City v. L.621, SEIU, 51 OCB 34 (BCB 1993) [Decision No. B-34-93]

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-

LOCAL 621, S.E.I.U., AFL-CIO,

Respondent.
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Decision No. B-34-93
Docket No. BCB-1567-93
(I-212-92)

DECISION AND ORDER

On March 19, 1993, the City of New York, appearing by its Office of Labor Relations ("City"), filed a scope of bargaining petition and an accompanying memorandum of law in support of its scope of bargaining petition. The petition and memorandum seek a determination on whether six demands proposed by Local 621, S.E.I.U., AFL-CIO ("Local 621" or "the Union"), which have not been resolved in negotiations between the parties, are mandatory subjects of bargaining within the meaning of Section 12-307 of the New York City Collective Bargaining Law ("NYCCBL").

On April 16, 1993, the Union filed an answer to the City's petition and memorandum of law. On May 10, 1993, the City filed a reply in support of its petition. On May 14, 1993, the Union sought authorization from the Office of Collective Bargaining to file a sur-reply, based upon its representation that the City's reply contained new arguments that had not been raised previously. The City did not oppose the submission of a sur-reply, which the Union filed on May 28, 1993.

Background

Local 621 represents employees holding the titles of Supervisor of Iron Work, Supervisor of Mechanics (Mechanical Equipment), and Deputy Director of Motor Equipment Maintenance (Sanitation). In Spring 1992, the Union and the City began bargaining for a successor agreement to the one covering the period July 1, 1986 to June 30, 1990. Between May 19 and October 13, 1992, the

parties engaged in a series of negotiation and mediation sessions in an attempt to settle the terms of their contract. At some point during that time, the Union presented the City with a list of bargaining demands that included the following:

> A. Non-Economic Demands:
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> 1. Modification of procedures concerning escort-ing of impaired employees (i.e., revision of PAP 85-05-Section 14.4, pg.24).
>
> 2. Amendment of Article VIII to provide for department-wide equal distribution of overtime.
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> 3. Health Insurance to continue for widows through age 65.
>
> 4. Minimum four (4) hours call-in pay.
>
> 5. Vacation and sick time to be deemed time worked.
>
> 6. Full time release for one (1) union officer.

On December 21, 1992, the Union 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").[1] In its Request, the Union asserted that the parties had

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[1] 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.**
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> * * *
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> **(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;
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> (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;

(continued...)

reached an impasse in their negotiations on several economic issues, as well as on the "non-economic" issues of minimum hours required for call-in pay; full release time for one union officer; and department-wide distribution of overtime. Collateral disputes as to whether the Impasse Panel would have jurisdiction over unit members holding the title Supervisor of Mechanics (Mechanical Equipment), or whether an impasse actually had been reached with respect to members in the Deputy Director title, are not germane to this proceeding.

RELEVANT STATUTORY PROVISIONS

Section 12-307 of the NYCCBL provides as follows:

> 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

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[1](...continued)

(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;

* * *

(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.

* * *

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 section;

(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 representa-tive 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 certi-fied employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where consid-erations 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 organi-zation, council or group of certified employees organizations designated by the board of certi-fication 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 organiza-tions 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 organiza-tion and the technology of performing its work. Decisions of the city or any other public employer on those matters

are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

PRELIMINARY ISSUES

A. Justiciability

The City has challenged the bargainability of each of the six "non-economic" demands initially proposed by the Union. Local 621 takes the position that since it did not request the Impasse Panel to consider its demands for widows' health insurance or for vacation and sick leave to be deemed time worked, these are inappropriate subjects for inclusion in a scope of bargaining proceeding. The City responds that until such time as the demands are withdrawn, they properly are before this Board for determination.

NYCCBL Section 12-309a.(2) confers jurisdiction on the Board of Collective Bargaining to determine whether a matter is within the scope of collective bargaining whenever the employer or a union requests that we do so. This section was included in the statute to make possible the resolution of such questions by means of a type of declaratory judgment process.[2] Unlike the other types of proceedings brought before this Board for determination, which require the existence of a "disagreement" or a "dispute" between the parties,[3] a request for a scope of bargaining determination need not involve an adversarial situation. It does not require the existence of a formal bargaining demand and a formal refusal to bargain, nor does it require a party to take a claimed unlawful unilateral action as a prerequisite to our making a final determination on bargainability.[4] Although we will not investigate or

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[2] Decision Nos. B-6-90 and B-21-87.

[3] NYCCBL Section 12-309a.(1),(3).

[4] Decision Nos. B-38-82; B-24-75; B-12-75; B-5-75; and (continued...)

address the negotiability of provisions that are not raised in a scope of bargaining petition,[5] we are authorized to issue an opinion on any matter that a party with standing brings before us. Thus, in this case, although Local 621 may not specifically have requested the Impasse Panel to consider its demands for widows' health insurance or for leave time to be deemed time worked, we will, nevertheless, at the City's request, make a determination on the bargainability of both subjects.

We will discuss seriatim our decision on the bargainability of each of the above-quoted demands characterized by the Union as "non-economic" and challenged by the City. We reiterate that our finding a matter within the scope of bargaining does not constitute an expression of any view on the merits of the underlying demand.[6]

THE DEMANDS

Demand No. 1

ESCORTING IMPAIRED EMPLOYEES
Modification of procedures concerning escorting of impaired employees (i.e., revision of PAP 85-05-Section 14.4, pg.24).

Department of Sanitation Policy and Administrative Procedure ("PAP") No. 85-05, effective July 1, 1987, concerns employee substance abuse. It modified

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[4](...continued)
B-11-68.

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

[6] Decision Nos. B-45-92; B-43-86; B-16-81; B-17-75; B-10-75; B-1-74; B-2-73.

a previous substance abuse policy issued in 1985. In a cover letter to employees, the Commissioner explained the reasons for the modification:

> In May 1985, the Department of Sanitation first issued our Substance Abuse Policy and Procedure, PAP #85-05. The intent of that policy -- to protect the health and safety of the public and Department employees and to ensure that employees troubled by drug and alcohol abuse problems get the help they need -- remains unchanged.
>
> The reissuance of Sanitation's Substance Abuse Policy and Procedure in this document reinforces the Department's rules prohibiting the use of drugs and alcohol at work. * * *

Section 14.4 of revised PAP 85-05 requires supervisors to perform certain duties when dealing with impaired employees. Among other things, subsection 4) requires them to "accompany employees to the Clinic or medical facility for their substance use tests following an accident, physical altercation, and where the employee has a job fitness problem." It is unclear whether subsection 4) is new to the 1987 revision of PAP 85-05, or whether such escort duty was part of the 1985 version.

City Position

The City argues that the Department of Sanitation has the managerial authority, under NYCCBL Section 12-307b., to modify its procedures for escorting impaired employees. According to the City, a demand infringing upon this authority is outside the scope of collective bargaining because it would interfere with management's right to decide the contents of the job description and with its ability to direct its employees. The City denies that the procedure modification presents a threat to employees' safety, and it maintains that the Union has failed to raise a sufficient question of fact even to warrant a hearing on whether the modified procedures will have an impact on safety.

Union Position

The Union contends that the procedure contained in Section 14.4 of PAP

85-05, requiring supervisor to take intoxicated or otherwise impaired employees to a clinic or medical facility after an accident, altercation, or where they appear unfit for duty, is unsafe. It points out that its members are not peace officers, they are unarmed, and they are not trained to perform this assertedly dangerous task -- they are merely mechanics who have become supervisors. Thus, according to the Union, the modified procedure presents a "clear" threat to the supervisors' safety and, as such, constitutes a "per se" practical impact. At the very least, in the Union's view, a serious enough question of safety exists to warrant a hearing.

Responding to the City's sufficiency argument, the Union denies that its allegations are conclusory. It maintains that its members lack the training, capacity and equipment to perform the dangerous tasks required by PAP 85-05 §14.4.

Discussion

Section 12-307b. of the NYCCBL reserves to management exclusive control and sole discretion to act unilaterally in certain enumerated areas that are outside the scope of collective bargaining. This Board repeatedly has construed Section 12-307b. to guarantee the City the unilateral right to assign and direct its employees, to determine what duties employees will perform during working hours, and to allocate duties among its employees, unless the parties themselves limited that right in their collective bargaining agreement.[7]

We also have recognized, however, that a clear threat to employee safety may warrant the imposition of a duty to bargain over the impact of a managerial decision, despite the fact that the decision was based on

[7] Decision Nos. B-40-92; B-6-91; B-37-87; B-23-87; B-15-87; B-6-87; and B-4-83.

management's statutory authority.[8] In other words, although the Union has no right initially to demand bargaining over a matter within the statutorily defined area of management prerogative, it may nevertheless have the right to demand bargaining for purposes of obtaining alleviation of the adverse effects upon unit employee working conditions of an exercise of management prerogative.

To avail itself of the practical impact protection of the law, however, it is incumbent upon the union to show how the alleged impact results either from a management decision or action, or from management's inaction in the face of changed circumstances.[9] To satisfy this burden, the union must do more than claim that a practical impact on safety exists. It must substantiate, with more than conclusory statements, the existence of a threat to safety before we will require the employer to bargain, or even order a hearing to present further evidence.

Applying these principles to the instant matter, we find that Local 621 has not sufficiently shown how the current application of PAP 85-05-Section 14.4 has created an impact on employees' safety. The policy has been in effect since 1987, at least. Thus, clearly it does not qualify as a recent managerial decision or action. An alternative approach, by which the union alleges that changed circumstances have caused an existing policy to become more dangerous, has not been advanced.

Accordingly, we find the Union's evidence insufficient to support a practical impact on safety claim at this time. We do so without prejudice to Local 621 filing its own scope of bargaining petition in the future, in the event that it can support its claim with statistics, data, or other documentary evidence showing how changed circumstances have made the

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[8] Decision Nos. B-40-92; B-49-91; B-25-91; B-9-91; B-6-91; B-69-88;

[9] Decision Nos. B-31-89 and B-43-86.

application of Section 14.4 of PAP 85-05 into something unsafe.

Demand No. 2

EQUAL DISTRIBUTION OF OVERTIME
Amendment of Article VIII to provide for department-wide equal distribution of overtime.

Article VIII of the parties most recent collective bargain-ing agreement reads as follows:

> All overtime shall, as far as practicable, be distributed equally among the employees in each work area within a department.

Union Demand No. 2 would eliminate the "in each work area" restriction, thus forcing management to equalize overtime agency-wide for all members of the bargaining unit.

City Position

The City argues that management has the statutory authority, under NYCCBL Section 12-307b., to schedule, assign or direct its employees. Therefore, in its view, Union Demand No. 2 is nonmandatory because it would infringe upon its managerial prerogative to determine the methods, means and personnel by which governmental operations are conducted. The City asserts that this Board, in Decision No. B-29-87, held that the decision on when and how much overtime to authorize or order falls within the realm of statutory management rights, and thus is outside the scope of the City's obligation to bargain collectively.

The City acknowledges that the parties' most recent collective bargaining agreement provides for the equalization of overtime. It contends, however, that the inclusion of a subject in a prior agreement, now covered by the status quo provisions of NYCCBL Section 12-311d., does not change the fundamental status of the subject. Relying on several Public Employment Relations Board (PERB) decisions, the City maintains neither a party's willingness to negotiate over a nonmandatory subject of bargaining, nor its agreement to incorporate a nonmandatory subject into a contract, transforms

that subject into a mandatory bargaining status. According to the City, a recent Board decision reaffirmed this principle, wherein assertedly we held that if a demand covers a subject of bargaining that originally was within management's prerogative, then that subject remains within the prerogative except if limited by an agreement, and then only for the purpose of administering the agreement and not for the purpose of negotiation.[10]

Union Position

According to the Union, a demand for equal distribution of overtime does not encroach upon management's right to decide when and how much overtime to authorize and order. Therefore, in its view, Demand No. 2 does not infringe on the City's right to determine the standards of service that it offers. The Union bolsters its contention by listing several PERB decisions that assertedly stand for the proposition that the assignment of overtime is a mandatory subject of bargaining.[11]

Discussion

The City is correct in claiming that because a public employer has chosen to negotiate over a permissive subject of bargaining in the past, it does not transform that subject into a mandatory subject of bargaining, nor is the employer obligated to negotiate over that subject in the future.[12] A

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

[11] Union-Endicott Central School District, 25 PERB ¶3083 (1992), and Starpoint Central School District, 23 PERB ¶3012 (1990), where the Board held that the manipulation of a work schedule was mandatorily bargainable; and United Federation of Police and Town of Blooming Grove, 21 PERB ¶3032 (1988), where the Board held that the means by which employees are assigned to meet manpower needs is a mandatory subject of bargaining.

[12] Decision Nos. B-4-89; B-62-88; B-16-74; B-7-72; and B-11-68. See also, City of Johnstown and Johnstown PBA, 25 PERB (continued...)

subject's status is fixed by law and is unaffected by the parties' actions or intentions.[13] However, in this case, the Union is not claiming that any such conversion has taken place. It simply is asserting that a demand seeking the equal distribution of overtime is a mandatory rather than a permissive subject of bargaining.

We have said repeatedly that, as a general proposition, scheduling and assignment of overtime falls with the City's statutory management right to determine the methods, means and personnel by which government operations are to be conducted.[14] This principle is reflected both in our Decision No. B-29-87, cited by the City, and in the decisions of the PERB cited by the Union. Here, however, Local 621 is not seeking to establish a right to perform overtime work in any particular circumstance. Instead, it is attempting to ensure that all its members share whatever overtime the City offers in an evenhanded manner on a department-wide basis.

A demand of that nature, limited to the procedures by which overtime is to be assigned, does not interfere with the employer's managerial prerogative to schedule overtime only when it deems such overtime necessary. We therefore find the demand a mandatory subject of bargaining. We stress, however, that there is a clear distinction between a demand for equalization of overtime, such as this, and a demand seeking an entitlement to perform overtime work. As we have said in the past and reiterate here, the option of assigning overtime falls squarely within the employer's statutory right to determine how its operations are to be conducted.

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[12](...continued)
¶3085 (1992); Troy Firefighters Ass'n. and City of Troy, 10 PERB ¶3015 (1977); and State of New York and CSEA, Inc. 6 PERB ¶3005 (1973).

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

[14] Decision Nos. B-29-87; B-20-87; B-16-87; B-35-86; and B-23-86.

Demand No. 3

HEALTH INSURANCE FOR WIDOWS AND DEPENDENTS
Health Insurance to continue for widows through age 65 and dependents.

City Position

The City raises three objections to the content and framing of this demand: First, to the extent that the demand would provide a new insurance coverage, the City contends that it is under no obligation to bargain over benefits for persons outside the bargaining unit. In its view, a demand concerning the provision of health insurance to widows and dependents of non-unit members pertains to people who clearly are not unit members. Second, the City contends that the demand is so vague and ambiguous that it cannot determine what benefits it would have to provide, to whom the benefits would be provided, or if the demand concerns terms and conditions of employment. Third, as far as unit members in the title Supervisor of Mechanics (Mechanical Equipment) are concerned, it contends that the demand is nonmandatory because Section 220 of the Labor Law covers employees in this title. According to the City, the Impasse Panel lacks jurisdiction over employees covered by Labor Law Section 220. Only "the Comptroller or another analogous officer" can issue a determination in a dispute involving their wages and supplements, and in the City's view, a demand for continuation of health insurance benefits qualifies as a "supplement" under the law.

Union Position

The Union's only response is that it did not request that this demand be presented to the Impasse Panel. It contends that the matter is not an appropriate subject for a scope of bargaining proceeding.

Discussion

As we said in our preliminary remarks above, we reject the contention of non-justiciability advanced by the Union. Once a party in interest files a scope of bargaining petition, we are authorized to make a decision on the bargainability of its contents, irrespective of whether the demands have been presented to an impasse panel.

Section 12-307a. of the NYCCBL provides that public employers and certified employee organizations shall have the duty to bargain in good faith on "wages," which specifically includes the subject of health and welfare benefits. NYCCBL §12-303e. defines municipal employees as persons currently employed by municipal agencies. Thus, neither retirees nor dependents of retirees fall within the meaning or coverage of the NYCCBL.[15] This does not mean, however, that a union can never negotiate for the benefit of spouses and dependents, even though they clearly are not bargaining unit employees. As we explained in Decision No. B-4-89 (at p.82), a demand that seeks employer contributions for the covered employee, upon whom the "intimate dependency [of spouse or child] make[s] their concern his concern,"[16] is within the scope of bargaining. In other words, to the extent that a demand seeks contributions to a fund that will provide a source of support for a surviving spouse and unmarried dependents of current bargaining unit members after their death, it involves a mandatory subject of bargaining. It is important to note that this obligation to negotiate 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 in his or her behalf, since

[15] Decision Nos. B-4-89; B-16-81; and B-21-72.

[16] Quoting from Village of Lynbrook v. PERB, 48 N.Y.2d 398, 12 PERB ¶7021 (1979).

retirees are not employees within the meaning of NYCCBL §12-303e.[17] Thus, a demand that would create a new benefit for retirees' survivors, or one that would continue contributions for surviving dependents of former employees who have retired already, is not within the scope of mandatory bargaining.

In this case, from the manner in which the parties have set out their positions, we cannot tell whether Demand No. 3 relates to new health insurance coverage, or whether it seeks to continue existing coverage. If it would require the City to provide new coverage for widows and dependents, or would continue coverage for surviving dependents of former employees who have retired already, the demand is not within the scope of mandatory bargaining. On the other hand, if the demand would provide health insurance coverage for a surviving spouse and unmarried dependents of current bargaining unit members after their death, it involves a mandatory subject of bargaining.

In the latter instance, one further qualification applies. We agree with the City's contention that "supplements," as defined by Section 220 of the Labor Law, include such items as health and welfare benefits.[18] Moreover, pursuant to NYCCBL Section 12-307a.(1), with respect to employees who are covered by Labor Law Section 220, there is no duty to bargain concerning those matters the determination of which is provided in Section 220.[19] Therefore, even if a demand to provide health insurance coverage for certain beneficiaries is otherwise mandatorily bargainable, it would fall outside the scope of bargaining under the NYCCBL for any employee covered by Labor Law Section 220.

Finally, we reject the City's vagueness contention. Even though a demand may appear unclear "on its face," if the circumstances behind a

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[17] Decision No. B-4-89 at fn. 87, p.83.

[18] Janik Paving & Construction, Inc. v. Roberts, 132 A.D.2d 978, 518 N.Y.S.2d 509 (App. Div. 4th Dept. 1987).

[19] Decision No. B-1-70.

bargaining demand adequately put the City on notice of the union's intent, we will not preclude consideration of the demand solely on this ground.[20] In this case, we are satisfied that, given the prior bargaining history between the parties, the City knew of the Union's intent, and, therefore, the demand is not so vague as to require its exclusion from bargaining on this basis alone.

Demand No. 4

CALL IN PAY - MINIMUM HOURS
Minimum four (4) hours call-in pay.

City Position

As a general proposition, the City agrees that the subject of call-in pay involves "wages," within the meaning of the NYCCBL. It contends that this demand is nonmandatory with respect to employees in Supervisor of Mechanics (Mechanical Equipment) title, however, because Section 220 of the Labor Law covers this title. For the same reason it advanced in one of its challenges to the preceding demand, the City maintains that the Impasse Panel lacks jurisdiction over "Section 220" employees. Only "the Comptroller or another analogous officer" can issue a determination in a dispute involving their wages and supplements.

With respect to employees in the other two titles represented by Local 621, the City contends that minimum call-in pay involves a city-wide matter, and it points out that Local 621 does not hold the city-wide bargaining certificate. Therefore, according to the City, this demand is outside the scope of bargaining in both respects.

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

Union Position

The Union acknowledges that, for employees holding the title of Supervisor of Mechanics (Mechanical Equipment), the issue of minimum call-in pay must be determined by the New York City Comptroller pursuant to Section 220 of the Labor Law. It points out, however, that the Labor Law does not cover employees in the title Supervisor of Ironwork. Therefore, according to the Union, the subject is an appropriate one for submission to an impasse panel insofar as it concerns employees in the latter title.

Subsequently, the Union's sur-reply acknowledges that its call-in pay demand implicates a city-wide matter. It further recognizes that District Council 37, rather than Local 621, has the right to bargain over city-wide matters for unit members in the title Supervisor of Ironwork.

Discussion

There seems to be no dispute remaining between the parties on the subject of minimum call-in pay. The Union acknowledges that the Impasse Panel lacks jurisdiction over its unit members who hold the title of Supervisor of Mechanics (Mechanical Equipment) because they are prevailing rate employees covered by Section 220 of the Labor Law. It also recognizes that call-in pay is a city-wide matter for its other members who are not subject to Section 220 of the Labor Law. The City, for its part, acknowledges that the subject of call-in pay, in general, is a mandatory subject of bargaining.

We agree with the parties in all respects. Wages and supplements for prevailing rate employees are determined by the Comptroller, pursuant to Section 220 of the Labor Law. As we already have said, NYCCBL §12-307a.(1) (supra, p.5) specifically provides that there is no duty to bargain over matters covered by that section.

For non-prevailing rate employees, minimum call-in pay clearly is an economic demand implicating wages, and, thus, qualifies as a mandatory subject of bargaining. Call-in pay cannot be bargained at the unit level, however,

because it falls within the coverage of section 12-307a.(2) of the NYCCBL (supra, p.5), and thus constitutes a matter that must be uniform city-wide for all employees subject to the Career and Salary Plan.[21]

Therefore, in this case, the Impasse Panel lacks jurisdiction to consider the subject of minimum call-in pay for either class of Local 621's bargaining unit members.

Demand No. 5

VACATION AND SICK TIME
Vacation and sick time to be deemed time worked.

City Position

The City does not challenge this demand insofar as it concerns unit members in the titles of Supervisor of Iron Work and Deputy Director of Motor Equipment Maintenance (Sanitation). With respect to employees holding the title Supervisor of Mechanics (Mechanical Equipment), however, the City contends that the demand is nonmandatory for the same reason it advanced in its challenges to the preceding two demands: Since Section 220 of the Labor Law covers this title, the Impasse Panel assertedly lacks jurisdiction to consider a demand that relates to "Section 220" employees; only "the Comptroller or another analogous officer" can issue a determination in a dispute involving their wages and supplements.

Union Position

The Union's initial response is that since it did not request that this demand be presented to the Impasse Panel, the matter is not an appropriate subject for a scope of bargaining proceeding. At the same time, however, the

[21] Cf. Decision No. B-23-85.

Union informs us that the demand does not concern employees in the Supervisor of Iron Work title. According to the Union, the demand relates solely to an interpretation of the determination of the New York City Comptroller, and there allegedly is no dispute that the issue will be presented to the Comptroller pursuant to Section 220 of the Labor Law.

Discussion

The Union, which seemingly is in a position to know, contends that Demand No. 5 relates only to employees in the title Supervisor of Mechanics (Mechanical Equipment). The City denies that this is so, without telling us which other title or titles it thinks might be involved. Accordingly, we shall render an opinion of general application, leaving it to the parties to decide to whom they intend our decision to apply. However, as we have said already, the Comptroller has jurisdiction over matters relating to wages and supplements for prevailing rate employees, pursuant to Section 220 of the Labor Law. NYCCBL §12-307a.(1) specifically provides that there is no duty to bargain over matters covered by that section. Thus, the one class of employees to whom our decision does not apply are those covered by Labor Law Section 220.

We also reiterate our view concerning scope of bargaining proceedings. Once a party in interest files a scope of bargaining petition, we are authorized to make a decision on the bargainability of its contents, irrespective of whether the demands have been presented to an impasse panel. Thus, we again reject the contention of non-justiciability advanced by the Union.

Turning to the merits of Demand No. 5, we have found that several of our previous decisions provide useful guideposts. In Decision No. B-10-81, we stated:

> The [Union] has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation,

> sick leave,
> or other purposes (emphasis added).

Under this rubric, we have held mandatory a demand that would require firefighters injured during an overtime tour of duty to be compensated until the end of their tour at a premium rate of pay.[22] Similarly, we found that a "supper allowance benefits" demand that, in effect, would shorten the work week, was a matter relating to hours, and, thus concerned a mandatory subject of bargaining.[23] Finally, we held that a demand to include additional administrative preparation time in the Fire Marshals' work chart, and to compensate them at the rate of ten additional days off each year for such time, fell within the general category of hours, and thus involved a mandatory subject of bargaining.[24] Viewed in this light, we find that the Unions' proposal encompasses a form of time and leave benefit which, generally, as a function of hours, concerns a mandatory subject of bargaining within the meaning of Section 12-307a. of the NYCCBL.

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

[23] Decision No. B-12-75.

[24] Decision No. B-45-92.

Demand No. 6

RELEASE TIME
Full time release for one (1) union officer.

City Position

The City contends that this demand is nonmandatory because it is so vague and ambiguous that it cannot understand the intent behind it, or know what would be required of management if granted. The City points out that the demand fails to specify both the type of release time that Local 621 seeks, and the purpose or purposes for which the release time would be used. This information is crucial, according to the City, because a demand for release time must "significantly and materially affect the bargaining relationship" and serve to further the policy favoring sound labor relations.[25] In the City's view, because the demand lacks specificity, it can only surmise what activities the union officer would be conducting during the release time.

The City notes that this Board has held that participation in electoral politics, or in meetings or conventions relating to internal union matters, does not have a significant impact on labor relations.[26] It concludes, therefore, that if a demand for release time would allow a union official to engage in those activities, it would not be a mandatory subject of bargaining. According to the City, because of the demand's vagueness, it has no way of knowing how local 621 intends to use the release time.

Union Position

The Union denies that its demand is ambiguous or that the City does not understand its intent. It asserts that the demand was presented and discussed during various bargaining sessions, and, at those times, the Union made its

[25] Quoting from Decision No. B-22-75.

[26] Citing Decision No. B-22-75.

proposal clear and unequivocal. The only question that the City allegedly ever asked was whether the release time would be with pay or without pay. According to the Union, even if Demand No. 6 appears "unclear on its face," where the circumstances are such that the City has adequate notice of the Union's intent, the impasse panel is not precluded from considering the demand on the ground of vagueness alone.[27]

Concerning the City's specific objection to the release time demand, the Union points out that it represents supervisory titles in agencies throughout the City. It claims that it needs a union officer who can devote full-time to such Union business as investigating grievances and working conditions, attending labor-management meetings and negotiations, and performing other activities necessary to sound labor relations. The Union maintains that this Board has deemed these activities as the kind that significantly and materially relate to collective bargaining and sound labor relations.[28]

Discussion

The City's main objection to the Union's release time demand is on the ground of vagueness, contending that it cannot be sure how the release time would be used. Local 621 responds by claiming that by the time bargaining had concluded, at least, the City was fully aware of what the Union was trying to accomplish with its proposal.

In Decision No. B-43-86, we held that although a demand was unclear "on its face," given the prior history between the parties, the City was on notice of the union's intent and, therefore, the demand was not so vague as to require its exclusion from bargaining. We reiterated this holding in Decision No. B-4-89, where we said that if the circumstances behind a bargaining demand adequately put the City on notice of the Union's intent, we will not preclude

[27] Citing Decision No. B-4-89 at pp. 98-99.

[28] Also citing Decision No. B-22-75.

consideration of the demand by the impasse panel on the ground of vagueness alone. In the instant matter, we are satisfied that the Union has clarified the purpose of its release time demand sufficiently to give the City adequate notice of its intentions. The only question remaining, therefore, is whether the subject of the demand itself is within the scope of bargaining.

In general, a demand for release time for labor relations and union activities falls within the scope of mandatory bargaining.[29] Different criteria apply for paid and unpaid release time, however. Since Demand No. 6 is non-specific, and because the parties have not informed us of their intention, we must render a two-pronged analysis to cover both contingencies.

For paid release time to be a mandatory subject of bargaining, it would have to be used for purposes that are significantly and materially related to a collective bargaining relationship, and that serve to further the policy favoring sound labor relations between the parties.[30] Examples of these activities include participation in negotiations and grievance proceedings, and membership on labor-management committees.[31] Additional types of activities that we would accept as being materially related to a collective bargaining relationship are reflected in Executive Order No. 75, as amended by Executive Order No. 6 (dated January 21, 1974). They include the investigation and processing of grievances; service as a member of a City pension board or on the Municipal Labor Committee; participation in impasse proceedings; and attendance, as employee representative, at funerals of employees killed in the line of duty.

In the case where a demand seeks unpaid release time, we again would generally accept the provisions contained in Executive Order No. 75, as amended by Executive Order No. 6, easing the restrictions on how the time must

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[29] Decision Nos. B-4-89; B-23-85; and B-22-75.

[30] Decision No. B-22-75.

[31] Decision No. B-22-75.

be used. Under the more relaxed standard, time could be spent for such union activities as organization and attendance at union meetings, conferences or conventions; recruitment of union membership; solicitation or members; collection and/or recording of union dues; preparation and distribution of union literature; conferences with or appearances before state and federal legislative committees; and holding of press conferences, without rendering a demand seeking unpaid release time nonmandatory.

According to Local 621, its present demand relates to activities primarily of first type, i.e., those that significantly affect the bargaining relationship and further sound labor relations. Assuming this to be true, a demand for paid release time would be a mandatory subject of bargaining, since it would relate to the Union's legitimate desire to have a representative available to devote time to fulfilling its duty to represent unit members.[32]

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 Local 621, S.E.I.U., AFL-CIO, the negotiability of which was challenged in the scope of bargaining petition filed by the City on March 19, 1993, 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, N.Y.
September 22, 1993

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

MALCOLM D. MACDONALD
CHAIRMAN

DANIEL COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

THOMAS J. GIBLIN
MEMBER

STEVEN H. WRIGHT
MEMBER