on this issue. It maintains that the Union was at fault for not proceeding to impasse on the issue, and reiterates its claim that the issue of reimbursement for travel to details had been settled in arbitration.

The Union's Memorandum of Law

The union maintains that PERB held, in County of Chautaugua[6] and County of Tompkins,[7] that both reimbursement of out-of-pocket expenses incurred during the course of the employer's business,

[6] See footnote 4, supra.

[7] See footnote 5, supra.

and procedures for such reimbursement, are mandatory subjects of bargaining. It asserts that the Department's order was issued without bargaining to impasse, and before impasse proceedings had been exhausted.

The City's Memorandum of Law

The City asserts that the PERB cases cited by petitioner are inapposite because, in the instant case, there is no unilateral change in a term and condition of employment. The City does not address the question of whether the subject of reimbursement of expenses is a mandatory subject of bargaining. The arguments and allegations contained in the remainder of the City's memorandum are not responsive to the Trial Examiner's letter of October 24, 1991, and are not repeated herein.

Discussion

At the outset, we will consider the procedural questions raised by the parties. The City claims that the Union's petition is "vague, speculative and conclusory" and does not identify the provision in the Department's order which it claims violates the NYCCBL. For this reason, the City argues, the Union has failed to state a valid claim of improper practice. The City cites Decision No. B-33-80, in which we held that, "[m]ere assertion of an improper practice without factual allegations evidencing the violative activity will not sustain the requisite burden of

proof..." Section 7.5 of the Rules of the Office of Collective Bargaining ("OCB Rules")[8] delineates the standard for pleading a charge of improper practice. A petition which materially fails to comply with this standard deprives the other party of a clear statement of the charges to be met and hampers the preparation of a defense.

As its statement of the nature of the controversy, the Union's petition claimed:

> By order dated July 11, 1991 (attached hereto), Respondents unilaterally implemented a mandatory subject of bargaining; to wit, Respondent Fire Department, in part, ordered Petitioner's members to pay for their transportation in connection with their employment, and in particular with regard to detailing of firefighters to quarters other than their assigned quarters.

It is true that the Union's petition does not cite the provision of the statute which it claims the City has violated. It does, however, contain a statement of the claim, the nature of the controversy, and a copy of the order at issue. It is the Board's long-established policy that the OCB Rules be liberally construed, especially where the other party is not prejudiced by a defect in

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[8] Part 7 of the OCB Rules states, in relevant part:

§ 7.5 Petition - Contents. A petition... shall contain: ...

c. A statement of the nature of the controversy, specifying the provisions of the statute, executive order or collective agreement involved, and any other relevant and material documents, dates and facts...

pleading.[9] Where it is clear that the petition provides respondents with sufficient information to place them on notice of the nature of the Union's claim and to enable them to formulate a response, the petition is sufficient under § 7.5 of the Rules.[10] It should be noted, however, that a petitioner risks dismissal of a claim unsupported by statutory citation which fails to provide sufficient clear information to enable respondent to formulate its defense.

In its answer, the City responded to the claim put forth in the petition, asserted affirmative defenses, and set forth additional facts and material, as prescribed in the OCB Rules.[11] The content of the City's answer demonstrates its awareness that the petition alleged implementation of a unilateral change in an area that is a mandatory subject of bargaining. As affirmative defenses, the City raised the issues of the Board's jurisdiction over this matter, its obligation to bargain over mandatory

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[9] Decision Nos. B-78-90; B-28-89; B-21-87; B-44-86; B-8-77; B-5-74.

[10] Decision Nos. B-56-88; B-44-86.

[11] Part 7 of the OCB Rules states, in relevant part:

§ 7.7 Answer - Contents. Respondent's answer... shall contain: ...
a. Admissions or denials of the allegations of the petition.
b. A statement of the nature of the controversy.
c. Any additional facts which are relevant and material.
d. Such other affirmative matter or defenses as may be appropriate.

subjects, and its alleged management prerogative to determine procedures for reimbursing travel expenses. The City also claimed that the issue in dispute had been raised by the Union and settled during the arbitration of July 12th.

The Union replied to the City's answer. In response to the City's affirmative defense that the issue had been raised in arbitration, it submitted a copy of the arbitration award. It is true, as the City later complained, that the arbitration award was issued after the City filed its answer. The arbitrator's award refers only to portal-to-portal pay, not to reimbursement of travel expenses to and from details. Although the City appears to argue that the instant issue was resolved during the July 12th arbitration, there is no persuasive evidence in the award itself, or in the Amended Answer/Surreply, that the arbitrator considered or decided the issue of reimbursement.[12] Thus, we need not consider

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[12] The City appears to be undecided as to the disposition and consequences of the July l1th order. In its answer, the City states that:

> The order at issue was submitted to arbitration. On or about July 13, 1991 [sic], the parties appeared (before the arbitrator). At that time, the [Union] raised the allegation that the July l1th order at issue violated the agreement. As a result, the order was held in abeyance for seven days.

The City submits a copy of the order of July 12th, holding the order "in abeyance for seven days" and states further that "as a result [of the arbitration), the order of July 11th was withdrawn." It then concludes that "the subject has been submitted to arbitration. The relief requested [in the petition] has been afforded to the UFA." The City has not submitted evidence that the July 11th order was, in fact, rescinded.

(continued...)

12 (... continued)

the portion of the Amended Answer/Surreply concerning the arbitration award because it is not germane to the matter before us.

The Union, however, exceeded the limits imposed f or a reply by the OCB Rules[13] when it raised an issue not alleged in the petition. Since the Union deprived the City of the opportunity to answer this allegation at the proper time, we will not consider the Union's argument that because the order of July llth was issued before impasse was declared, its implementation constitutes an improper practice within the meaning of the NYCCBL. For all of the above reasons, then, we will not admit the City's Amended Answer/Surreply into the record. Because we will not consider the document, we also need not reach the question of whether it is an amended answer or a surreply.[14]

The final procedural matter to be considered is the question of whether to admit into the record the parties' memoranda of law,

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[13] Part 7 of the OCB Rules states, in relevant part:

§ 7.9 Reply - Contents... petitioner may serve and file a verified reply which shall contain admissions and denials of any additional facts or new matter alleged in the answer. Additional facts or new matter alleged in the answer shall be deemed admitted unless denied in the reply.

[14] We note, however, with reference to the City's characterization of this submission, that there is a distinction made at law between an amended answer and a surreply.

submitted in response to the Board's request for additional argument on the question of whether reimbursement of expenses incurred in the course of the employer's business is a mandatory subject of bargaining. In its letter of November 19, 1991, the Union stated:

> Rather than address itself to the specific issue as framed by [the Trial Examiner], the City instead attempts to present new evidence to bolster an old defense(i.e., that the affirmation of an existing practice does not constitute a unilateral change in terms and conditions of employment). The City cannot be permitted to offer any new evidence, argument or legal support which is not responsive to [the Trial Examiner's] narrowly framed question posed to the parties.

We agree. At the City's urging, the parties were asked to respond to one question of law, referring only to PERB decisions. The Union complied with this request. The City submitted a document that is, essentially, a third attempt at an answer, in which it revisits old arguments, raises additional arguments and submits new evidence. To permit this document to be made part of the record, without affording the Union the right to reply, would contravene the fundamental principles of due process.[15] Therefore, we will not consider the City's memorandum, including its attachments, except to the extent that it addresses the PERB cases concerning reimbursement.

The City claims that the instant dispute is not within the jurisdiction of this Board because a provision for transporting

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[15] Cf., Decision No. B-52-91 at 9-10 (a party may not request two opportunities to have an issue resolved in its favor).

detailed firefighters is contained in Article XV of the collective bargaining agreement.[16] Article XV provides f or transportation "to and from fires and in emergencies. A plain reading of the contract leads us to agree with the Union that the contract is silent on the issue of transportation to and from units to which they have been detailed. The Union neither alleged a contractual violation nor cited a contractual provision as proof of a change in a term and condition of employment. There being no alleged violation of the contract, it is clear that the Board has jurisdiction over this dispute in an improper practice proceeding.[17]

We next consider whether the procedure for reimbursing transportation expenses on details promulgated in the July 11th order is a mandatory subject of bargaining. The Board of Collective Bargaining has exclusive jurisdiction to determine which matters are mandatory, permissive and prohibited subjects of bargaining.[18] The essence of both the Taylor Law and the NYCCBL is the obligation placed upon public employers to negotiate with and

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[16] Article XV ("TRANSPORTATION") of the collective bargaining agreement between the parties states:

> The Department recognizes its responsibility to provide transportation to. and from fires and in emergencies. When transportation is not made available, and an employee is authorized to use and uses his personal car, he shall be paid $1.75 for that use. Payment shall be made within a reasonable time.

[17] Civil Service Law § 205.5(d); Decision Nos. B-53-89 and B-57-87.

[18] Decision No. B-13-74.

enter into written agreements with recognized and certified public employee organizations regarding wages? hours, and terms and conditions of employment. Any subject with a significant or material relationship to a condition of employment might be designated a mandatory subject of bargaining. The scope of bargaining is restricted, however, when it intrudes on areas that involve a basic goal or mission of the employer.[19]

The Union asserts that reimbursement of travel expenses incurred during the course of employment is a mandatory subject of bargaining. The City argues that § 12-307b of the NYCCBL affords the City the right to determine the means and personnel by which government operations are to be conducted and, generally, to exercise complete control and discretion over its organization and the technology of performing its work. The city maintains that determining a procedure for reimbursing travel expenses to firefighters is among the rights accorded to management by statute and, therefore, is a prohibited subject of bargaining.

Promulgation of certain work rules may be within management's statutory prerogative to direct its employees and determine the methods, means and personnel by which government operations are to be conducted. Exercise of managerial authority constitutes an improper practice, however, when it interferes with rights protected under the NYCCBL,[20] and a claim to limit management's

[19] Decision Nos. B-5-90; B-1-90.

[20] Decision No. B-50-90.

exercise of its statutory rights may thus be based upon statutory proscription[21]. When asserting such a claim, the critical question is whether the challenged procedure involves changes in wages, hours or working conditions.[22]

In the instant case, petitioner must show that the Department's plan for reimbursement of travel expenses on details is a mandatory subject of bargaining within the meaning of the NYCCBL.[23] Petitioner relies on two cases decided by the New York State Public Employment Relations Board ("PERB") in support of its argument on this issue. In County of Tompkins,[24] the Union alleged an improper practice when the public employer unilaterally abolished past practices by which employees received advances toward, and reimbursement of, travel expenses. The hearing officer found that "compensation for expenses incurred by employees in the [public employer's] business is a term and condition of employment" and a mandatory subject of bargaining, and added:

> ... whether employees are able to obtain advances of

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[21] Decision No. B-39-88.

[22] Decision No. B-56-88.

[23] Section 12-307a of the NYCCBL provides, in relevant part:

> ... 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) ... [and] working conditions....

[24] County of Tompkins v. CSEA, 17 PERB 4575 (1984).

> anticipated expenses or must seek reimbursement f or such expenses impacts on the use of their personal finances and the procedure is, thus, also mandatorily negotiable as a term and condition of employment.

Similarly, in County of Chautaugua,[25] in which the Union challenged a change in the practice of reimbursing employees for meal expenses, PERB held that "[r]eimbursement of expenses incurred by employees engaged in their job duties is a mandatory subject of bargaining; it is but another form of wages", and that "employee participation in the implementation of... employer policies [which impact upon employee interests] is a term and condition of employment."[26] The reimbursement procedure instituted by the Department in the order of July 11th is clearly analogous to the procedures challenged in the cited cases. We conclude, therefore, that the reimbursement scheme at issue here is a term and condition of employment, and a mandatory subject of bargaining within the meaning of the NYCCBL.

In its answer, the City's sole argument regarding the claimed change in a term or condition of employment is as follows:

> There has been no unilateral change regarding a mandatory subject of negotiation. Regarding the issue of payment for transportation, the order states: "Members being

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[25] 22 PERB 4564 (1989).

[26] The decision quotes Police Association of New Rochelle, New York, 13 PERB 3082 (1980), which states:

> ... an administrative work rule constitutes a mandatory subject of negotiation unless it has slight impact upon terms and conditions of employment or if it has a major impact upon managerial responsibilities that, by law or public policy, may not be shared.

> detailed shall be informed at the same time that they will be reimbursed for the cost of public transportation in accordance with existing procedures." The UFA has not identified how this provision changes any term and condition of employment. Accordingly, no improper practice has been committed.

The Union responds by alleging, in an affidavit by its attorney, that the reimbursement plan represents a change in past practice. The Union maintains that before the order was issued, its members had never been directed to use, and pay in advance for, the expenses of public transportation. The Union asserts, further, that before July 11th the Department had no procedure in place to reimburse travel costs on details. Thus, we are presented with a record which contains, on the one hand , the Union's allegation of the Fire Department's unilateral imposition of required travel with subsequent reimbursement of expenses, together with a sworn denial that there previously was any applicable procedure for such reimbursement. On the other hand, the record contains only the City's reference to and quotation from the challenged order, which asserts that reimbursement will be, "in accordance with existing procedures". In this context, the order's reference to "existing procedures" is self-serving and unpersuasive. The City, in its answer, has failed to give citation to the source of those "existing procedures", or to submit a copy thereof, or to describe them in any degree of detail.[27] Based upon this record, we do not

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[27] We note, further, that were they made part of the record, neither the City's Amended Answer/Surreply nor its memorandum of law would have altered our conclusion on this issue. The only additional facts alleged concerning this issue are the references,

(continued...)

27 (... continued)
in the memorandum, to reimbursement rules of the Comptroller of the City of New York, and a Fire Department document providing, by its own terms, for reimbursement for Inspectors and Supervisors in the Bureau of Fire Prevention. Were they properly before us, we would not find that either of these references

f ind that a substantial issue has been raised as to the prior existence of applicable procedures for reimbursement. Accordingly, we find that the Fire Department's actions constituted a unilateral change in a mandatorily bargainable term or condition of employment.

County of Chautauqua holds that a public employer may act unilaterally when the parties are deadlocked in negotiations, and the employer is faced with a compelling reason to take unilateral action and is willing to continue to negotiate thereafter.[28] Here, the City has presented no evidence that the parties were deadlocked, or that it had a compelling reason to act. We find, therefore, that the Department unilaterally implemented a change in a term and condition of employment in its order of July 11th by directing firefighters to take public transportation to details and instituting a procedure for reimbursing the costs of such travel.

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established an existing Fire Department practice or procedure applicable generally to reimbursement of the travel expenses of detailed firefighters.

[28] County of Chautauqua, supra, note 25.

The City contends, and the Union denies, that the City complied with its duty to bargain in good faith.[29] It appears to us that neither party is blameless in this case. Petitioner alleges, rightfully, that the City unilaterally implemented a procedure before mandatory bargaining on the subject had been exhausted. It also appears, however, that petitioner organized and encouraged its members to participate in what amounted to a job action, and then filed an improper practice petition, before the parties had completed negotiations in good faith. Neither the actions of the Department nor the Union were calculated to promote sound labor relations within the framework established by, or in the spirit of, the Taylor Act and the NYCCBL. The crux of the

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[29] The statutory definition of good faith bargaining, as set forth in Section 12-306c of the NYCCBL, includes the following obligations:

> (1) to approach the negotiations with a sincere resolve to reach an agreement...
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays...
>
> (5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

matter is that neither party requested declaration of an impasse.[30]

The duty to negotiate a mandatory subject includes the duty to negotiate until agreement is reached or the impasse procedures are exhausted, and to submit to the impasse procedures set forth in the statute.[31] Neither party in the instant case has fulfilled its statutory duty to bargain to impasse. As the Union correctly states, when an employer desires to implement a change in a term or condition of employment during the term of a collective bargaining agreement, the parties must engage in mandatory interim bargaining on the issue. Coincidentally, however, the parties in the instant dispute are now engaged in bargaining on a successor to their expired collective bargaining agreement. In the interest of efficiency, we direct the parties to include in their current negotiations the issue of reimbursement of expenses incurred by firefighters using public transportation to travel to detailed quarters. We reiterate that the issue in dispute, because it is a mandatory subject in interim bargaining, is distinguishable from other issues currently in negotiation. For this reason, if the parties have not reached a successful conclusion on this issue

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[30] The Rules of the Of f ice of Collective Bargaining afford each party the opportunity to declare an impasse, to wit:

> § 5.2... A request for the appointment of an impasse panel may be made jointly by the public employer and the certified or designated employee organization, or singly by either party...

[31] County of Chautauqua, 21 PERB 4588 (1988); City of Newburgh, 15 PERB 3116 (1982), conf'd 97 A.D.2d 258, 16 PERB 7030 (1983), aff'd 63 N.Y. 2d 793, 17 PERB 7017 (1984).

within a reasonable amount of time, we will entertain a request from either party to move the issue to impasse.

Until this issue is resolved, we will retain jurisdiction over the instant improper practice charge. Since it is unclear whether the Department's order of July 11th has been "held in abeyance" or "rescinded". we direct the Department to cease and desist from requiring firefighters to advance the cost of using public transportation to and from details until the issue is resolved by negotiation or an impasse panel has issued its findings. This direction is limited to the issue of the required use of public transportation without prior payment of the cost thereof. Nothing contained in our direction shall be construed to limit the right of the Department to assign its personnel and to require that changes of assignment be made in a timely manner, using any of the various available means of transportation.

ORDER

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

ORDERED, that the Fire Department and the Uniformed Firefighters Association enter into negotiations on the issue of reimbursement of firefighters for expenses incurred while using

public transportation to travel to detailed quarters, and it is further,

ORDERED, that the Board of Collective Bargaining retain jurisdiction of the improper practice charge filed as Docket No. BCB-1398-91 until the above issue is resolved by negotiation or submission of the issue to an impasse panel, and it is further,

DIRECTED, that the Fire Department shall cease and desist f rom requiring firefighters to advance the cost of using public transportation to detailed quarters until such time as the parties reach a negotiated settlement of this issue or until the matter is presented to and determined by an impasse panel.

Dated: New York, New York
December 27, 1991

MALCOLM D. MACDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

CAROLYN GENTILE
MEMBER

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