LEEBA, 5 OCB2d 18 (BCB 2012)

(Impasse Appeal) (Docket Nos. BCB-3001-12 & BCB-3002-12) (I-2-09)

Summary of Decision: The Union appealed, in part, the Report and Recommendation of an Impasse Panel regarding wages and other terms and conditions of employment for employees in the title of Environmental Police Officer. The City appealed the Panel's Report in its entirety. The Board remands this matter to the Panel to: (1) excise all references to the DEP consultant's report from the Panel's Report; (2) determine whether it would have reached the same conclusions and made the same recommendations without any consideration of the referenced portions of the consultant's report; and (3) to the extent the Panel deems it necessary or appropriate, clarify and/or amend the Report accordingly; and the Board affirms the Panel's Report in all other respects. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Impasse

-between-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner-Respondent,

-and-

THE CITY OF NEW YORK

Respondent-Petitioner.

DECISION AND ORDER

On February 13, 2012, the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union") appealed, in part, the Report and Recommendation ("Report") of a one-person Impasse Panel ("Panel"), dated January 14, 2012, regarding a bargaining impasse with the City of New York ("City") over wages and other terms and conditions of employment for employees in the title of Environmental Police Officer, Levels I, II, and III ("EPOs"). That

appeal has been docketed as case number BCB-3001-12. On the same date, the City also appealed the Panel's Report. The City's appeal has been docketed as case number BCB-3002-12. These two appeals relating to the same impasse Report have been consolidated for determination herein. The impasse panel proceeding, the Report from which is the subject of these appeals, was docketed as case number I-2-09. Based upon the size and scope of the Panel's Report, and in order to insure that the parties would have sufficient time to address fully the issues raised in their respective appeals, the parties stipulated to a schedule for the filing of papers relating to the appeal, which differed from the timeframe prescribed by § 1-05(l) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules"). The stipulated schedule, and a further stipulated extension thereof, was approved on behalf of the Board by the Trial Examiner.

The appeal by LEEBA argues, among other things, that while the Panel drew some proper conclusions, its Report fell short of providing the measure of relief necessary to resolve the bargaining dispute. The Union asserts that the Panel engaged in a "misguided" effort to protect the City from a perceived economic impact that does not exist. In failing to recommend full parity with the members of the New York City Police Department ("NYPD") as to all benefits, the Panel did not acknowledge proof offered by the LEEBA at the hearings. The Union notes that term of the agreement recommended by the Panel – 53 months – was not proposed by either party and is excessively long. LEEBA contends that the Panel also refused to allow into evidence the report of a consultant ("the Smith Report") hired by the employing agency, the Department of Environmental Protection ("DEP") which, according to the Union, supported its demands, yet the Panel referred to the consultant's findings in its Report. For these and other

reasons set forth more fully hereinafter, LEEBA asks the Board to recognize the errors in the Panel's Report and "build a solution that corrects the errors."

The appeal by the City argues that (i) the record evidence does not provide substantial support for the result reached by the Panel; (ii) the Report is flawed by material errors of fact and/or law; (iii) the Report is not consistent with the criteria set forth in the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") governing the determinations of Impasse Panels; (iv) the Panel exceeded its authority in recommending that the term of the agreement be longer than that proposed by either party; and (v) the Panel improperly relied on a document (the Smith Report) that had been excluded from the record, thereby denying the City the opportunity to offer evidence responsive to the contents of the excluded document, resulting in prejudice to the City. For these and other reasons set forth more fully hereinafter, the City asks the Board to either modify the Panel's Report by conforming it to the City's proposal, or, in the alternative, to set aside the Report and remand the matter to a new impasse panel.

The Board remands this matter to the Panel to: (1) excise all references to the Smith Report from the Panel's Report; (2) determine whether it would have reached the same conclusions and made the same recommendations without any consideration of the referenced portions of the Smith Report; and (3) to the extent the Panel deems it necessary or appropriate, clarify and/or amend the Report accordingly; and the Board affirms the Panel's Report in all other respects.

BACKGROUND

A. Prior Proceedings

In *LEEBA*, 3 OCB2d 29 (BCB 2010), the Board summarized the bargaining history of the unit containing EPOs. That history, which is instructive in placing the instant proceeding in context, shows that in October 2005, LEEBA was certified to represent City employees in the title EPOs.[1] EPOs are responsible for protecting the watershed areas, water supply systems and installations maintained by the Department of Environmental Protection of the City of New York ("DEP"). Furthermore, EPOs enforce the City's Watershed Rules and Regulations. According to the EPO job specification, of which the Board has taken administrative notice, EPOs are classified in the Miscellaneous Service under Rule X of the Personnel Rules and Regulations of the City of New York. Those employees who are classified under Rule X are not included in the Career and Salary Plan. Rules of the City of New York, Title 55, Appendix A, Rule X; *LEEBA*, 3 OCB2d 29, at 2.

Following LEEBA's certification, the Union and the City began negotiations for an initial collective bargaining agreement.[2] The parties met to negotiate at least six times between the commencement of bargaining and October 2008. On November 9, 2009, LEEBA filed a Request for the Appointment of an Impasse Panel ("Impasse Request"). The Office of Collective Bargaining ("OCB") brought the parties together for two mediation sessions held in January 2010. The Board of Collective Bargaining, on January 25, 2010, declared that an

[1] LEEBA, 76 OCB 5 (BOC 2005). These employees were previously represented by Local 300. Service Employees International Union, as part of another bargaining unit, and were covered by a 2002-2005 unit collective bargaining agreement as well as a Supplemental Agreement pertaining only to EPOs, effective until the date of LEEBA's certification. The Board of Certification's decision removing the EPOs from their then-existing unit placement and ordering a representation election, which ultimately was won by LEEBA, is found at LEEBA, 76 OCB 3 (BOC 2005).

[2] The parties disagree as to whether negotiations began in October or November, 2005.

impasse exists between the parties and directed the commencement of impasse proceedings. *Id.* at 3.

During the course of negotiations, and prior to the Board's declaration of impasse, both parties filed improper practice petitions relating to the conduct of the negotiations. Each party asserted that the other had engaged in bad faith bargaining. The charges raised included the City's claim that LEEBA was insisting on negotiating nonmandatory and prohibited subjects of bargaining, and LEEBA's assertion that the City was refusing to bargain over mandatory subjects. The Board issued three decisions addressing and disposing of these claims: *LEEBA*, 79 OCB 18 (BCB 2007) (interim decision, including negotiability rulings); *LEEBA*, 2 OCB2d 29 (BCB 2009) (final decision after hearings on bad faith bargaining claims); and *LEEBA*, 2 OCB2d 43 (BCB 2009) (Supplemental Order directing bargaining in good faith). Thereafter, the City filed a scope of bargaining petition seeking a determination of whether certain demands proposed by LEEBA which had not been resolved in negotiations between the parties, were mandatory subjects of bargaining within the meaning of the NYCCBL. The Board issued its determination of the scope of bargaining questions in *LEEBA*, 3 OCB2d 29 (BCB 2010).

B. The Impasse Proceeding

On March 17, 2010, following a selection process pursuant to the OCB Rules, a one-person impasse panel (arbitrator Alan R. Viani) was designated to hear the dispute. Hearings commenced following the Board's scope of bargaining determination. Impasse hearings were held on October 20 and 28, November 1 and 3, December 6 and 26, 2010, January 31, February 7 and 15, March 17, and May 12, 2011, at the Office of Collective Bargaining, adducing more than 1,500 pages of record testimony. The parties had a full opportunity to examine and cross-examine witnesses, to submit documents, and to submit written argument in support of their

respective positions. In the course of the hearings, the parties introduced 13 Joint Exhibits, 16 City Exhibits, and 73 Union Exhibits.

On January 14, 2012, the Panel issued a comprehensive 24-page Report, recommending the terms of the agreement for EPOs. The most significant terms of the Report may be summarized as follows: The duration of the agreement shall be from October 20, 2005 (the date LEEBA was certified to represent EPOs) through March 31, 2010. Wage increases for all levels and steps of EPOs shall conform to a "uniformed services" pattern, specifically providing for increases of 5% effective 10/20/05; 4% effective 4//1/06; 4% effective 4/1/07; 4% effective 4/1/08; and 4% effective 4/1/09 through 3/31/10. Annual contributions to the Union's Welfare Fund shall be the same as provided to other bargaining units covered by standard unit agreements. Additional economic benefits listed below will begin on March 31, 2010: the uniform allowance will be increased to $1,000 annually; the night shift differential will be raised to 10% beginning at 8:00 p.m.; the Injury on Duty leave benefit will be modified to be up to 18 months leave of absence with pay for any injury occurring while on duty, whether by assault or other causes, and without charge to sick or annual leave; and the Union will be permitted to allocate up to $75 per employee per year to establish a Legal Defense Fund. The Report expressly declined to grant the Union's demands regarding a 40-hour work week and changes in overtime arrangements under the Fair Labor Standards Act ("FLSA").

On January 30, 2012, acting pursuant to NYCCBL § 12-311(3)(c)(e), LEEBA accepted in part and rejected in part the recommendations set forth in the Report. On January 31, 2012, acting pursuant to the same section, the City rejected the Report in its entirety. These appeals by both parties, in accordance with NYCCBL § 12-311(4)(a) and § 1-05(m)(2) of the OCB Rules, followed.

C. The Motion to include the Smith Report in the Record

On February 10, 2012, LEEBA filed with the Office of Collective Bargaining ("OCB") a motion "to include the Dennis Smith Report in the record" for purposes of LEEBA's appeal of the determination of the Panel in this case. The City submitted papers in opposition to this motion.

The object of the motion is a report ("the Smith Report") prepared by a consultant to DEP in 2008. The report was prepared, at the request of a former DEP Commissioner, by Professor Dennis C. Smith of the New York University Robert F. Wagner Graduate School of Public Service. The Union contends that the Smith Report was ordered to evaluate the effectiveness of the EPO force, and determine whether it possessed the necessary resources to adequately protect the environmental interests of the City and surrounding communities from the threat of biological or chemical terrorist attack. (Union Mot. at 2) It is not disputed that the report at issue, dated June 2008, is a "draft final report" to the former Commissioner and that it was never formally finalized or accepted by DEP or the City. (City Opp. to Mot., Attachment B, letter to Panel dated February 7, 2011) It is also undisputed, and a disclosed portion of the Report so states, that the Report:

> . . . is an interim report of a study of the functions, organization and management of the DEP Police intended to answer the question, "Does the New York water system have in place the security system it needs to protect this vital infrastructure from the threat of terrorist attack?"

(City Opp. to Mot., Attachment A, quoting Smith Report at 3) DEP has marked the Smith Report "confidential" and has treated it as an extremely sensitive document within the agency. It has declined a newspaper's FOIL request for the Smith Report, writing that,

> Such information, in the hands of persons who may seek to cause harm to this vital infrastructure, could jeopardize the security of the City's water and wastewater systems.

(*Id.*, quoting DEP response to FOIL request made by the Daily News)

In the course of the hearings before the Panel, LEEBA requested that DEP produce the Smith Report so that the Union could enter it into evidence. The City objected on several grounds, including that the Report was a draft that never was finalized, it contained sensitive security-related information concerning the City's water supply system, and it was not relevant to the matters in dispute in the impasse proceeding. The Panel was given the opportunity to review the Smith Report *in camera*, after which the Panel directed that LEEBA representatives be permitted to view a redacted version of the Report in a room with a City representative present, for the purpose of preparing questions to examine or cross-examine a City witness who would testify. (Tr. 1244-1246) However, as to the admission into evidence of the Smith Report, itself, the Panel stated:

> Let me make a ruling on the question of the Smith report. If it's put into the record, then it's going to [be] made available to everybody and obviously the department is very nervous about that. So to avoid that problem, the Union has had an opportunity to read it, to look at it, to prepare its questions concerning it.
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> And in that context I will not put it directly in the record, but the fact is that the Union has had an opportunity to look at it and will be able to ask questions about it [on] either direct or cross-examination.

(Tr. 1407) At the time, counsel for the Union objected to the Panel's ruling on several grounds, including that the rules of evidence precluded questioning concerning a document not in evidence, and that questioning based on notes might not be as accurate as questioning based upon the original document. (Tr. 1407-1408)

In its motion to include the Smith Report in the record, LEEBA argued that the Panel's exclusion of that document constituted error, that the Smith Report was necessary to an understanding and evaluation of the Panel's Report, and that it would be "a marvelous starting point for the Board to learn about the duties, responsibilities, and job functions" of the EPOs. (LEEBA Mot. at 8-9)

The City opposed the motion, arguing that there was no basis to overturn the Panel's evidentiary ruling excluding the Smith Report. The City asserted that the Panel's ruling was a legitimate exercise of the discretion given impasse panels. Moreover, according to the City, it would be prejudicial to its interests if the motion were granted, because the City, in reasonable reliance on the Panel's ruling, did not present any evidence or argument to the Panel regarding the Smith Report – which was only a draft – such as evidence of why DEP never requested a final version of the Report, or what it believed were the errors in the Report.

On April 20, 2012, the Trial Examiner in this matter issued a six-page letter-ruling, denying the Union's motion on the grounds that (a) it would be contrary to NYCCBL § 12-311(c)(4)(b) ("review . . . shall be based upon the record and evidence made and produced before the impasse panel") to make part of the record on appeal, and thus subject to review by the Board, a document the admittance of which was argued before the Panel and which the Panel ruled would be excluded from the record; (b) granting the motion would be prejudicial to the City because it would deprive the City of the opportunity to offer evidence as to reasons for DEP never requesting a final version of the Report, or what DEP believed were the errors in the Report; and (c) to the extent the transcript of the impasse proceedings shows that the Panel's evidentiary ruling was based, at least in part, on his concern that full disclosure of the Smith Report would pose a risk to the security of the watershed, it would be imprudent to overrule the

Panel and place the Smith Report in the record on appeal – thus making it a public document – without any showing by the Union that the security concerns of the City – and the Panel – are unwarranted.

The Union takes exception to the decision of the Trial Examiner denying LEEBA's motion. The Union asserts that the Trial Examiner was without authority to rule on a motion not made in the course of a hearing and that a ruling on the motion made by anyone other than the Board deprives the Union of "due process." LEEBA does not address the merits of the Trial Examiner's decision. The parties were informed that the Board would review the ruling on the motion as part of its consideration of the impasse appeals.

POSITIONS OF THE PARTIES

LEEBA's Position

The Union's appeal petition, as well as its statement accepting and rejecting portions of the Report, argue that the provisions of the Report are either insufficient or in error as to a number of issues. Most significantly:

1. LEEBA objects to the time period awarded, from October 2005 through March 2010, because it is more than three years; conflicts with other portions of the Report; fails to recognize that EPOs have been without a contract, proper compensation, or uniformed status for more than 11 years; forces EPOs to suffer under a "clerical agreement" designed for Career and Salary Plan employees indefinitely; fails to provide for customary benefits of uniformed status; suppresses the right to bargain and gain pay parity with the New York City Police Department ("NYPD") for an extended period of time; and mistakenly declares that the extended time frame will bring greater efficiency to the labor relations process when it will do just the opposite.

2. While LEEBA accepts the Panel's award of a "uniformed" standard of pay increases (*i.e.*, the uniformed pattern) it objects to the application of those percentage increases to the EPOs' present compensation schedule because that fails to produce parity with the NYPD or even narrow the gap between EPO compensation and NYPD compensation.

3. LEEBA objects to the sufficiency of a number of the benefits awarded, including contributions to the Union's Welfare Fund, because they are not the same contributions applied to comparable titles in the NYPD. LEEBA further objects to the Panel's decision to delay the effective date of certain benefits, including Welfare Fund contributions, increase in the uniform allowance, and increase in the rate of night differential pay until March 31, 2010, on the ground that since EPOs have performed work comparable to the NYPD throughout the term of the agreement, they should have been awarded these benefits from the beginning of the term of the agreement.

4. LEEBA objects to the Panel's award with respect to Injury on Duty leave because the EPOs should have been given the same "line of duty" injury benefit that is available to members of the NYPD.

The Union points out that the NYCCBL and the Taylor Law require impasse panels to compare the wages, hours, fringe benefits, and characteristics of employment of the EPOs to those of employees performing similar work. Here, the record fully supports the Panel's conclusion that EPOs are police officers involved in law enforcement and are entitled to wages, benefits and terms and conditions of employment commensurate with other municipal uniformed services employees. LEEBA argues that the Panel refrained from awarding the EPOs parity with the NYPD only because of its misguided effort to protect the City from the perceived "extraordinary cost" the City would incur under such an award. However, the Union asserts that

the City is not responsible for the cost of the EPOs' compensation and benefits because those benefits are paid from the budget of the Water Board, an independent public service corporation, which reimburses the City in full. Thus, there is no "net cost" to the City. If necessary, the Water Board can, among other options, raise consumer water rates to pay the cost of the EPOs' award.

Finally, LEEBA argues that the Panel's Report refers to the Smith Report, which compares the work of EPOs to that of the Housing and Transit Police forces. Comparison is required by the Taylor Law and the Smith Report makes comparisons. Therefore, the Smith Report is relevant to the impasse proceeding. The probative value of the Smith Report outweighs any prejudice claimed by the City, and thus it should not have been excluded from the record.

For the above reasons, LEEBA asks the Board to correct the Panel's errors and grant the EPOs full police parity, together with full on-duty injury protection and a collective bargaining agreement that parallels that of the NYPD.

City's Position

The City submits that the Panel's Report must be set aside for several reasons. The City contends that: (i) the record evidence does not provide substantial support for the result reached by the Panel; (ii) the Report is flawed as a result of material and essential errors of fact and/or law; (iii) the Report is not supported by the NYCCBL's criteria governing determination by impasse panels; (iv) the Panel exceeded its authority by awarding a term that is longer than the contract duration proposed by either party; and (v) the Panel improperly relied on a document (the Smith Report) which had expressly been excluded from the record, resulting in substantial prejudice to the City.

The City argues that Panel's award of an agreement term of 53 months and 12 days, from October 20, 2005 through March 31, 2010, is unsupported by any evidence in the record. The City had proposed a 30-month award, consistent with the duration of the settlement period for every other municipal civilian union during the corresponding period. The Union made no proposal, but did not take issue with the City's proposal. As neither party proposed a duration of more than 30 months, the Panel lacked authority to recommend anything longer. Moreover, there was evidence that the City had eliminated funding for the few remaining unsettled contracts for the 2008-2010 period. Accordingly, there was no basis for the Panel to award a term greater than 30 months, extending into a period for which the City has not budgeted funds for new wage increases.

The City challenges the Panel's finding that EPOs should be awarded a "uniformed services pattern" of settlement. The City asserts that in making this determination, the Panel reached a result that is contrary to the record evidence and the controlling statutory criteria. According to the City, the undisputed evidence showed that, in past bargaining rounds in which there were separate patterns for uniformed and civilian employees, employees in the EPO and predecessor titles have always been covered by the civilian pattern. The Panel preliminarily agreed with the City that there should be no change in the historical treatment of the EPOs absent a showing of "unique, extraordinary, compelling, and critical circumstances." However, the City asserts that in finding that the record provided a basis for departing from the EPOs' past treatment and finding that they should be granted the uniformed pattern, the Panel effectively disregarded the historical labor relations framework and the placement of these employees within that framework. The Panel placed little, if any, weight on the past actions and choices of the parties and acted as though it were writing on a blank slate, free to make its own *de novo*

determination. The City argues that this was inconsistent with the well established principle that interest arbitrators should place great importance on adhering to an established labor relations framework. To the extent the Panel failed to do this, it violated the requirement in NYCCBL § 12-311(c)(3)(b)(v) that an impasse panel consider "such other factors as are normally and customarily considered in . . . collective bargaining or in impasse panel proceedings."

In determining that there existed changes in the work performed by EPOs that would justify the application of the uniformed pattern to these employees, the Panel considered changes that pre-dated one or more of the previous civilian pattern-conforming agreements reached by the EPOs' bargaining representative, and it mischaracterized the nature and/or significance of the purported changes. In addition, any reliance the Panel placed on the Board of Certification decision in *LEEBA*, 76 OCB 3 (BOC 2005), was misplaced, as that decision involved the application of a unit placement legal standard that is entirely different from and irrelevant to the standard properly applied in impasse proceedings. Furthermore, the Panel's reliance on the police officer status of EPOs under State law also was misplaced, as EPOs and their predecessor titles have always possessed that status, thus there was no change. Moreover, the evidence showed that EPOs and NYPD Police Officers do not "perform similar work," since the two groups have different purposes, missions, and work environments.

The City argues strenuously that the Panel did not give proper consideration to the financial impact of its award on the City's ability to pay. The City submits that the evidence demonstrated that any award in excess of the City's offer (the civilian pattern) will necessarily require an increase in water rates. The Panel's conclusion that the impact on the City's budget would be "negligible" was based solely on the small size of the EPO bargaining unit. However, the City asserts that the likely consequence of an award that deviates from the City's offer is not

merely the incremental cost incurred for this bargaining unit, but must include the cost of multiplying that award by its potential extension to the thousands of other City employees in other units who may claim to be in the same position as the EPOs, based on their law enforcement or investigative functions.

In any event, argues the City, though the Panel purported to award the EPOs the uniformed services pattern, the wage increases, benefit improvements, and other terms awarded exceed the overall net cost of the uniformed pattern for the corresponding rounds of bargaining. Further, the Panel's award regarding increased contributions to the Union's Welfare Fund, an increase in the uniform allowance, an increase in the night shift differential, and modification of provisions concerning on duty injuries, are not supported by the record.

Finally, the City contends that the Panel erred in making reference to the Smith Report after having properly ruled that that document would be excluded from the record. The City, in reliance on the Panel's ruling, did not present any evidence or argument in the impasse hearings regarding the Smith Report, such as evidence of why DEP never requested a final version of the Report, or what it believed were the errors in the Report. The Panel's own statement at the hearing confirmed that the Panel did not believe the Smith Report held any probative value. Nevertheless, contrary to its ruling, the Panel made several references to the Smith Report in the Panel's Report. These references to a document not in evidence constitute error. Further, the Panel's references to the Smith Report are prejudicial to the City, which refrained from offering evidence to address the Smith Report.

For the foregoing reasons, the City asks the Board to either modify the Report to conform it to the City's offer, or, in the alternative, set aside the Report and remand the matter to a new

impasse panel to conduct further proceedings and/or to issue a new Report based on the record evidence.

DISCUSSION

Pursuant to NYCCBL § 12-311(c)(4)(b), where the Report and Recommendation of an impasse panel is appealed to this Board, our review shall be based upon the record and evidence before the impasse panel; shall include an examination of whether the panel's recommendations take into account the standards for determination of wages, hours and working conditions prescribed by NYCCBL § 12-311(c)(3)(b); and shall include consideration of issues, if any, of conformity of the recommendation with any law or regulation properly governing the conduct of collective bargaining between the City and its employees. *DC 37*, 4 OCB2d 29, at 8 (BCB 2011); *UFA*, 51 OCB 19, at 10 (BCB 1993).

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

> . . . shall consider wherever relevant the following standards in making its recommendations for terms of settlement:
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> (i) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York city or comparable communities;
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> (ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

> (iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;
>
> (iv) the interest and welfare of the public;
>
> (v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

"[N]o fixed value or weight, [however] is prescribed for any of these criteria to be applied equally in all cases" *CSBA*, 11 OCB 4, at 7-8 (BCB 1973). Further, an impasse panel "is free to apply the criteria as circumstances require to the exigencies of each particular case." *DC 37*, 4 OCB2d 29, at 9 (BCB 2011); *PBA*, 17 OCB 12, at 6 (BCB 1976).

The Board's function in this proceeding is limited to deciding "whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel." *DC 37*, 4 OCB2d 29, at 9. The Board in reviewing the Report and Recommendation shall not substitute its own judgment in determining the facts or adjudicating the merits for that of the impasse panel. *Id.* at 9-10; *see also UFA*, 37 OCB 11, at 6 (BCB 1986); *UFA*, 51 OCB 19, at 11; *Podiatry Soc. of NYS*, 9 OCB 23, at 8 (BCB 1972); *see also Caso v. Coffey*, 41 N.Y.2d 153, 158 (1976) ("[I]t need only appear from the decision of the arbitrators that the criteria specified in the statute were "considered" in good faith and that the resulting award has a "plausible basis.") (citation omitted). Thus, an Impasse Report and Recommendation shall be upheld "unless it can be shown that the Report and Recommendations were not based on objective and impartial consideration of the entire record, and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law." *DC 37*, 4 OCB2d 29, at 10

(BCB 2011); *UFA*, 51 OCB at 11-12 (quoting *Podiatry Soc. of NYS*, 9 OCB 23, at 8 (BCB 1972)); *see also Caso*, 41 N.Y.2d at 158 (Because the "essential function of compulsory arbitration panels is to 'write collective bargaining agreements for the parties,' [i]t follows that such awards, on judicial review, are to be measured according to whether they are rational or arbitrary and capricious.") (citing *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y.2d 493, 503 (1970)).

Here, both parties allege numerous grounds on which the Board should modify and/or vacate the Panel's Report. In essence, the Union argues that the Report is correct in finding that EPOs should receive a uniformed services pattern of pay increases, but does not go far enough because it fails to award parity with the compensation and benefits received by police officers employed by the NYPD. The City, on the other hand, argues, in essence, that the Report is flawed because it improperly gives little, if any, weight to the EPOs' bargaining history and their title's placement within the City's collective bargaining framework. Using the standards of review stated above, we now consider these and the parties' others objections to the Report.

Initially, it must be noted that there is no allegation that the impasse proceeding was tainted by any fraud or bias, or that the Panel did not impartially consider the record. Therefore, the questions for this Board are whether the record provides substantial support for the Report and whether the Report's conclusions have a "plausible basis," or whether those conclusions are flawed by material and essential errors of fact and/or law.

We first address the significant dispute over the Panel's determination that EPOs "should be awarded a uniformed services pattern of settlement." (Report at 20) The Panel concluded that wage increases conforming to the uniformed services pattern were warranted because it found that the totality of the circumstances and changes set forth in the record established a

sufficiently compelling basis to warrant application of the uniformed services pattern instead of the civilian pattern of bargaining. (*Id.* at 19-20) The Panel based this conclusion on its analysis of record evidence concerning a number of changes that had occurred affecting the EPOs, including:

1. That the separate bargaining unit containing the EPO title was first created in 2005 and that its representative, LEEBA, was not involved in negotiating any of the prior agreements involving that title. The Panel noted that the Board of Certification, in the decision creating the EPO unit, found that the interests of the EPOs significantly differed from those of the other employees with whom they had been grouped in the predecessor unit. (Report at 11)

2. That the present impasse proceeding was the first time the question of which pattern should apply to EPOs was raised in a forum empowered to decide that question. (Report at 12)

3. That the evidence showed that the duties, responsibilities, jurisdiction, and training of the EPOs and their predecessor titles had evolved over the years, increasingly so since 2000, such that currently EPOs have the authority to patrol and exercise full police powers both within New York City and outside the City, including performing anti-terrorism duties and communicating with other law enforcement agencies concerning criminal and terrorist activities. They have been given special training in interrogation, biochemical incidents, weapons of mass destruction, homicide investigation, handling Hazmat materials, and special weapons. They have been organized into new "Specialized Units," including an Emergency Service Unit, Strategic Patrol, four Canine Units, an Aviation Unit, a SWAT Team, and an increased Marine Unit. EPOs regularly work alongside other law enforcement officers and, within the City, coordinate with the NYPD on activities that are not on DEP property. They have been assigned special deployments to supplement NYPD coverage at protest sites. In sum, EPOs are involved

in a full range of police activities and duties. (Report at 13-19, citing multiple references to the testimony and exhibits)

The City challenges this determination by the Panel on several bases. The City maintains that any reliance the Panel placed on the Board of Certification decision in *LEEBA*, 76 OCB 3 (BOC 2005), was misplaced, as that decision involved the application of a unit placement legal standard that is entirely different from and irrelevant to the standard properly applied in impasse proceedings. This Board, however, observes that although the City is correct that the representation case involved a different issue (unit placement) and legal analysis, the factual findings made in that case are clearly relevant to the present impasse proceeding. Specifically, the Board of Certification, after a five-day evidentiary hearing, found that:

(a) since the time the EPO's predecessor titles were first certified in 1985 and placed in a bargaining unit with numerous other titles that did not perform law enforcement duties, the manner in which EPO and predecessor titles performed their duties has changed (*Id.* at 5); their law enforcement duties have taken on new significance since the attacks of September 11, 2001, and those law enforcement responsibilities have increased because of heightened security concerns regarding the water supply and the infrastructure that transports water to the City (*Id.* at 7-8);

(b) EPOs share a community of interest growing out of the qualifications, training and duties unique to a police officer (*Id.* at 21); and

(c) the EPOs regularly perform police duties as described in detail in the decision (*Id.* at 5-8, 19-20).

We believe that these factual findings by the Board of Certification are relevant to the issue before the Panel as to whether the more appropriate pattern of compensation was the

uniformed pattern or the civilian pattern. Thus, the Panel's references to and reliance upon those findings were proper.

The City also disputes the significance of any changes in the duties of EPOs, arguing, in effect, that the City's interest in preserving the historical labor relations framework and the placement of the EPOs, up to now, as civilian employees within that framework, outweighs any evidence that because of their present duties, training, and mission, EPOs are more like members of the uniformed law enforcement services. We find that this argument ignores the reality that previous agreements covering the EPO and predecessor titles were negotiated by another representative while these employees were in a unit overwhelmingly comprised of non-police, non-law-enforcement titles. As the Panel properly recognized (Report at 12), the present impasse is the first opportunity the EPOs and their current representative, LEEBA, have had to negotiate as a law enforcement unit. The City objects that some of the EPOs' duties and training already had changed before the current separate unit was certified; however, this Board does not believe that this requires that the changes be ignored. In fact, the earlier changes provided the basis for the Board of Certification's determination that it was not appropriate for the EPOs to remain submerged within a non-law enforcement unit. Therefore, it was not unreasonable for the Panel to consider those changes in duties and training in determining that there was a change in circumstances of such a degree and magnitude to justify application of the uniformed services pattern instead of the civilian pattern of bargaining.

The City contends that in awarding a uniformed service pattern, the Panel did not give proper consideration to the financial impact of its award on the City's ability to pay. The City asserts that the likely consequence of this award that deviates from the City's offer of the civilian pattern is not merely the incremental cost incurred for this bargaining unit of approximately 175

employees, but must include the cost of multiplying that award by its potential extension to the thousands of other City employees in other bargaining units, represented by other unions, who may claim to be in the same position as the EPOs, based on their law enforcement or investigative functions. The Panel considered but discounted this claim, stating that its findings were limited to the unique circumstances of EPOs, which it believed would preclude any undue spillover effect. (Report at 21) This Board agrees. The Panel accepted the premise that there should be no change in the placement of EPOs within the City's historical bargaining framework absent a showing of "unique, extraordinary, compelling, and critical circumstances" (Report at 10), and described in detail the factual bases on which it found a change in circumstances of such a degree and magnitude to justify departure from the EPOs' prior placement. We find that the specificity of the Panel's analysis and the unique set of overall circumstances described regarding EPOs substantially limits, if not precludes, any argument by other unions to extend the result reached in this impasse determination to any other bargaining unit.

Moreover, in awarding EPOs wage increases conforming to the uniformed service pattern, the Panel expressly refused to recommend "full pay and benefit parity" with police officers employed by NYPD,

> . . . because of the extraordinary costs that the City would incur and in recognition of the fact that the current police officer pay and benefits did not occur overnight, but are a product of years of negotiations and impasse panel awards.

(Report at 20) Accordingly, we do not find that the Panel's award disregards the City's ability to pay.

Next, we consider both parties' arguments that the Panel's award of an agreement term of 53 months and 12 days, from October 20, 2005 through March 31, 2010, must be set aside. LEEBA, which did not propose any time period before the Panel, objects primarily because the

Report defers implementation of a number of the awarded benefits, other than wages, until the last day of the agreement. The City, which proposed a term of 30 months, argues that, as neither party proposed a duration of more than 30 months, the Panel lacked authority to recommend anything longer. The City also contends that it submitted evidence that it had eliminated funding for the few remaining unsettled contracts for the 2008-2010 period, thus the Panel should not have established a term that extended into a period for which the City has not budgeted funds for new wage increases. We find that the length of the agreement is a matter properly within the discretion of the Panel and is not limited to the term proposed by one or both parties. The NYCCBL provides, in § 12-311(c)(3)(c), that:

> The report of an impasse panel shall be confined to matters within the scope of collective bargaining.

Certainly, the duration of an agreement is a mandatory subject of bargaining. *Buffalo Police Benevolent Association*, 43 PERB ¶ 4562 (ALJ 2010), citing *Old Brookville Policemen's Benevolent Association*, 16 PERB ¶ 3094 (1983). The NYCCBL, unlike the Taylor Law (Civil Service Law, Article 14) does not limit the period for which an impasse panel may render an award. *Compare* NYCCBL § 12-311(c) (no durational limitation) *with* Taylor Law § 209(4)(c)(vi) (two-year limitation). While it is true that neither party proposed an agreement in excess of 30 months, the Panel expressed a cogent reason for its choice of duration:

> The end date is aimed at serving a dual purpose: First, to maintain the new agreement in the same timeframe as the prior contracts (that is, renewing each April 1), which has administrative benefits while maintaining continuity of terms and conditions of employment; second, to foster sound labor relations, it makes eminent sense to bring the collective bargaining agreement for this unit of employees into the same timeframe as their New York City municipal counterparts, all of whom have agreements that expire in 2010. This Panel recognizes that it is too far past 2008 to recommend [an] agreement that would end in 2008 and trigger, almost immediately, another round of bargaining. This

> recommended time frame will bring greater efficiency to the labor relations process between the parties.

(Report at 22-23) This Board does not find this explanation to be unreasonable.

Further, while the period chosen by the Panel is not supported by a specific request or proposal, it is based upon evidence of the parties' bargaining history and the Panel's understanding of the same collective bargaining framework referred to repeatedly by the City. Although the City alleges that no contract applicable to another unit for the period between 2008 and 2010 was put in evidence, it is common knowledge within the municipal labor relations community, and we take administrative notice, that other law enforcement titles are parties to either collective bargaining agreements ("CBAs") or memoranda of understanding ("MOU") for periods through 2010 or later.[3] Moreover, the City's argument that a party that did not settle its contract by 2008 should be foreclosed from being awarded any wage increase for the 2008-2010 period, because the City has not budgeted funds for that purpose, though perhaps an understandable position given the current fiscal climate, nevertheless is not persuasive. Such a position might be seen to improperly penalize a party for exercising its right to utilize the NYCCBL's statutory impasse procedures, a position this Board cannot condone.

Similarly, the fact that the Panel chose to defer implementation of a number of the awarded benefits, other than wages, until the last day of the agreement, a finding to which LEEBA objects, does not make the length of the agreement improper. It represents a conscious decision by the Panel to balance the benefit to the EPOs against the cost to the City. The Panel stated:

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[3] In this regard, the City Office of Labor Relations' own website discloses the provisions of the following agreements and their terms for the following titles: Police Officer – 2006-2010 (MOU); Sergeant – 2005-2011 (CBA); Lieutenant – 2009-2011 (CBA); Captain 2003 – 2012 (CBA); Special Officer – 2008-2010 (CBA).

> This Panel has determined that it is reasonable to delay the start of these benefits until that date [March 31, 2010] because they will have already been received in the past, the delay will ease their administration, and the delay helps reduce the cost to the City of these changes.

(Report at 24) We find that it was entirely within the Panel's discretion to determine the effective date of the benefits it awarded.

Next, we address the matter of the Panel's reference in the Report to the Smith Report. The City contends that the Panel erred in making reference to the Smith Report after having properly ruled that that document would be excluded from the record. LEEBA, on the other hand, argues that the Smith Report is relevant to the impasse proceeding, that its probative value outweighs any prejudice its admission might cause the City, and that it should not have been excluded from the record. In this regard, LEEBA also objects to the Trial Examiner's ruling denying its motion to include the Smith Report in the record on appeal.

We have reviewed the record of the impasse proceeding and find, as alleged by the City and as found by the Trial Examiner in his ruling, that the admission of the Smith Report was argued before the Panel and that the Panel expressly ruled that it would not be admitted into the record. (Tr. 1407) Further, the Panel indicated, based on his *in camera* review of the document, that:

> . . . it [the Smith Report] is a recommendation obviously. And it's one point of view that was done by these particular consultants as to what should be done with respect to the personnel issues. All right? I don't necessarily have to be educated on that, but at the same time it's a report that was not implemented or accepted for the most part, I believe. . . . I understand also that it is a recommendation. And obviously the Union has its own recommendations as to what should be done and that's being argued out here.

(Tr. 1486-87) It appears from this statement that the Panel may have considered that, as an unaccepted recommendation, the Smith Report had limited probative value. More importantly,

the record reflects that the City had alleged before the Panel that the Smith Report contained confidential information and that DEP has treated it as an extremely sensitive document within the agency. The City provided documentation to the Panel that DEP had declined a newspaper's FOIL request for the Smith Report, writing that,

> Such information, in the hands of persons who may seek to cause harm to this vital infrastructure, could jeopardize the security of the City's water and wastewater systems.

(DEP response to FOIL request made by the Daily News, quoted in letter to the impasse panel, dated December 2, 2010) This concern about the security of the watershed if the Smith Report were publicly disclosed, lead the Panel to declare:

> If it's put into the record, then it's going to [be] made available to everybody and obviously the department is very nervous about that.

(Tr. 1407)

For these reasons, the Panel expressly refused to accept the Smith Report into evidence, but only permitted LEEBA representatives to view a redacted version of the Report in order to prepare to examine or cross-examine a City witness. (Tr. 1244-1246)

We find that no legal basis has been presented to overturn the Panel's ruling excluding the Smith Report. LEEBA's suggestion that the Smith Report would be "a marvelous starting point for the Board to learn about the duties, responsibilities, and job functions" of the EPOs (LEEBA Mot. at 8-9) is of no consequence. The Smith Report was reasonably excluded by the Panel based upon the reasons it articulated.

Moreover, we have reviewed the Trial Examiner's decision denying LEEBA's motion to include the Smith Report in the record on appeal before this Board. The Trial Examiner denied the motion on the grounds that (a) it would be contrary to NYCCBL § 12-311(c)(4)(b) ("review .

. . shall be based upon the record and evidence made and produced before the impasse panel") to make part of the record on appeal, and thus subject to review by the Board, a document the admission of which was argued before the Panel and which the Panel ruled would be excluded from the record; (b) granting the motion would be prejudicial to the City because it would deprive the City of the opportunity to offer evidence as to reasons for DEP never requesting a final version of the Report, or what DEP believed were the errors in the Report; and (c) to the extent the transcript of the impasse proceedings shows that the Panel's evidentiary ruling was based, at least in part, on his concern that full disclosure of the Smith Report would pose a risk to the security of the watershed, it would be imprudent to overrule the Panel and place the Smith Report in the record on appeal – thus making it a public document – without any showing by the Union that the security concerns of the City – and the Panel – are unwarranted. We agree with and adopt that ruling for the reasons stated in the Trial Examiner's decision.[4]

Having found that the Smith Report was properly excluded from the record, we now turn to the matter of the Panel's references to it in the Panel's Report. The Panel referred to the Smith Report three times in its Report. Firstly, on page 2 of the Report, in a footnote, the Panel identified the Smith Report and indicated that it had been submitted at the request of the Panel,

[4] We note that subsequent to the Trial Examiner's ruling, counsel for LEEBA questioned the authority of the Trial Examiner to rule on a motion not made at a hearing. As the Trial Examiner informed counsel, and as we hereby endorse, he was authorized by this Board to serve as a Trial Examiner for the purpose of ruling on LEEBA's motion herein. Section 1-12(l) of the OCB Rules prescribes the procedure to be followed for all motions not made at a hearing, but does not specify by whom such motions shall be determined. It has been this Board's practice to delegate such interlocutory motions to a Trial Examiner for determination, subject to review by the Board when the underlying case comes before the Board for final determination. *See James-Reid*, 79 OCB 9, at 2-3 (BCB 2007). Moreover, the ruling was within the Trial Examiner's power, under § 1-13(c)(4) of the Rules, to "do any and all things necessary and proper to effectuate the policies of the statute and these rules."

> . . . as a confidential document to be used for the limited purpose of informing on the activities of the EPOs and related personnel matters.

The City disputes that this was the purpose for which the Smith Report was produced, alleging that the Panel directed that LEEBA representatives be permitted to view a redacted version of the Report in a room with a City representative present, solely for the purpose of preparing questions to examine or cross-examine a City witness who would testify. (Tr. 1244-1246) This Board's review of the record supports the City's understanding of the purpose for which the Smith Report was produced. However, as there is no reliance on the substance of the Smith Report on this page, we find no prejudice to any party.

Secondly, on page 14 of the Report, the Panel included a citation to a page of the Smith Report, in a string cite together with references to City, Union, and Joint exhibits, as authority for the undisputed fact that EPOs are defined as police officers under State law. *See* Criminal Procedure Law § 1.20(34)(o). We find that the reference to the Smith Report, here, is merely redundant and in no way prejudicial. It could be excised from the Report without consequence.

Thirdly, the Panel refers to the substance of the Smith Report in some detail in the second paragraph on page 19 of the Report. The Report states that the consultant, in the Smith Report, "submitted findings entirely consistent with those listed above," and proceeds to summarize, in the remainder of a 17-line paragraph, some of the findings and recommendations of the consultant. The reference to "those listed above" clearly refers to the Panel's detailed findings concerning the evolution of the EPOs' job duties, responsibilities, training, and jurisdiction set forth on pages 11-18 of the Report. The Panel's findings on those pages are replete with numerous citations to the transcript of the impasse proceedings and the exhibits submitted by the parties.

The panel's reference to the substance of the Smith Report is problematic. The real question raised by this reference is whether the Panel relied on the Smith Report, a document not in evidence, as a basis for making its determination; or whether it merely cited the Smith Report as describing findings similar to those which the Panel reached based upon its own independent analysis of the record testimony and exhibits.

In the case of traditional arbitrations, the courts may vacate an arbitration award where the arbitrator considered matters not in evidence. *See Application of Fischer*, 106 A.D.2d 314, 317 (1st Dept. 1984). However, the purpose of such vacatur is to prevent arbitrators from deciding disputes based upon their own independent investigation rather than on the proof adduced at a hearing. *Goldfinger v. Lisker*, 68 N.Y.2d 225, 231 (1986), citing *Berizzi Co. v. Krausz*, 239 N.Y. 315 (1925). In the unique circumstances of the present case, this Board does not believe that an outright vacatur is required. The record shows that the Smith Report was made available to all parties during the course of the impasse hearings. There is no claim that the Panel engaged in any independent investigation.

We note that even where a court would vacate an arbitration award for such consideration of evidence outside the record, the court may order a rehearing before the same or a different arbitrator. CPLR 7511(d). Under NYCCBL § 12-311(c), an impasse panel's product is less final than a conventional arbitration award – it is called a report & recommendation, not an award. The parties may accept or reject. The Board has review power and the power to vacate, modify, or remand to the Panel for further action. We have not hesitated to remand a matter to an impasse panel where circumstances warranted that action. *See DC 37*, 4 OCB2d 29 (BCB 2011); *UFA*, 51 OCB 19 (BCB 1993). Therefore, we find that in the present case it is appropriate to remand to the Panel to: (1) excise all references to the Smith Report from the Panel's Report; (2)

determine whether it would have reached the same conclusions and made the same recommendations without any consideration of the referenced portions of the Smith Report; and (3) to the extent the Panel deems it necessary or appropriate, clarify and/or amend the Report accordingly.

Finally, the Board has considered the remaining arguments advanced by both parties. Notwithstanding how they are labeled, we find that most of them relate to disagreement with the weight the Panel gave to particular evidence, or with the Panel's assessment of the relative importance of particular arguments, or with its judgment as to appropriate terms for settlement. We find that these are all matters within the discretion of the Panel, that there is no basis to find any abuse of that discretion, and that the arguments are, in any event, not persuasive.

Accordingly, the Board remands this matter to the Panel to take the actions described above; and affirms the Panel's Report in all other respects.

ORDER

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

ORDERED, that the appeal of the Law Enforcement Employees Benevolent Association be, and the same hereby is, granted in part and denied in part, as set forth herein; and it is further

ORDERED, that the appeal of the City of New York be, and the same hereby is, granted in part and denied in part, as set forth herein; and it is further

ORDERED, that the Report and Recommendation of the Impasse Panel hereby is remanded to the Panel to: (1) excise all references to the Smith Report from the Panel's Report; (2) determine whether it would have reached the same conclusions and made the same

recommendations without any consideration of the referenced portions of the Smith Report; and (3) to the extent the Panel deems it necessary or appropriate, clarify and/or amend the Report accordingly.; and it is further

DIRECTED, that the Impasse Panel issue an amended Report and Recommendation in accordance with the above instructions; and it is further

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

ORDERED, that implementation of the Report and Recommendation of the Impasse Panel be held in abeyance until after the Impasse Panel has issued an amended Report and Recommendation as directed herein.

Dated: May 29, 2012
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

I dissent.

ERNEST F. HART
MEMBER

PETER PEPPER
MEMBER