City v. UFA, 49 OCB 45 (BCB 1992) [Decision No. B-45-92]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of
Scope of Bargaining Petition of

CITY OF NEW YORK,

Petitioner,

-and-

UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Respondent.
- x

Decision No. B-45-92
Docket No. BCB-1517-92
(I-209-92)
(I-210-92)

DECISION AND ORDER

On August 21,, 1992, the City of New York, appearing by its Office of Labor Relations ("OLR"), filed a scope of bargaining petition and an accompanying memorandum of law in support of its scope of bargaining petition. The petition and memorandum seeks 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"). In its petition, the City challenges the bargainability of fifty-eight numbered Union demands, some of which contain a number of subparts, that have not been resolved in negotiations between the parties for a successor agreement to their 1987-1990 unit contract.

On September 14, 1992, the UFA filed its answer to the

City's petition and memorandum. The answer did not address twenty-eight of the fifty-eight numbered demands that the City challenged. On October 1,, 1992, the city filed its reply in support of its petition. The reply did not address seven of numbered demands that the Union responded to in its answer.

Background

In August 1990, the UFA and the City commenced collective bargaining negotiations for an agreement to succeed the one covering the period July 1, 1987 to June 30, 1990.[1] On July 3, 1991, the City's then First Deputy Commissioner of Labor Relations wrote a letter to the UFA President, which provides:

> As you know, A.8619 is pending in the Senate and Assembly. The enactment of A.8619 into law will decrease the City's contribution into the Fire Pension Fund. The commencement date of the availability of the portion of the savings attributable to your union realized by the City from the enactment of A.8619 into law, and thereby available for collective bargaining, will be the same as the commencement date of your successor

[1] The bargaining unit consists of all Firefighters and Fire Marshals (Uniformed) employed by the City (See Article I of the Agreement.)

> contract, July 1. 1990. If we cannot agree an to the translation of those savings into an amount which in available for collective bargaining, this issue of the amount of savings attributable to your union from the enactment of A.8619 into law may be submitted to impasse pursuant to the New York City Collective Bargaining Law.[2]

On April 2, 1992, the UFA filed a Request for Appointment of an Impasse Panel, pursuant to §1-05 of Title 61 of the Rules of the City of New York ("RCNY").[3] Therein, the Union alleged that

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[2] In Decision No. B-8-92, which issued on March 26, 1992, the Board of Collective Bargaining ("the Board"), inter alia, held that the July 3, 1991 letter constituted "a unilateral expression of [the City's] willingness to submit an allegedly nonmandatory issue to an impasse panel."

[3] Title 61 of the RCNY, entitled: Office of Collective Bargaining, Chapter 1 - Practice and Procedure (hereinafter referred to as "the OCB Rules"), provides, in relevant part:

> **§1-05 Impasse Panels.**
>
> **(b) Request for impasse panel-contents.** 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. ... The request shall be filed with the board and shall contain:
>
> (1) The names and addresses of the parties;
>
> (2) The date when negotiations began and the date of the last meeting;
>
> (3) The nature of the matters in dispute and any other relevant facts, including a list of the specific employer and. or employee organization demands upon which impasse has been reached;
>
> (4) A statement that collective bargaining (with or without mediation) has been exhausted and that conditions are appropriate for the creation of an impasse panel;

(continued...)

the parties reached an impasse in their collective bargaining negotiations an the singular issue of the value Of savings attributable to the Union from the enactment of A.8619. In its request, the UFA maintained that negotiations had not been exhausted on any other issue in collective bargaining at that time. The UFA's request was docketed an Case No. I-209-92.

In a letter dated April 20, 1992, addressed to Malcolm D. MacDonald, Director of the Office of Collective Bargaining and Chairman of the Board of Collective Bargaining, the City opposed the UFA's request on the ground that conditions necessary for the creation of an impasse panel did not exist at that time. The City argued that "[i]f the UFA desires that an impasse panel determine the valuation issue, it must wait until collective

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3(...continued)

(c) Upon receipt of a request for an impasse panel, the director may conduct or cause to be conducted an investigation to ascertain if the conditions for an impasse panel have been met, namely, the collective bargaining negotiations have been exhausted and that the conditions are appropriate for the creation of an impasse panel.

(f) Authorization of panel. If the board determines that collective bargaining negotiations (with or without mediation) have been exhausted and that conditions are appropriate for the creation of an impasse panel. it shall instruct the director to appoint such a panel. In reaching its determination, the board may conduct or direct such additional investigation, conferences or hearings as it deems advisable and proper. The director may appoint an impasse panel, without prior consultation with the board, upon request of both parties.

bargaining on all mandatory issues on which the parties have not agreed has been exhausted. At that time, it may submit a request for the creation of an impasse panel setting forth all mandatory issues on which the parties have not agreed, and those outstanding permissive issues, such as the valuation issue, that the City has consented to have presented to an impasse panel." In response to the City's April 20th letter, the UFA argued that "resolution of the question of the value of savings generated by legislative changes in the pension system interest rate assumptions [will] clarify, for both sides, the resources available to resolve the remaining issues." Pursuant to the OCB Rules, Chairman 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.

On May 6, 1992, the City filed its own Request for Appointment of an Impasse Panel. The City alleged that after numerous negotiation sessions, including more than 12 sessions aided by the mediation services of Deputy Chairman Viani, the parties have reached an impasse in their collective bargaining negotiations an issues relating to wages, hours and working conditions. The City's request was docketed as Case No. I-210-92.

On Kay 20, 1992,, Deputy Chairman Viani reported to Chairman MacDonald that his attempts at mediation have not met with

success, that collective bargaining negotiations between the parties have been exhausted, and that conditions are appropriate for the creation of an impasse panel. Accordingly, Mr. Viani recommended the appointment of an impasse panel to hear and decide the dispute.

On May 21, 1992, the UFA submitted its second Request for the Appointment of an Impasse Panel, this time alleging that the process of collective bargaining between the parties on all issues relating to wages, hours and working conditions had been exhausted. In that both parties now were in agreement that conditions were appropriate for the creation of an impasse panel, and given Mr. Viani's report, as well as his own evaluation of the circumstances surrounding the lengthy negotiations between the parties, Chairman MacDonald concluded that an impasse panel should be appointed.

All three requests were consolidated for one proceeding. Following a selection process agreed upon by the parties and consistent with the OCB Rules, on July 8, 1992, a three member panel was designated to hear the dispute. The instant petition. was filed on August 21, 1992.[4]

[4] It should be noted that on July 29, 1992, the Union filed its own scope of bargaining petition, which was docketed as BCB 1513-92, seeking a determination on whether aspects of a work schedule that allegedly contravene statutory law and certain pension-related longevity payments are mandatory subjects of bargaining. See Decision No. B-44-92.

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-vide 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;

(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 an employees, such as questions of workload or manning, are within the scope of collective bargaining.

PRELIMINARY ISSUES

A. Negotiability of Demands that are Mandatory Subjects in Part. and Nonmandatory Subjects in Part

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.[5] 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 that performed by PERB in ruling upon refusal to bargain charges under the improper practice provisions of §209-a of the Taylor Law. Therefore, we adhere to our policy of informing the parties of both the mandatory and the nonmandatory elements of their demands.

[5] E.g., Decision Nos. B-4-89 and B-16-81.

B. Demands Challenged by the City on the Ground of Vagueness

The City, in its petition, challenged six of the Union's economic bargaining demands solely on the ground of vagueness. For each, the City argued that it could not determine the amount of the economic increase being sought or cost of the demand. The Union answered by denying that its demands are vague, and contending that this Board has held that a demand to "update and improve economic terms is not vague." The City did not respond to the Union's answer, with respect to these six demands, in its reply.

In Decision No. B-43-86, we held that even though a portal-to-portal pay demand for Fire Marshals 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 was not so vague as to require its exclusion from bargaining we reiterated this holding in Decision No. B-4-89, where said that if the circumstances behind a bargaining demand adequately puts the City on notice of the Union's intent, we will not preclude consideration of the demand by the impasse panel an this ground alone.

In the instant matter, we find that the following demands can have but one meaning -- a request for an increase in an existing economic benefit. Thus, the City has adequate notice of

the Union's intentions and of the nature of the changes it is seeking for each. Since these demands do not otherwise encompass nonmandatory subjects of bargaining, we shall permit them to be considered by the impasse panel:

Demand No. 15 - SALARIES
Provide for substantial increase in base salary on July 1. 1990, with across-the-board proportionate increases in night differential and weekend and holiday rates.

Demand No. 16 - SALARIES
Provide for new longevity pay schedule for Firefighters.

Demand No. 29 - SALARIES
Provide for an increase in the uniform allowance.

Demand No. 32 - SECURITY BENEFIT FUND
Provide for an increase in contributions to the Security Benefit Fund.

Demand No. 43 - ANNUITY FUND
Provide for a substantial increase in contribution to the Annuity Fund for Fire fighters.

Demand No. 44 - ANNUITY FUND
Provide for a substantial increase in contribution to the Annuity Fund for Fire Marshals commensurate with specialty pay differential for Fire-Marshals.

C. Demands Previously Adjudicated

It is well-settled policy of this Board to stand by its previous decisions and determinations, and not disturb settled

issues, in the absence of the presentation of new legal arguments that we have not considered previously.[6] Of the Union demands challenged by the City in this proceeding, seven are identical to demands that we previously ruled on in Decision No. B-4-89. Inasmuch as Decision No. B-4-89 was a final judgment an these matters, the parties and the issues are identical, and no new arguments have been presented by either party, we decline to modify our previous holdings. Therefore, we reiterate our earlier determination with respect to the following demands, without discussion:

> Demand No. 19 - Would require the City to provide and maintain certain fire protective equipment. (Decision No. B-4-89 at pp. 60-61.)
>
> Demand No. 38 - Would require the City to provide a certain health insurance election to unit members and their dependents. (Decision No. B-4-89 at pp. 77-86.)
>
> Demand No. 75 - Would require the City to provide free passage on public transportation. (Decision No. B-4-89 at pp. 205-210.)
>
> Demand No. 84 - Would increase a cleaning allowance and clean-up time.(Decision No. B-4-69 at pp. 278-281.)
>
> Demand No. 86 - Would provide certain inter-agency transfer credits. (Decision No. B-4-89 at pp. 292-299.)

[6] Decision Nos. B-34-90; B-17-90; B-65-88; B-22-86; B-27-85; B-9-78; and B-16-75.

Demand No. 115 - Would establish a safety committee for Fire Marshals. (Decision No. B-4-89 at pp. 165-174.)

Demand No. 119 - Would establish a labor-management committee for Fire Marshals. (Decision No. B-4-89 at pp. 220-223.)

D. Construction of Pleadings

The Union, in its answer, did not address many of the City's objections directly. This is understandable because the City did not articulate clearly its position on many of them until it filed its reply. In the City's original scope of bargaining petition, paragraph numbered "6" reads an follows:

> 6. Consistent with the Board's decisions concerning identical or virtually identical demands in B-4-89, the City respectfully submits that the following demands, either in their entirety or in part, are not within the scope of bargaining.

The City then proceeded, in sequential paragraphs numbered "7" to "41," simply to quote the text of thirty-five demands that it was challenging "either in their entirety or in part." Each paragraph vas followed with a reference to certain pages of Decision No. B-4-89, allegedly discussing "the identical or virtually identical demand," but without any further explanation. As a result, the Union was left to guess at the City's specific position and objections. The Union apparently guessed

incorrectly in the case of several demands. For example, in challenging Demand No. 23 (assignment pay differential) the City did not make its position on eligibility clear until it filed its reply more than two weeks; after the Union submitted its answer.

Rule 7.5 of the Revised Consolidated Rules of the Office of Collective Bargaining (Title 61, §1-07 RCNY), provides that a scope of bargaining petition must contain a statement of the nature of the controversy . . . and any other relevant-material documents, dates and facts." In essence, Rule 7.5 establishes a sufficiency of pleading requirement, requiring the moving party to give adequate notice of the proposed area of inquiry so that the responding party may frame a meaningful response.[7] The City's scope of bargaining petition is inadequate to satisfy this requirement. In order to help expedite the proceedings of the impasse panel, we will not summarily dismiss those portions of the City's pleadings that are technically defective. We caution the parties, however, that even under our policy of liberally construing pleadings, we cannot excuse pleadings that are not sufficient to put the respondent and this board on notice of the specific nature of the petitioner's claim. Petitions that list challenged demands without explanation, or those that make no, argument, but merely refer a responding party to a separate

[7] Decision Nos. B-63-91; B-78-90; B-59-88; B-39-85; and B-20-83.

document filed in another case, will be subject to summary dismissal.

E. Unanswered Demands Challenged by the City

The Union, in its answer, did not respond to twenty-eight of the demands challenged by the City. The City contends that the UFA must therefore agree that these demands are non-mandatory. We will not make a determination of their status in the absence of a complete set of pleadings reflective of the parties' positions on their bargainability. Rather, we deem the twenty-eight challenged demands that the Union ignored in its answer to have been abandoned. The abandoned demands may not be presented to the impasse panel for consideration. Under the circumstances, we make no finding herein on whether any of the following demands qualify as mandatory or nonmandatory subjects of bargaining; our disposition of these demands shall have no precedential effect in any other case:

> Demand No. 14 - Would incorporate Firefighters' job description into Agreement;
>
> Demand No. 17 - Would provide for full longevity eligibility after 20 years;
>
> Demand No. 39 - Would clarify the continuation of certain health care costs for retirees;
>
> Demand No. 47 - Would restore adjusted tour flexibility;

Demand No. 53 - Would provide a pay-out option at time of retirement;

Demand No. 60 - Would require the Department to comply with occupational safety, health and right-to-know laws;

Demand No. 62 - Would require the Department to provide training for operators of certain types of fire equipment;

Demand No. 63 - Would incorporate a minimum staffing standard;

Demand No. 64 - Would restore a minimum staffing standard;

Demand No. 65 - Would restore a staffing standard;

Demand No. 66 - Would provide a minimum staffing standard for fire companies;

Demand No. 71 - Would restrict outside activities of Firefighters during inclement weather;

Demand No. 80 - Would grant super-seniority for vacation picks to union delegates.

Demand No. 85 - Would restore an attachment (Attachment I) to the agreement;

Demand No. 91 - Would maintain an LSS quota of 401 firefighters;

Demand No. 93 - Would expedite processing of disability retirement applications;

Demand No. 95 - Would create a right to unlimited mutual exchange of tours;

Demand No. 96 - Would develop flexible investment options for employee pensions;

Demand No. 97 - Would provide a minimum benefit for early-death retirees;

Demand No. 98 - Would provide cost of living increase for retirees' pensions;

Demand No. 99 - Would require the City to amend Administrative Code with respect to retirees' life insurance contributions;

Demand No. 100 - Would require the City to amend its Charter with respect to exempting outside earnings from City income tax;

Demand No. 105 - Would continue Section 2 of 1984-1986 Fire Marshals' agreement;

Demand No. 107 - Would adopt a certain standard for when a Fire Marshal in medically able to return to work;

Demand No. 113 - Would require the Department to upgrade Fire Marshals' radios;

Demand No. 114 - Would require the Department to provide driver training for Fire Marshals;

Demand No. 117 - Would require the Department to fill vacant Fire Marshal positions within 15 days;

Demand No. 127 - Would require the Department to distribute certain publications to Fire Marshals.

We will discuss seriatim the remaining demands that have been challenged and joined, 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.[8]

[8] Decision Nos. B-43-86; B-16-81; 9-17-75; B-10-75; B-1-74; B-2-73.

THE DEMANDS

Demand NO. 2

WORK SCHEDULE

Provide that the Commissioner shall-install a two-platoon system in accordance with Section 487a-11.0 of the Administrative Code of the City of New York.

Demand No. 5

WORK SCHEDULE

Provide for a 25 group work chart.

City Position

The City contends that these demands relate, not to hours, but to scheduling. Therefore, according to the City, they are nonmandatory because they fall within management's statutory rights regarding the scheduling of work. With respect to Demand No. 2, the City also contends that we hold nonmandatory a virtually identical demand in Decision No. B-4-89.

Union Position

The Union argues that its demands, which are consistent with New York City Administrative Code §15-112, encompass a mandatory subject of bargaining as phrased. It bases its position upon a previous holding, where we said that where a matter is covered by statute, it is not necessarily beyond the scope of mandatory

bargaining, provided that the subject does not contravene the statute's intention.[9]

Discussion

Section 15-112 of the Administrative Code of the City Of New York [formerly Administrative Code §487a-11.0] provides that firefighters shall work in a "two-platoon system." In summary, the section provides 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. It 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 ....”

Prior to 1989, the parties had incorporated the text of Administrative Code §15-112 into their collective bargaining agreement.[10] In two scope of bargaining petitions filed in November of 1988 challenging one another's bargaining demands, however, the parties each tested the basis for the continued

[9] Citing Decision No. B-4-89.

[10] Article III, Section 2 of the 1984-1987 UFA Agreement.

incorporation of the text. Firefighter Demand No, 3 and Fire Marshal Demand No. 6 read as follows:

> 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 of the Administrative Code.

City Demand No. 1, on the other hand, read as follows:

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

In effect, the Union demands sought to enhance the provisions of Administrative Code Section 15-112, while City Demand No. 1 sought its removal from the Agreement altogether.

We resolved the matter in Decision No. B-4-89. We said that while the City must bargain on the total number of hours in a work day and the total number of hours in a work week, the determination of work charts is within management's statutory rights. Accordingly, we found that the Union's demand, in its entirety, was not a mandatory subject of bargaining. This necessarily meant that the subject of City Demand No. 1 also was nonmandatory. We explained that where the employer has voluntarily agreed to include a permissive subject in the agreement, in this case a provision of the Administrative Code that referred to work charts and therefor concerned the scheduling of work, it was under no obligation to continue that provision in a successor agreement. Thus, we authorized the City

to delete the provisions of Administrative Code §15-112 from the next agreement unilaterally.

Having discussed and decided the identical issue once before, we decline to modify our previous holding. Both Demand No 2 and Demand No. 5 relate, at least in part, to scheduling, which is a right reserved to management. The Union's current argument in no way changes this fact. Although a demand in not a nonmandatory subject of bargaining simply because it restates the language of a statute,[11] in this case, the language of §15-112 of the Administrative Code contains nonmandatory components. Unlike the discrete aspects of some bargaining demands which are separable, we are powerless to separate the nonmandatory parts of a statute from its mandatory parts. Our only recourse then, in a case where a party seeks to incorporate provisions of statute that has both mandatory and nonmandatory elements, is to declare the entire demand nonmandatory, as we do here.

[11] Decision No. B-4-89.

Demand No. 18
SALARIES
Provide for paid holiday for Martin Luther King, Jr. Birthday and any additional national holidays created by the Federal Government; additionally, provide for all scheduled work actually performed on designated holiday to be compensated at time and one-half in cash.

City Position

The City contends that, contrary to the Union's assertion, this demand is not a straight economic proposal. Rather, it is one that seeks impermissible lock-step parity because it would require the City to adjust vacation time granted in the future to non-bargaining unit employees. In addition, the City maintains that the demand is contrary to public policy, because it would cause the City to assume an indeterminate fiscal obligation over which it has no control, and would be impossible to predict.

Union Position

The Union maintains that its demand seeks holiday pay for Martin Luther King's birthday, and pay at time and one-half for work performed on scheduled holidays. As such, the demand assertedly presents purely economic proposals, which are mandatory subject of bargaining.

Discussion

The City's challenge with respect to this demand is limited to the portion of it concerning holiday pay for any additional national holidays created by the Federal Government. The Union, in its answer did not respond to the challenged portion of the demand. We, therefore, will deem that portion Demand No. 18 that the Union ignored in its answer to have been abandoned. The abandoned portion may not be presented to the impasse panel for consideration. We make no finding herein on whether a demand seeking holiday pay for any additional national holidays created by the Federal Government is a mandatory or a nonmandatory subject of bargaining. The remainder of the demand, concerning holiday pay for Martin Luther King's birthday, and pay at time and one-half for work performed on scheduled holidays, are mandatory subjects of bargaining.

Demand No. 23

SALARIES

Provide for specialization pay for Firefighters performing specialized functions, e.g. chauffeurs, tillermen, 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; additionally, provide that Firefighters performing specialized functions shall be selected from among eligible members by seniority.

City Position

The City contends that this demand is mandatory only if "eligible" means "determined to be qualified by the City." If the demand is one that seeks to mandate assignments by seniority, it is nonmandatory. According to the City, this Board has held that such a demand is only a mandatory subject of bargaining if the use of seniority is limited to determine assignments among employees that the City already has found to be qualified.

Union Position

The Union argues that, for reasons stated in Decision No. B-4-89, its demand concerning specialization pay, and its demand concerning the selection of Firefighters to perform specialized functions, are mandatory subjects of bargaining.

Discussion

The City's challenge with respect to this demand is limited to the selection portion of it. The City does not challenge the portions of the UFA's proposal that seek differentials for specialized assignments -- its objection is limited to the possibility that its managerial discretion would be infringed if the demand would operate to deprive the City of its unilateral right to select the employees that the Department deems eligible for specialized assignments.

The Union, in its answer, did not address the City's objection directly. This is understandable because this is one of challenged demands that the City did not articulate clearly its position until it filed its reply. (See Preliminary Issues discussion on construction of pleadings, supra, p. 13.)

In Decision No. B-4-69, we evaluated three UFA demands relating to seniority. The first of the three (Firefighter Demand No. 18) was virtually identical to present Demand No. 23. In that case, the City objected on the ground that the demands interfered with its statutory managerial prerogative. We held that demands seeking the assignment of personnel based on seniority levels would be beyond the scope of mandatory collective bargaining only if they contemplate seniority to be the sole criterion in determining employee assignments. We

agreed with the Union that the three demands did not contravene the City's statutory managerial prerogative to assign its personnel because management maintained the authority to determine eligibility. Since they did not completely remove the assignment of employees from within the City's discretion, we found that they were within the scope of mandatory collective bargaining.

The determination that we reached in Decision No. B-59-89 stands in contrast. In that case, a nursing unit organization sought to bring the following non-discretionary seniority provision before an impasse panel: "An LPN employed for 15 years need not float." We held that the thrust of the demand was to apply an absolute limitation on management's right to assign employees, without recognition of the exigencies of the department. As such, it constituted an impermissible infringement on the employer's discretion to deploy personnel to meet its operational needs.

We find that present Demand No. 23, as framed, does not suffer the defect contained in the LPN non-floating proposal, because the City maintains the unilateral discretion to set the eligibility standards for the Firefighters that it assigns to specialized functions. Thus, we conclude, an we did in Decision No. B-4-89, that the Union demand for a pay differential for Firefighters performing specialized functions, and its demand

that Firefighters performing specialized functions shall be selected from among eligible members by seniority, are mandatory subjects of bargaining.

Demand No. 34

SECURITY BENEFIT FUND

Provide for an increased contribution to the Fund currently known as "the Civil Legal Representation Fund" and rename the same as "The UFA Medical Research Fund."

City Position

The City argues that the demand is so vague that it cannot determine what is required of it, since the demand does not indicate the amount of the increase being sought. In addition, the City contends that because the Union has not defined the fund that it seeks to create in such a way as to indicate whether it implicates terms and conditions of employment.

Union Position

The Union denies that the demand is vague, and asserts that it implicates a mandatory subject of bargaining. It then explains that the UFA has used monies from the Medical Research Fund to track the health effects of firefighting by entering data into a computer based on physical examination results.

Discussion

From the limited information before us we cannot discern the purpose behind the "Civil Legal Representation Fund," nor does the Union's answer clarify why it wants to change the fund's name. The City rightly contends that it cannot tell whether the proposed new name would implicate new terms and conditions of employment. We find that the second part of this demand so vague that we cannot determine whether it encompasses a nonmandatory subject of bargaining. When a demand is so unclear that it inadequately demonstrates its intent, we will hold the demand nonmandatory.[12]

With regard to the first part of this demand, seeking an increased contribution to the existing Fund, we find it not so vague as to require its exclusion from bargaining. (See Preliminary Issues discussion on vagueness, supra, p.10.)

[12] Decision Nos. B-4-89 and B-43-86.

Demand No. 35

SECURITY BENEFIT FUND

Provide for establishment of a Criminal Legal Representation Fund for the purpose of covering legal costs incurred by Fire Marshals in criminal matters,, not otherwise indemnified by the City, and providing 24-hour access by Fire Marshals to a criminal attorney.

City Position

The City contends that this demand is both permissive and vague. Allegedly it is permissive to the extent that it seeks to interfere with the City's statutory management rights to determine assignments of its employees and hiring. According to the City, in order to provide 24-hour per day access to a criminal attorney, the City either would have to hire new legal staff or reassign current legal employees. The demand allegedly is vague because the City claims it cannot determine whether the legal representation fund will pertain to legal defense arising out of Fire Marshals' performance of their terms and conditions of employment.

Union Position

The Union denies that its demand is vague. It contends that Demand No. 35 is of an economic nature, and that it is a mandatory subject of bargaining. The Union specifies that this fund would be used by Fire Marshals only for job-related legal matters, such as defending against wrongful arrest charges.

Discussion

In view of the Union's answer, the City, in its reply, apparently drops its opposition to the establishment of a Criminal Legal Representation Fund on the ground that the fund may be concerned with things other than terms and conditions of employment. We are left to decide, therefore, whether the portion of the UFA Demand No. 35 seeking 24-hour per day access by Fire Marshals to a criminal attorney interferes with management's statutory rights to assign personnel.

We cannot tell from the Union's answer whether it proposes that fund monies be used to hire outside counsel, or that the fund act as a reimbursement device for City attorneys who may be assigned to represent Fire Marshals in criminal proceedings arising out of the exercise of their official duties. To the extent that City attorneys may be involved in the representation of Fire Marshals, the 24-hour per day availability portion of the demand is nonmandatory since it could force the City to reassign some of its employees. Assignment and reassignment of personnel is a managerial prerogative, and is thus outside the scope of mandatory collective bargaining. On the other hand, if a fund is established, and if fund monies are used to pay for outside counsel, the ability of the fund to provide attorneys on a 24-hour per day basis will depend upon the fund's endowment and the

demands for service made upon it. in any event, in the latter case, reassignment of City personnel is not implicated, thus eliminating the City's claim that its managerial rights would be affected. Therefore, to the extent that this demand seeks to provide 24-hour per day outside counsel to be paid for by the fund, it is a mandatory subject of bargaining.

Demand No. 36

SECURITY BENEFIT FUND

Provide for continued health coverage and continued contributions to the Security Benefit Fund and the Retirees' Security Benefit Fund for surviving spouses and unmarried dependents of covered active and retired employees, such coverage and 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 the dependent is a full-time student, the age of 23.

Article IX of the 1987-1990 Firefighters' 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, pursuant to the terms of a supplemental agreement to be reached by the parties, subject to the approval of the Corporation Counsel. 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. Demand No. 36 seeks 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.

City Position

The City maintains that the portion of this demand concerning continued health coverage and continued contributions for unmarried dependents is a prohibited subject of bargaining, to the extent that it would provide employees with a right to elect continued Security Benefit Fund coverage for their dependents who have their own right to elect coverage under a group plan pursuant to federal law.

Union Position

The Union counters that the part of its demand concerning continued health coverage and continued contributions to the Security Benefit Fund for unmarried dependents and surviving spouses of active employees is a mandatory subject of bargaining.

Discussion

In Decision No. B-4-89, Firefighter Demand No. 27 read as follows:

> 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.

In the same decision, Fire Marshal Demand No 38 read as follows:

> 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.

Thus, the wording of present Demand No. 36 is nearly identical. The City argued, in that case too, that the demands were pre-empted by federal law.

In Decision No. B-4-89, we began our discussion of this issue with the general observation that 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, . . .) . . ." We said, therefore, that a demand to negotiate concerning contributions to a Security Benefit Fund was a

mandatory subject of bargaining. We further noted, however, that the City is under no duty to negotiate with respect to persons outside the bargaining unit. Relying upon a previous decision, which was based upon a ruling of the U.S. Supreme Court, we said that the right of an employee organization to negotiate is limited to current employees within its bargaining unit and does not extend to former employees, retired employees or current employees who are not in its bargaining unit.[13]

In this light, we then examined Firefighter Demand No. 27 and Fire Marshal Demand No. 38, which sought 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, in Decision No. B-4-89, we did not deem the Union to be seeking to negotiate on behalf of spouses and dependents, who clearly are not bargaining unit employees. Rather, we found that the demands sought City contributions for the covered employee upon whom the "Intimate dependency [of spouse or child] make[s] their concern his .concern". Thus, we held that, to the extent that the demands sought contributions to a fund that provide a source of support

[13] Decision No. B-21-72, which held that retired employees were not "employees" within the meaning of NYCCBL section 12-303(e), based upon 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).

for a surviving spouse and unmarried dependents of a current bargaining unit employee after his death, they involve a mandatory subject of bargaining.

We went on to hold, however, that to the extent that Firefighter Demand No. 27 and Fire Marshal Demand No. 38 sought continued contributions for surviving dependents of former employees who have already retired, they did not involve mandatory subjects. Nor did the fact that a retiree himself or herself was "covered" by the Security Benefit Fund affect the negotiability of the previous proposals. We concluded that 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. In a footnote, we pointed out that the obligation to negotiate concerning continued contributions for the surviving dependents of current 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.

Turning to the federal pre-emption question, we rejected the City's argument that the demands were either prohibited or permissive subjects because they involved matters that are covered by the federal statutes and rules. We hold that the more fact that a particular subject in “addressed" by existing laws

did not render it a nonmandatory subject of bargaining. We explained that coverage by existing law may be 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.

In the present case, the city argues that, under certain conditions, the Unions' dependent survivors coverage proposal is a prohibited subject of bargaining because it could interfere with the right of a dependent to select his or her own coverage under the provisions of the Consolidated Omnibus Budget Reconciliation Act ("COBRA") 29 U.S.C. §§1161-68. We do not see how the Union's demand possibly could interfere with such rights. It appears to us that if covered dependents want to make a selection to which they are entitled under COBRA, they remain free to do so without interference.

Having thoroughly discussed and decided the virtually identical issues once before, we decline to modify our previous holding. Since the City has not established how Demand No. 36 is pre-empted by or in conflict with COBRA, we find that it is mandatorily negotiable with respect to the surviving spouse and unmarried dependents of current bargaining unit employees, and non-bargainable with respect to the surviving spouse and unmarried dependents of former employees.

Demand No. 41

HEALTH

Provide that the City will provide for inoculations against communicable diseases as provided by law.

City Position

The City contends that this demand is vague because it does not specify the law to which it refers. Without such specification, according to the City, it cannot tell whether terms and conditions of employment are involved, or whether the City's statutory management rights are implicated. As an example, the City raises the possibility that a law concerning inoculations could provide that specific equipment be used or that certain persons perform the inoculations. Such a requirement, it contends, would interfere with its statutory managerial rights.

Union Position

The Union argues that its demand for inoculations essentially is a demand for improved health care. As such, the Union contends, it concerns a mandatory subject of bargaining.

Discussion

The City challenges Demand No. 41 as being vague and overbroad. The City and the Union refer to separate parts of our discussion in Decision No. 3-4-89 concerning occupational safety and health (OSHA) regulations and health care plans to support their respective positions. In its previous health care plan demand, the Union sought "to update and improve basic health care coverage"; in its OSHA demand, the Union sought "to assure that the City will comply with all applicable [OSHA] and right-to-know laws. We hold that the health care plan demand was not so vague or ambiguous as to make it nonmandatory. We decided that the OSHA demand, however, was not specific enough in insure that it did not intrude impermissibly on the City's statutory managerial authority. On this ground we found the demand nonmandatory.

In this case, we find that our holding in the OSHA demand discussion forms the closer analogy to the present challenge. Essentially, Demand No. 41 seeks a contractual guarantee that firefighters will be inoculated against every communicable disease identified by a law. The Union asserts that the demand is bargainable because it is "narrowly framed" and does not suffer from "the same confusion" that its previous OSHA demand encountered. We disagree. We find that Demand No. 41 contains the same flaw that the OSHA demand contained: the Union fails to specify the particular statute or statutes under 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.

As in our previous OSHA demand discussion, we are constrained to f ind the present demand nonmandatory in its entirety due to the UPA's failure to particularize the laws to which it refers. In order to enable us to render a decision as to the status of various statutes as mandatory subjects, it is incumbent upon the Union to do more than to imply that the contents of all such laws necessarily are 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.[14]

Inasmuch as the UFA has not provided sufficient information to enable us to make the initial determination an to the mandatory status of any of the laws that it claims are applicable, we cannot determine the negotiability of matters that may be covered by the various statutes. Accordingly, we find that the instant demand, as phrased, may not be considered by the impasse panel.

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

Demand No, 45

VACATION AND LEAVE

Provide for annual leave of 26 work days for members with more than three (3) years of service and 20 work days for employees with less than three (3) years of service. Resolve any outstanding issues related to vacation periods.

City Position

The City contends that this demand is virtually identical to a demand considered by this Board in Decision No. 3-4-89, and is, at least in part, nonmandatory.

Union Position

The Union counters that, for reasons stated in Decision No. B-4-89, the part of the demand concerning increased annual leave for its members is a mandatory subject of bargaining.

Discussion

In Decision No. B-4-89, Firefighter Demand No. 35 read as follows: "Resolve issues relating to vacation periods." Thus, the previous demand is essentially identical to the second part of the current demand. In our discussion of the previous demand in Decision No. B-4-89, we held that the demand was unclear on its face, and that, standing alone, it did not clearly state the

Union's intention nor specify the changes sought. We noted that the Union failed to offer any circumstantial evidence that could be construed as putting the City on notice of the Union's intent. We concluded that because the demand arguably could encompass a nonmandatory subject of bargaining, it could not be considered by the impasse panel.

The second part of the present demand suffers from the same defect. Because the Union has not clearly stated its intention or specified the "outstanding issues" it seeks to resolve, we cannot tell whether this part of the demand encompasses a nonmandatory subject of bargaining. Therefore, we are once again constrained to preclude the second part of Demand No. 45 from consideration by the impasse panel.

With respect to the first part of Demand No. 45, it clearly involves a request for an increase in annual leave entitlement. The City apparently does not challenge this part of the demand. Time and leave benefits are within the general subject of hours and, as such, are mandatory subjects of bargaining under Section 12-307a. of the NYCCBL.

Demand No. 48

VACATION

Provide for unlimited accrual of personal leave days; further provide upon leaving service employees Shall be compensated in cash for unused personal leave days at the rate of pay then in effect, such payment 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 contends that this demand is prohibited with regard to the pension calculation portion, because inclusion of cash compensation for unused personal days in pension calculations conflicts with Section 431 of the Retirement and Social Security Law. According to the City, Section 431 only permits inclusion of base salary in pension calculations, and not payments made in addition to base salary.

Union Position

The Union responds that its demand concerning the accrual of personal leave, and how accrued personal and vacation days will be compensated, presents economic proposals that are mandatory subjects of bargaining.

Discussion

The City's challenge with respect to this demand is limited to the pension calculation portion of it. The city makes no objection to the portions dealing with personal leave days accrual or utilization of vacation days. Thus, ve will limit our discussion to the issue of whether a demand seeking to include the value of unused personal leave time in pension calculations is a prohibited subject of bargaining.

In Decision No. B-4-89, one of the components of Firefighter Demand No. 38 and Fire Marshal Demand No. 46 read as follows: "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." This is virtually identical to the portion of present Demand No 48 that the City is challenging.

In our discussion of the previous demands in Decision No. 9-4-89, we first noted that, in that case, the City interposed no specific objection to the portion of the demand concerning pension calculations. We found it incumbent, however, 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").[15] We pointed out that we have long held that parties may not bargain over a subject in such a way as to reach an agreement that would controvert a statutory provision.[16] We said, therefore, that this element of the previous demands was outside the scope of bargaining.

Having thoroughly discussed and decided the identical issue once before, we reiterate our previous holding. Thus, that portion of Demand No. 48 that deals with pension calculations is a prohibited subject of bargaining.

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[15] 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.

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

Demand No. 56

VACATION

Provide for contractual entitlement to death leave currently set forth in regulations. Further, provide for expanded definition of "immediate family" to include grandparents.

City Position

The City contends that this demand is vague because it does not indicate which "regulations" are involved. According to the City, a demand referring to another law must specifically describe that law. By foregoing the opportunity, in its answer, to specify which regulations the Union seeks to incorporate in its contract, the bargainability of the demand allegedly remains impossible to determine.

Union Position

The Union's position simply is that this demand concerns time and leave. As such, it is purely economic and thus is a mandatory subject of bargaining.

Discussion

The City challenges a portion of Demand No. 56 concerning the Department policy governing death leave as being so vague that it makes it impossible to determine the demand's

bargainability. In its responsive pleadings, the union neither denies that part of its demand is vague, nor sets forth the substance of the regulation it seeks to incorporate in its collective bargaining agreement.

In a proceeding such as this, there are two policy concerns that we must consider: On the one hand,-it is our policy to limit our holdings to the express terms of the demands placed in issue before the Board. On the other, it is also our policy "to favor agreement and execution of contracts to define the rights of the parties."[17] In the instant matter, the first consideration outweighs the second, because we cannot tell whether the "regulations" to which the Union refers to relate to an area of nonmandatory bargaining, since it offered no citation to them. Since we cannot determine whether the Union's proposal might interfere with the employer's managerial right to assign the number of firefighters who are on duty at any given time, we find that the first portion of the Demand No. 56 is not a mandatory subject of bargaining.

The City does not challenge the Union's proposal to expand the definition of "immediate family" to include grandparents. Therefore, we make no determination on the status of the second portion of Demand No. 56.

[17] Decision Nos. B-4-89 and B-3-75.

Demand No. 70

APPARATUS FIELD INSPECTION DUTY ("AFID")

Calculate savings for increased productivity actually achieved as a result of increased AFID inspections mandated by last CBA for productivity credit for UFA.

City Position

According to the City, although the Union, in its answer, "recasts this demand as an information request," the City maintains that it is apparent from the language of the demand that it seeks a productivity credit in an amount equal to claimed productivity increases. The City adds that the Union requested and received information from it on a variety of subjects during negotiation. In the City's view, had the Union actually been interested in the information it now seeks, it would have requested it in the same manner as it did when it requested the other information.

Even assuming that the demand were construed as a request for information, however, according to the City, furnishing information is not a mandatory subject of bargaining. Relying on a previous decision,[18] the City contends that before a Union is entitled to information, its demand must be found to pertain to a term or condition of employment. Demand No. 70 allegedly

[18] Citing Decision No. B-16-61.

pertains, not to a term or condition of employment, but rather to the Fire Department's fiscal condition and budgetary figures.

The City concludes that the demand is nonmandatory for two reasons: First, because requiring a party to bargain over a demand that pertains to a matter or event that preceded or is otherwise outside of the term of the contract under negotiation assertedly would be inappropriate and contrary to longstanding principles of labor law. Second, because requiring a party to bargain over a demand concerning a request for information which does not pertain to a term and condition of employment allegedly is inconsistent with Board precedent.

Union Position

The Union's position simply is that this demand seeks to have the city divulge the savings that it has generated from AFID inspections. According to the Union, the demand essentially is a request for the City to furnish information. It maintains that because the requested information is related directly to collective bargaining and the City's ability to pay, the demand. in within the scope of collective bargaining.

Discussion

We accept that this demand, both on its face and in view of the Union's explanation of the intent behind it, is nothing more

than a request for information. Section 12-306c.(4) of the NYCCBL requires opposing parties, upon request, to furnish "data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining." NYCCBL Section 12-307a. specifies that wages, hours, and working conditions, among other things, are within the scope of collective bargaining.

We have found the term "wages" to be a broad one, including but not limited to such things as wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums.[19] In addition, we have held that, within general negotiations of wages and wage comparability, the subject of projected productivity gainsharing is mandatorily bargainable.[20] It stands to reason then, that if projected productivity gainsharing is mandatorily bargainable, past productivity savings also is a mandatory subject negotiation. Therefore, the UFA's demand for data on savings generated as a result of increased productivity through AFID inspections is entirely appropriate.

The question remains, however, whether an enumerated bargaining demand is the proper way for a union to obtain the

[19] Decision No. 9-22-92.

[20] Decision No. B-9-91.

information to which it otherwise may be entitled. The City, in defending its position, cites a decision of the Public Employment Relations Board (PERB), which, it contends, stands for the proposition that an employee organization demand that merely seeks information is not a mandatory subject of bargaining.[21] The City technically may be correct. One option available to us, therefore, would be to declare Demand No. 70 nonmandatory in this proceeding, permit the Union to re-request the information independently, and, should the City not comply, find that it committed an improper practice by not doing so. It seems to us pointless to force the parties into such procedural gymnastics, particularly in view of the expeditious and indulgent way that we have treated their pleadings thus far. Accordingly, in view of the circumstances unique to this case, we will not exalt form over substance by denying the Union's request for information from the City simply because the request was made in the form of a bargaining demand rather than in some other means of communication.

[21] Addison Central School District, 11 PERB ¶4550, aff'd 11 PERB ¶3107 (1978).

Demand No. 79

Delegates

Provide for released time, and replacement of all those released, for UFA delegates attending Union meetings and Union-sponsored seminars.

City Position

The City contends that the portion of this demand requiring replacement of released employees interferes with its managerial right to determine staffing levels and deployment. It points out that the Union has not responded to this objection.

Union Position

The Union's answer only addresses mandatory release time for union-related business. It ignores the City's challenge concerning replacement of released employees.

Discussion

Because the Union ignored the City's challenge to the portion of Demand No. 79 that deals with replacement of released employees, we will deem that portion of the demand to have been abandoned by the Union. It may not be presented to the impasse panel for consideration. We make no finding, however, on whether a demand concerning mandatory replacement of released employees qualifies as a mandatory or nonmandatory subject of bargaining.

Demand No. 81

LINE OF DUTY DEATH BENEFIT

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 the employee's duty, or as a result of any attempt on such employee's part to effect the rescue of any person from danger while, on duty -or while taking any action on off duty arising from his status as a Firefighter or Fire Marshal, a payment of $100,000.00 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. in addition to the foregoing, provide for a $100,000.00 life insurance benefit from City funds for any employee who dies while on active service or who is permanently disabled an a result of any job-related injury.

Under the terms of the 1967-1990 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-sun payment. It also seeks to increase the amount of the payment from $25,000 to $100,000, and to provide supplemental insurance coverage for job-related death or disability.

City Position

The city contends that this demand is one that is virtually identical to a demand considered by this Board in Decision No. B-4-89, and is, at least in part, nonmandatory.

Union Position

The Union counters that, for reasons stated in Decision No. B-4-89, all aspects of the demand concerning death benefits for employees engaged in active duty or who die, or are permanently disabled as a result of a job-related injury, condition, or characteristic hazard, are mandatory subjects of bargaining.

Discussion

In Decision No. B-4-99, Firefighter Demand No. 61 and Fire. Marshal Demand No. 77 read as follows:

> 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 or 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 [Firefighter or 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.

At the outset of our discussion in that decision, we noted that a demand to negotiate for a death benefit is a mandatory subject of bargaining. We disagreed with the City's contention that the death benefit provisions found in the Administrative Code pre-empted the demands,, and made then run afoul of the Taylor Law prohibition on pension bargaining. We emphasized that while parties may not negotiate in contravention of existing law, the demands as submitted were not inconsistent with the benefits provided by the Administrative Code. We held that they specifically sought a payment "in addition to any other payment which may be made as a result of [the] death."

Insofar as the Union's demands sought to expand coverage of 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 found that the demand was overbroad because it could include action taken outside the geographic jurisdiction of the City, and could extend to action taken within the scope of other employment. We said that since the City could not be required to negotiate concerning matters that are not "terms and conditions of employment," to the extent the demands were not clearly related to matters within the scope of employment, they were nonmandatory.

Finally, we held that the provision seeking an extension of

the line-of-duty. death benefit to cover an employee who dies while taking off-duty action arising from his status as a Firefighter or Fire Marshal does not suffer from the same infirmity because it contemplates action taken within the scope of employment.

Having thoroughly discussed and decided the identical issue once before, we decline to modify our previous holding. Thus, that portion of Union Demand No. 81 which relates to death benefits for employees acting within the scope of their employment, whether on or off duty, is a mandatory subject of bargaining. The balance of the demand, as it concerns death benefits outside the scope of employment, is nonmandatory.

Finally, we note that the earlier demand did not contain a supplemental disability and life insurance component. Thus, we had no reason to consider it. Because the City, in its petition, only challenges the portion of Demand No. 81 that we discussed in Decision No. B-4-89, we again do not consider the supplemental disability and life insurance component.

Demand No. 104

WORK SCHEDULE

Provide that an additional 30 minutes of administrative preparation time shall be added to the Fire Marshals' work chart, to be compensated in 10 days time off each year to be taken at the Fire Marshals' discretion.

City Position

The City contends that this demand specifically seeks alteration of the Fire Marshals' work chart. As such, it allegedly interferes with the city's managerial right to determine scheduling. Consequently, the City concludes, the demand is not simply a matter of hours, as asserted by the Union in its answer. In addition, the City argues that in demanding that time off can be taken at the employees' discretion, the proposal interferes with management's statutory right to determine staffing.

Union Position

The Union's position simply is that this demand seeks to increase the length of the work day, which assertedly is a mandatory subject of bargaining.

Discussion

We accept that the first part or this demand, on its face, concerns compensatory time off for Fire Marshals. As such,, it falls within the general category of hours, which is a mandatory subject of bargaining.

The last portion of the demand concerning time off at Fire Marshals' discretion, however, interferes with the City's managerial right to schedule hours of work. In Decision B-4-89, we evaluated a similar demand, which would have provided that "compensatory days shall be taken at the absolute option of the employee."[22] We held that when a demand provides for the use of compensatory time at the sole discretion of the employees, it interferes with the City's managerial right to determine the number of Firefighters and Fire Marshals who would be on duty at a given time. Consequently, we held that the demand was not mandatorily negotiable. The last part of the present demand suffers the same defect. Accordingly, it, too, is a nonmandatory subject of bargaining.

[22] Firefighter Demand No. 42; Fire Marshal Demand No. 52.

Demand No. 109

SALARIES

Provide new longevity pay scheduled for Fire Marshals including, but not limited to, an increase in longevity pay commensurate with the specialty pay differential in Fire Marshals' salary.

City Position

The City contends that this demand is nonmandatory on the ground of vagueness. The City maintains that it cannot determine what the demand would require, because the demand does not define either the "new" schedule sought or the amount of the "increase." Second, the City argues that, to the extent the demand could affect the pension calculation, it is nonmandatory for the same reason that it gives in opposing Demand No. 17.[23]

Union Position

The Union denies that this demand is vague. it contends that the demand it is economic in nature, and is bargainable.

Discussion

On its face, this demand clearly seeks to increase longevity pay for Fire Marshals. As such, it is an economic demand

[23] The City opposes Demand No. 17 on the ground that it calls for a change in the pension calculation, and thus concerns a prohibited subject of bargaining.

implicating wages, which is a mandatory subject of bargaining.

The City's second claim, that because this demand could affect the pension calculation it is nonmandatory, cannot stand. To adopt that logic would mean that every demand for a wage increase would be nonmandatory, unless the parties first stipulate that the increase would be "nonpensionable." We will not allow such an impediment to intrude into the collective bargaining process. Therefore, the demand, as written, may be submitted to the impasse panel.

Demand No. 131

ADDITIONAL PROVISIONS

Provide for City pick-up of additional 2 1/2 [[sic] Of employees gross salary pension contribution (ITHP), or contribution of equivalent amount to UFA Compensation and Accrual Fund where no pension contribution is required.

City Position

The City maintains that, unlike security benefit fund contributions, pension fund contributions are regulated by state law. In its view, Section 470 of the Retirement and Social Security Law established a moratorium on negotiations over pension contributions. According to the City, the moratorium, which prohibits any changes in the current public pension scheme,

also applies to changes in the funding structure, regardless of who will fund the plan or how much such funding will be. Therefore, the City concludes, Section 470 specifically prohibits bargaining over any changes to the current pension scheme.

Union Position

The Union contends that Demand No. 131 is purely economic. It asserts that the parties historically have negotiated over the employee rate of contributions to the pension fund, which has fluctuated depending upon the outcome of those negotiations. According to the Union, this Board has hold that a demand concerning contributions to an employee benefit fund is a mandatory subject of bargaining, despite the City's earlier argument that such a demand is prohibited because it is covered by statute. In addition, the Union maintains that the City's reliance on Section 470 of the Retirement and Social Security Law is misplaced, because Section 470 allegedly relates only to benefit levels, and does not address who will fund the contributions for the benefits.

Discussion

While this Board has exclusive jurisdiction to determine scope of bargaining issues, we may find that a matter is outside the scope of bargaining if it is pre-empted by statute or if a

negotiating demand seeks a provision inconsistent with a statute.[24] According to the City, Demand No. 131 Concerns pension fund contributions, a subject that allegedly is prohibited by New York State law.

Section 470 of the Retirement and Social Security Law, as amended in 1991, reads, in pertinent part, as follows:

> Until July first, nineteen hundred ninety-three[,] changes negotiated between any public employer and public employee ... 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 ....[25]

Thus, the law specifically establishes a moratorium, until July 1, 1993, on changes negotiated between a public employer and public employee with respect to any benefit provided by a public retirement system now or in the future, as well as to payments to fund or insurer to provide income or payment to retirees or their beneficiaries. The issue that we must determine here is whether Section 470 pre-empts the type of funding change that the Union seeks in its instant demand.

Demand No. 131 appears to be a dual character demand, having

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[24] Decision Nos. B-4-89; B-41-87; B-24-75; B-5-75; B-3-73; B-16-71; B-11-68.

[25] Retirement and Social Security Law, Article 12, §470 (as amended L.1987, ch.203; L.1989, ch.236,; L.1991, ch.196.)

two component parts, as follows:

> (i) A proposal that the City "pick up" an additional 2½% of employees' gross salary pension contribution ("ITHP" or Increased Take Home Pay), and, in the alternative;
>
> (ii) A proposal that the City contribute an equivalent amount to the UFA Compensation Accrual Fund for those employees who are not required to make a pension contribution.

We are uncertain whether the Union intended for the demand to be unified or severable. In view of our practice of advising the parties of those elements of a dual character demand that are mandatory and those that are not (See Preliminary Issues discussion on dual character demands, supra, p. 9), we will analyze each of the components separately to determine whether either has pension-like characteristics that would prohibit bargaining under state law.

ITHP Pick-Up

ITHP is part of the Fire Department Pension Fund. It is an equivalent amount of money that the City may contribute annually to the pension fund, to offset a portion of fund members' contributions, upon executive order of the Mayor. In Decision No. B-1-74, we described ITHP as a benefit which:

> compensates employees with the dollar equivalent of what they must pay annually into the retirement fund. It is a city funded offset to the contributions required of Members of the Retirement System. Benefits attributable to ITHP are payable only upon death or Retirement and contributions under ITHP are not

> refundable,, as are employee contributions, upon termination other than by death or Retirement.[26]

Where the employer pays a portion of an employee's pension contribution, it assume or "picks up" the equivalent percentage of the worker's contribution. From 1963 to 1973, under the Administrative Code, the portion of pension contribution that the City could pick up for pension fund members fluctuated between 2½% and 5%.[27] Following the enactment of Section 470 of the Retirement and Social Security Law in 1973, however, the parties were prohibited from negotiating changes in retirement system benefits whenever the changes would require legislative approval (the so-called pension bargaining moratorium). Thus, with respect to the first part of Demand No. 131, we find that it represents the kind of proposed change in pension benefits or payments that Section 470 prohibits, because the change would have to be submitted to the legislature for each year that it was

[26] We note that there was no issue as to the nature of ITHP itself in Decision No. B-1-74. Rather, that case concerned a union demand for increased wages to be paid in the event that the Legislature failed to renew ITHP for any year during the life of the contract. The City argued that a benefit substituting for a pension benefit would circumvent the then newly enacted moratorium on pension bargaining. Rejecting the City's claim, the decision held that such a substitute for pension a benefit was a wage demand, and was thus mandatorily bargainable.

[27] See New York City Administrative Code §13-326, as amended.

authorized by the collective bargaining agreement.[28]

Compensation Accrual Fund

Article XI of the parties' 1987-1990 collective bargaining agreement obligates the City to make regular contributions to a Compensation Accrual Fund at the rate of $1.00 per nine-hour Firefighter tour, and $2.00 per fifteen-hour Firefighter tour. The article refers to the Fund as an "annuity fund," established pursuant "to the terms of a supplemental agreement to be reached by the parties subject to the approval of the Corporation Counsel." According to the 1987-1990 supplemental agreement, the Fund benefit level is based upon the combined value of employer contributions and yield on the Fund's investments. The Fund is managed by trustees appointed solely by the Union, and its participants are eligible for benefits immediately upon their retirement, resignation, dismissal, or death, regardless of length of time in service. In the event of a covered member's death, whether in service or after termination of employment, a designated beneficiary automatically receives the balance of the annuity payment to which the Fund participant had been entitled.

Thus, there appears to be a significant distinction between

[28] See Decision No. B-1-74, which notes that "DC 37's demand would require the City to compensate employees . . . in the event ITHP were not approved by the legislature for any year of the collective bargaining agreement."

the compensation Accrual Fund, whose benefits are Payable unconditionally to all participants upon their severance of employment, and the statutory pension, which would be payable only if the participant retires after a minimum length of service. The apportionment of fund assets represents a further distinction. In a statutory pension fund, undistributed assets inure to the employer's credit, and may have the effect of reducing its contribution in successive years.[29] The Compensation Accrual Fund, on the other hand, credits neither the City nor the UFA with undistributed assets. All such benefits inure to annuitants and their beneficiaries.

Based upon these distinctions, we find that the second part of Union Demand No. 131, which proposes that the City increase its contribution to the Compensation Accrual Fund, concerns an economic benefit for employees that is different from pension bargaining. This is consistent with our determination in Decision No. B-1-74, discussed above. Accordingly, we hold that the second part of the Union's demand, seeking from the City an additional percentage contribution for the Compensation Accrual

[29] Under Section 13-331 of the Administrative Code governing the New York City Fire Department Pension and Related Funds, for example, when the capital and accrued interest of the pension fund is sufficient to pay all the benefits, the income and revenues of the fund regularly are credited to the Contingent Reserve Fund, the entity holding the funds to pay retirement and pension benefits, death benefits, and ITHP.

Fund, is a mandatory subject of bargaining.

In view of the dual character of the demand, and our finding that the first part, concerning pick-up, is a prohibited subject of bargaining, we leave it to the Union to decide if it still wishes to pursue the second part of the demand, concerning the Compensation Accrual Fund.

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, the negotiability of which were challenged in the scope of bargaining petition filed by the City. on August 21, 1992, 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.

Dated: New York, New York
November 18, 1992

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

JEROME E. JOSEPH
MEMBER

THOMAS J. GIBLIN
MEMBER

DEAN L. SILVERBERG
MEMBER

STEVEN H. WRIGHT
MEMBER

NUMERICAL INDEX