City v. PBA, 59 OCB 24 (BCB 1997) [Decision No. B-24-97 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of	:	
THE CITY OF NEW YORK,	:	DECISION NO. B-24-97
Petitioner,	:	DOCKET NO. BCB-1904-97 (I-225-96)
-and-	:	
PATROLMEN'S BENEVOLENT ASSOCIATION,	:	
Respondent.	:	

DECISION AND ORDER

On April 25, 1997, the City of New York ("City"), appearing by its Office of Labor Relations ("OLR"), filed a scope of bargaining petition, seeking a determination on whether a number of matters which have been raised in negotiations between the City and the Patrolmen's Benevolent Association ("PBA" or "the Union") are mandatory subjects of bargaining within the meaning of §12-307 of the New York City Collective Bargaining Law ("NYCCBL"). On May 2, 1997, the City submitted a "clarification" of paragraph "14" of its petition.[1]

On May 12, 1997, the PBA filed an answer to the petition. On May 22, 1997, the City filed a reply. On May 23, 1997, the PBA filed a letter, in lieu of a formal motion, objecting to the City's reply to the extent it allegedly raises new facts and

[1] In essence, the City clarified that a challenge to PBA Demand No. II.A. is incorporated by reference in its challenge to PBA Demand No. VII.

legal arguments.[2]

BACKGROUND

On January 23, 1996, the City of New York submitted to the Board of Collective Bargaining ("Board") a request for the appointment of an impasse panel, maintaining that the process of collective bargaining had been exhausted with regard to negotiations between the PBA and the City for a successor to the parties' collective bargaining agreement that expired on March 31, 1995. The City's request was docketed as Case No. I-225-96.[3]

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[2] Specifically, the PBA objects to the following as "entirely new argument": (1) the City's argument that the PBA's productivity and gainsharing proposal is an attempt to control the City's budget; (2) the City's argument that the PBA's gainsharing and wage increase demand is vague; (3) the City's argument that the PBA's demand for the creation of a joint labor-management committee to discuss productivity and gainsharing issues is nonmandatory; and (4) the City's argument that the PBA's demand concerning prescription drugs is part of the health benefits that are bargained collectively with the Municipal Labor Coalition ("MLC"). The PBA asks that these legal arguments be stricken, or alternatively, the PBA's response to each alleged new argument, set forth therein, be considered.

We do not agree that the first and third of these matters are entirely new argument warranting our consideration of an additional reply by the PBA. However, with respect to the second and fourth items, we find that the City's arguments do advance new legal theories and, therefore, will consider the PBA's response on these matters, infra.

[3] On February 12, 1996, the New York State Legislature passed Ch. 13 of the Laws of 1996, which allowed the PBA to bring contract negotiation disputes to the Public Employment Relations Board ("PERB"). On February 14, 1996, the PBA filed a petition with PERB seeking a declaration of an impasse. On February 28, 1996, the City filed a lawsuit challenging the constitutionality of Ch. 13 of the Laws of 1996. Also on that date, the Director (continued...)

On January 22, 1997, the PBA submitted to the Board a request for the appointment of an impasse panel, alleging that the parties have reached an impasse in negotiations. On January 23, 1997, the City renewed its request for the appointment of an impasse panel.

At its meeting on January 30, 1997, the Board declared the existence of an impasse in bargaining between the City and the PBA, and authorized the appointment of an impasse panel to resolve the dispute in accordance with the provisions of §12-311c of the NYCCBL. On March 27, 1997, Stanley L. Aiges, Chairman, Arnold M. Zack, and Maurice C. Benewitz were designated as the impasse panel. Preliminary conferences between the parties and the impasse panel have been held and hearings before the impasse panel are scheduled to commence on June 3, 1997.

The City's petition seeks a determination of whether the disputed demands are mandatory subjects of negotiation which may be considered by the impasse panel. Demands which are not mandatory subjects of negotiation may not be considered by an impasse panel unless submitted to the panel by the mutual

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[3](...continued)
of the Office of Collective Bargaining ("OCB") informed the parties that the matter would be held in abeyance "at least until such time as the court rules on the issue of a preliminary injunction." On December 19, 1996, the New York State Court of Appeals issued a decision holding that the bill passed by the State was unconstitutional.

agreement of the parties.[4]

RELEVANT STATUTORY PROVISIONS

Section 12-307 of the NYCCBL provides:

> Scope of collective bargaining; management rights.
>
> a. Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that:
>
> (1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for in said election;
>
> (2) matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining unit are involved;
>
> (3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations

[4] See Decision Nos. B-9-68; B-16-71.

designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department;

(4) all matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved;

(5) matters involving pensions for employees other than those in the uniformed forces referred to in paragraph four hereof, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as representing bargaining units which include more than fifty per cent of all employees included in the pension system involved.

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

Section 12-311c of the NYCCBL provides, in relevant part:

Impasse Panels.

* * *

(3) (a) An impasse panel shall have power to mediate, hold hearings, compel the attendance of witnesses and the production of documents, review data, and take whatever action it considers necessary within a reasonable period of time, as determined by the director, it shall, within such period of time as the director prescribes, render a written report containing findings of fact, conclusions and recommendations for terms of settlement.

(b) An impasse panel appointed pursuant to paragraph two of this subdivision c shall consider wherever relevant the following standards in making its recommendations for terms of settlement:

(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;
(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.

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

* * *

PRELIMINARY ISSUE

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

In cases where a demand has a dual character, we have followed a practice of advising the parties of those elements of a demand which are mandatory subjects and of those elements which are nonmandatory subjects of bargaining.[5] This practice is consistent with our authority, under NYCCBL §12-309a(2), to determine whether a matter is within the scope of mandatory collective bargaining. We view our function in implementing this authority as one of informing the parties rather than penalizing them for refusing to bargain over disputed demands.

THE DEMANDS

Except where demands have been grouped because they deal with related issues, we will discuss seriatim the demands which have been challenged, the positions of the parties, and our decision on the bargainability of each demand.[6]

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

[6] A finding that a matter is bargainable does not constitute an expression of any view on the merits of a demand. See Decision Nos. B-4-89; B-43-86; B-16-81; B-17-75; B-10-75; B-1-74; B-2-73.

PBA Demand No. II.A.

FY'95 and '96 Bonus Payments

Initial gainsharing pensionable bonus for each of FY '95 and FY '96 payable on ratification of Agreement (see, infra, par. VII).

PBA Demand No. VII.*

Productivity, Performance and Safer City Gainsharing

A. 1995-1997

The PBA seeks and maintains entitlement to Productivity, Performance and Gain Sharing compensation awards for each of FY 1995, FY 1996, et seq. The PBA demand for past productivity, which since FY 1995 and to date has generated savings in excess of 2% per annum, is predicated upon additional job responsibilities its members have assumed, while maintaining all prior duties, in more efficient fashion and with greater productivity, thereby providing savings to the City. These savings, as to which its members are entitled to share, are reflected through the following:

1. Safer City Performance and Productivity Savings: The City's own crime statistics (and those of the FBI), as well as tourism, business and other pertinent data and statistics, demonstrate that, as the direct result of increased productivity and more effective police force performance, there were produced in the pertinent period sharply reduced levels of serious crime, reduced crime-related costs, the reduction and initial reversal of the business exodus, and significant increases in tourism and other tax and income producing benefits to the City.[1]

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* Note: footnotes 1 through 4 are contained in the text of the PBA's demands and are quoted herein for the sake of completeness. The Board expresses no position on the accuracy or merit of these footnotes.

[1] To illustrate, according to the FBI's preliminary Uniform Crime Reports for the first six months of 1996, New York City's total crime index declined by 10.5% as compared with the same

2. A further 2% per annum saving occurred for each of FY 1995 and 1996 by virtue of the "reduction of duplicative and redundant administrative functions" that were eliminated upon the merger of Housing and Transit Police into the NYPD, permitting a 500-person increase in the patrol force utilizing existing personnel (without concomitant increases in personnel costs, fringes, etc.)[2]

3. Additional savings on merger of Housing and Transit Police into NYPD:

(a) Elimination of increased Welfare Fund contributions that had been paid to Housing Police Welfare Fund (this item had previously

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period in 1995. Preliminary New York City Police Department statistics for all of 1996 indicate a reduction in total crime of over 38% as compared with 1995. Indeed, preliminary New York City Police Department statistics show that serious crime has continued to fall in the first quarter of 1997 (e., with incidents of murder decreasing 27.1% and rape decreasing 14%) (N.Y.Times, April 1, 1997, p.1). The impact of these compelling crime reduction efforts - which were evident in 1995 as compared with 1994 -- reflected itself in, for example, the increase in visitor spending in the City by approximately 14% during the period 1993 through 1995 and, in the same period, in hotel occupancy rates increasing from 69.5% to 78.5%. And, the Mayor has publicly proclaimed that this dramatic reduction in serious crimes was the result of increased police performance and effectiveness (i.e., productivity).

It merits emphasis that, as noted below, in the enactment of A04844, S 2959 in March 1997 - the Safe Streets surcharge legislation - the City represented to the Legislature that serious crime reduction enabled it to ask for, and it was legislatively granted, authority to reduce the prescribed 38,310 force strength by a factor of 2%, without reducing Safe Streets funding.

[2] Testimony of Mayor Rudolph W. Giuliani Before House Committee on Government Reform - 3/13/97. In urging that the New York State Legislature continue the Safe Streets tax surcharge, the City represented that the savings involved 700 police officers. Harding, NYC Memorandum in Support of A.4844, S. 3959, Feb. 26, 1997.

been equated for valuation purposes with the $2000 bonus paid police officers).

(b) Savings on elimination of proviso permitting Housing police buy-out of terminal leave. (After 20 years Housing police received approximately 60 days plus 3 days for each year over 20 years and for partial years, they received 1 day for each 4 months).

(c) Savings on closure and planned closure of Housing police facilities.

(d) Federal funds for continued maintenance of Housing Authority/Housing police activities by NYPD police officers.

(e) Increased income tax revenue by reason of requirement that all former Transit Police Officers must now pay residency tax.

(f) Elimination of Housing and Transit PBA excusals for union duties.

(g) Decrease in number of police officers for Housing and Transit Divisions following merger.

4. Increased Performance responsibilities on merger:

(a) Police officers now required to go into subways and Housing Authority facilities in addition to other duties.

(b) Increased first response obligations.

B. Going Forward (FY '97 et.seq.).

The above-noted savings, which exceed 2% per annum, are continuing, and their continued value should immediately be fixed in the manner set forth below and police officers compensated therefor on a going forward basis. Further avenues for gainsharing would, likewise, then be defined, cost-quantified and implemented as appropriate.

Additionally, as has already been shown in the

bargaining[3] and will in due course be demonstrated, immediate bases, capable of ready implementation, exist for **further** and substantial gainsharing savings in excess of that 2% base.

1. The Labor-Management Committee and Panel

(a) A joint Labor-Management Committee shall be formed immediately upon signing of the new collective bargaining agreement. The Committee shall establish policy guidelines for gainsharing programs, monitor their progress and consider other productivity measures.

(b) Immediately following signing of the new collective bargaining agreement, a three-person Panel shall be designated, each party to designate one member and those two shall designate a third, who shall have or have had law enforcement experience. The members of the panel shall serve for three-year terms or until a successor assumes office and shall be compensated by the parties in an amount and manner agreed upon by them prior to signing of the collective bargaining agreement.

(c) The Labor-Management Committee shall calculate the annual savings generated by the performance and Safer City gainsharing efforts and formulate an equitable distribution methodology. Where the committee is unable to agree or where its assistance is called for by any party in devising, implementing, monitoring or determining the appropriate equitable distribution of accrued savings, or where its intervention may advance any of the purposes hereunder, the Panel may act to recommend solutions, alternatives, proposals or other measures to advance the intention of this effort. In so doing, the Panel may issue such public or private reports as it may deem appropriate.

(d) The Labor-Management Committee and, if

[3] To illustrate, the PBA has noted that productivity advances and gainsharing are possible through the carefully phased reduction in RMP sectors.

> necessary, the Panel shall immediately upon signing of the collective bargaining agreement work out any details attendant to and, if feasible, cause to be promptly examined and implemented initial gainsharing measures, examples of which have already been discussed.[4]

City Position

The City challenges the bargainability of these demands on several grounds. First, it notes that the City possesses the statutory management rights, pursuant to NYCCBL §12-307b, to determine the standards of services to be offered by its agencies and the methods, means and personnel by which government operations are to be conducted. This statutory management prerogative includes the right to maintain the efficiency of its operations and to exercise complete control and discretion over its organization and the technology of performing its work. According to the City, these management rights are limited only by the constraints that a resulting practical impact might impose. To the extent that the PBA's demands would limit the City's right to make decisions involving an increase in workload, greater productivity, and changes in job responsibilities, argues

[4] See, e.g. fn. [2], supra. Additionally, in the above-noted Safe Streets re-enactment, the City successfully argued for a 2% reduction in the mandated force strength, which would involve between 500-600 officers, and equate to an annualized saving well in excess of a further 2%. Simply utilizing initial implementation of the foregoing RMP sector approach, that goal could be accomplished, allowing the City to continue receiving all of the Safe Streets economic benefits, while still obtaining significant savings.

the City, they involve nonmandatory subjects of bargaining.

Second, the City characterizes these demands as attempts by the PBA to bargain over savings generated as a result of increases in workload and productivity that allegedly constitute a "practical impact" on workload. The City points out that the Board has defined a workload practical impact as an unduly burdensome or unreasonably excessive increase in workload as a regular condition of employment. It is asserted that the savings generated as a result of such an impact is not a mandatory subject of bargaining unless the Board first has made a finding of practical impact based upon evidence produced at an impact hearing. The City reads the PBA's demands as making speculative claims of impact based upon a proposed reduction in personnel; and conclusory claims of impact based upon an increase in responsibilities and duties. As to the former, the City argues that it has not taken an affirmative step to change existing manning levels, so that no inquiry into practical impact is warranted. As to the latter, the City contends that the PBA has not shown that there has been an unduly burdensome or unreasonably excessive increase in workload; additional duties that are within the job description and are not unduly burdensome do not rise to the level of a practical impact.

The City analogizes these demands to one considered by the Board in Decision No. B-66-88. There, the Board held that a

demand to bargain over the use of savings generated from the hiring of more employees in trainee positions than originally agreed upon, which presumably resulted in an increase in the caseload of existing unit employees, was a nonmandatory subject of bargaining because hiring and deployment of personnel is a management prerogative and because the existence of a practical impact had not been demonstrated.

Third, the City submits that, even assuming, arguendo, that a practical impact on workload were found to exist, the City, under the decisions of the Board, would have to be given an opportunity to correct or minimize the impact. Only if the City fails unilaterally to alleviate the impact would bargaining be required.

In its reply, the City contends that the PBA's demands are not truly demands for productivity or gainsharing, since they merely seek credit for a reduction in crime, an increase in tourism, increased tax revenue, an alteration of the terms of the Safe Streets legislation, and the merger of the police forces. The City argues that none of these matters relate to productivity, nor do they relate to any increased job responsibilities. In any event, the City submits, the alleged savings stem from the City's exercise of its managerial rights.

Contrary to the PBA's assertion, the City claims that the Union's demands do not constitute "an integrated wage proposal;"

rather, they are an attempt to bargain over the allocation of funds in the City's budget, which is a management right. At best, according to the City, the PBA's demands are an attempt to bargain over a practical impact on workload that has not been proven to exist. Moreover, the City alleges, to the extent that the PBA's demands are an economic proposal, they are vague and ambiguous since they do not specify how much of the alleged savings the PBA is entitled to and what share of future potential savings, if any, they seek. For all of these reasons, the City submits that the PBA's demands are outside the scope of bargaining.

Union Position

The PBA submits that these demands are elements of an integrated wage proposal that rests, in part, upon productivity and gainsharing; and that, as such, they are mandatory subjects of bargaining. Citing the Board's decision in Decision No. B-9-91 as authority, the PBA contends that the productivity and gainsharing elements of these demands are incorporated, "simply as one economic component of a more general wage proposal," as evidence of the appropriateness of the economic proposal thus advanced. The Union points out that the productivity and gainsharing measures relate to efficiencies, events and matter occurring or proposed to occur following the expiration of the prior collective bargaining agreement. Furthermore, the PBA

submits that its productivity and gainsharing demands are not vague, as alleged by the City.

The PBA rejects the City's characterization of its proposal as seeking "impact bargaining" over the consequences of the City's managerial decisions. Rather, the Union asserts that what it seeks is a share of the economic savings it has helped generate. It argues that in prior decisions[7], the Board has recognized that productivity gains are mandatorily bargainable within the more general negotiation of wages and wage comparability. The PBA argues further that the Board has made a clear distinction between seeking a productivity share by way of practical impact bargaining (which is bargainable only after a finding by the Board of the existence of practical impact), and seeking it as one economic component of a more general wage proposal (which is mandatorily bargainable). The PBA emphasizes that it is not seeking bargaining in the context of a claim of practical impact. For these reasons, the Union submits that its productivity and gainsharing demands are mandatorily bargainable.

Discussion

PBA Demand No. II.A., which seeks an "initial gainsharing pensionable bonus for each of FY '95 and FY '96," is cross-

[7] Decision Nos. B-14-92 and B-15-92. These decisions involved bargaining demands brought by other representatives of the police force, the Lieutenants Benevolent Association and the Sergeants Benevolent Association, respectively.

referenced by the PBA to its Demand No. VII. Both of these demands relate to "gainsharing." Demand No. VII appears to state an alleged basis for granting, and a mechanism for determining the amount of, the gainsharing bonus requested in Demand No. II.A. Accordingly, we will group these two demands together for purposes of this discussion.

Addressing, next, a procedural matter, we have considered the PBA's contention that certain arguments contained in the City's reply raise, for the first time, new issues not previously advanced, which should not be considered by this Board. We find that the City's arguments regarding the alleged effect of these demands on its budgetary process, and the effect the proposed labor management committee would have on the exercise of management rights, are merely extensions of arguments raised in its scope of bargaining petition and, therefore, are not improperly included in a reply. We agree with the PBA, however, that the City's claim that, to the extent these are economic demands, they are vague, was not raised in the petition. Accordingly, we have considered the PBA's response on the merits to the vagueness argument.

Turning to the substance of the dispute over these demands, our review of PBA Demand No. VII reveals that a considerable part of the text of the "demand" is not in the nature of a conventional bargaining demand at all. Rather, significant

portions of the language of Demand No. VII (including footnotes) represent allegations of fact and arguments in support of the premise upon which this demand is based: that since 1995, the members of the police force have been more productive and effective, and that this performance, together with a decrease in the City's crime rate, an increase in tourism (alleged to be consequences of the performance of the police force), and the City's implementation of the merger of the Transit and Housing police forces into the New York City Police Department, have generated savings to the City in excess of 2% (of an undefined base) per annum. These statements, which, for purposes of this Decision, we will refer to as "background," relate to the merit of the PBA's demand, and to the sources allegedly available to fund it, but not to the question of the demand's status as a mandatory or nonmandatory subject of negotiation.

In the context of this background material, Demand No. VII seeks essentially the following:

> (1) a demand for a "productivity, performance and gainsharing" compensation award for each fiscal year, beginning with fiscal year 1995, in an undefined amount;
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> (2) a demand for a joint labor management committee, with the power to:
>
> > (a) establish policy guidelines for gainsharing programs, monitor their progress, and consider other productivity measures, (b) calculate annual savings generated by gainsharing efforts, (c) formulate an equitable distribution methodology for such savings, and (d) work out the details

> attendant to initial gainsharing measures and, if feasible, cause them to be promptly examined and implemented.
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> (3) a demand for a 3-person Panel, to serve three year terms at such compensation as will be agreed upon; where the labor management committee is unable to reach agreement, or where its assistance otherwise is requested by any party, the Panel is empowered to:
>
> > (a) recommend solutions, alternatives, proposals, or other measures to advance "the intention of this effort," (b) issue such public or private reports as it may deem appropriate, and (c) if necessary, perform the same function stated in paragraph (2)(d), above.

This demand, as a whole, purports to amplify and support Demand No. II.A., which seeks a "gainsharing" pensionable bonus payment (in an undefined amount) for each of Fiscal Years 1995 and 1996. This is in addition to the general wage increases of 3% in 1997, 4% in 1998, and 6% in 1999, proposed in Demand No. II.B. (the bargainability of which is not disputed by the City).

We address, first, the City's contention that these demands constitute an attempt by the PBA to bargain over savings generated as a result of increases in workload and productivity that allegedly constitute a "practical impact" on workload. The PBA rejects the City's characterization of these demands as a matter of impact bargaining, and it expressly and repeatedly disclaims any intention to assert a practical impact claim. Although we can understand why the City might construe these as demands, in part, for impact bargaining, we accept the PBA's representation that they are not intended as such. Moreover,

nowhere does the PBA claim that the various changes in organization and operation of the police force that are alleged to have given rise to savings to the City, have resulted in an unduly burdensome or unreasonably excessive increase in workload as a regular condition of employment.[8] In the absence of such allegations, these demands do not raise a claim of practical impact. For this reason, we do not reach the City's arguments regarding the alleged insufficiency of the PBA's proof of impact and the alleged prematurity of any demand for practical impact bargaining.

We next will consider whether these productivity and gainsharing demands are part of a more general negotiation of wages and wage comparability, which are mandatorily bargainable, as claimed by the PBA; or constitute an infringement on management's statutory prerogative to determine matters of productivity, which is a nonmandatory subject, as asserted by the City. Preliminarily, we observe that the words "productivity" and "gainsharing" are not yet terms of art in a labor law context. These terms are not used in any relevant statute, and have not been defined in a precise manner in the decisions of either this Board or the PERB. From our review of cases involving these issues, past and present, it is apparent to us

[8] This definition of a practical impact on workload is well established in our decisions. See, e.g., Decision Nos. B-3-93; B-66-88; B-56-88; B-37-82.

that these terms have meant different things to different parties, and even to the same parties at different times. "Productivity" and "gainsharing" have been used loosely (and sometimes incorrectly) to refer to matters that alternately involve wage demands, demands for practical impact bargaining, and demands that involve the exercise of management prerogative.[9] It is with an understanding of the imprecise nature of these terms and the variability of their meaning from case to case that we undertake a review and analysis of the relevant caselaw from this Board and PERB concerning productivity bargaining.

Several cases brought before this Board involving uniformed force unions have raised this issue. In an interim decision in 1991,[10] we denied the City's motion to dismiss concurrent scope of bargaining petitions filed by the Sergeants' and Lieutenants'

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[9] In its reply, the City cites the following definition of the term "productivity bargaining" from Roberts' Dictionary of Industrial Relations (3rd ed. 1986):

> [U]nion-management negotiations which concern changes in work rules to increase productivity or eliminate inefficiencies and to reward employees for productivity gains. Productivity bargaining may involve the elimination of outmoded work practices or the introduction of new technology in exchange for job security protections.

This is a sound and useful definition. However, it is apparent from past cases, as well as the present one, that the parties have not always adopted this definition in formulating what they have labelled as "productivity" demands.

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

Benevolent Associations seeking a determination as to whether the City could be required to bargain over, inter alia, "the gainsharing and productivity which solo patrols allegedly would produce." We observed that the City viewed the gainsharing issue in the context of impact bargaining.

Although this Board determined that each Union had stated a claim, sufficient to withstand the instant motion to dismiss, by alleging that implementation of solo supervisory patrols would increase supervisors' workload to an unreasonable or excessive level[11] (a claim not asserted in the present case), we cautioned,

> It is unclear to us whether the Unions are seeking a productivity share by way of practical impact bargaining, or simply as one economic component of a more general wage proposal.

The parties' collective bargaining agreements had expired; they were engaged in a new round of bargaining when the scope petitions and the City's motion to dismiss were filed. The unions alleged that, upon implementation of solo patrols, their members would be performing substantial amounts of unremunerated work. They asserted that they should be given the opportunity to bargain for a share of the "increased productivity" that the solo patrols would generate. Viewing the bargaining dispute in this context, this Board determined the issue in the following terms

[11] The Board ordered the underlying scope-of-bargaining petitions held in abeyance pending consideration by the parties' Labor-Management Safety Committees of the solo patrol program.

which would be reiterated in subsequent decisions on productivity bargaining:

> To the extent that the Unions may be seeking to include projected productivity gains realized by the implementation of the solo supervisory patrol program within a more general negotiation of wages and wage comparability, the subject of gainsharing would be mandatorily bargainable.

With the scope petitions still pending and negotiations for a successor contract still under way, the same unions filed improper practice petitions alleging refusal to bargain over anticipated productivity gains which assertedly would result from implementation of solo patrols. Considering only the question of whether the City unlawfully refused to negotiate concerning a subject claimed to be within the scope of mandatory bargaining,[12] this Board rejected the Unions' improper practice arguments.[13] In so doing, we reaffirmed our long-standing recognition of the managerial prerogative to decide, within a general job description of a title, the job assignments appropriate for employees in that title, as well as to assign work in a way it deems necessary to maintain the efficiency of governmental operations. "As long as the tasks assigned are an aspect of the essential duties and functions of the position," we held, "there

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[12] The Board declined to consider practical impact as a dimension of these cases, leaving that question for its Decision No. B-45-93 (the alleged impact on safety was not proven; there was no discussion of gainsharing).

[13] Decision Nos. B-14-92 and B-15-92.

is no mandatory obligation to negotiate when they are altered."[14]

We determined that, based on the record before us in these later cases, it was not apparent how, if at all, the announced assignment of unit members to solo patrols would change their essential duties and functions. In the absence of such a demonstrable change, we found no mandatory duty to bargain and, thus, no improper practice for not bargaining to impasse over gainsharing or any other aspect of the redeployment.

This Board reiterated its earlier holding, however, that in a different context, such as "a more general negotiation of wages and wage comparability," productivity gains realized by implementation of the solo patrol program were within the scope of mandatory bargaining. Under the facts presented in these cases, however, we found insufficient evidence that the City in fact had refused to bargain over that issue.

The issue of alleged productivity and gainsharing was addressed once more, in 1993, when this Board considered a scope petition filed by the Correction Captains Association over a demand for gainsharing resulting from civilianization of certain functions within the Department of Correction.[15] The Union contended both that the civilianization program had a practical

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[14] Decision Nos. B-15-92 at 14, and B-14-92 at 10, both citing Decision Nos. B-61-91 and B-56-88.

[15] Decision No. B-28-93.

impact on the safety of unit members, and that the sharing of any productivity gains resulting from the use of civilians to perform work previously performed by members of its unit was mandatorily bargainable. The parties' collective bargaining agreement had expired and they were engaged in a new round of bargaining for a successor agreement.

This Board found that, to the extent the Union sought productivity gainsharing through practical impact bargaining over the effects of civilianization, the Union failed to state facts sufficient to support a claim of practical impact which would justify such bargaining. However, to the extent that the Union also sought to include the matter of gainsharing of projected productivity gains as an economic component of a more general wage proposal, we held that in this context the demand was within the scope of mandatory bargaining.

We observe that the non-impact aspects of the gainsharing and productivity demands in the solo patrol cases were based upon a claim of savings allegedly attributable to increased work that would be performed by members of the unit, while in the Corrections case, the non-impact aspect of the demand was based upon a claim of savings allegedly attributable to the shifting of unit work to lower-paid civilian employees. In both situations, the unions raised practical impact claims (a factor not present in the instant matter) and it was unclear the extent to which the

productivity and gainsharing demands were intended only as part of the requests for impact bargaining, and also as part of more general economic demands. Lest there be any doubt, in the context of each of these cases, when this Board stated:

> To the extent that the Unions may be seeking to include projected productivity gains . . . within a more general negotiation of wages and wage comparability, the subject of gainsharing would be mandatorily bargainable,

we meant that the unions in those cases possessed a right under the NYCCBL to bargain over a proposed wage increase, which was based in part upon allegations of productivity or other gains and monies available to the City as a general source of funding.

Although we have found no case in which the PERB Board has ruled upon the negotiability of a productivity or gainsharing demand, at least two PERB Administrative Law Judge ("ALJ") decisions have addressed this issue. In one, regarding an employer demand for training to increase productivity, the ALJ found the demand to be too vague to determine whether mandatory subjects were at issue.[16] As to the nature of productivity, the ALJ observed that,

> While certain aspects of productivity are mandatory - such as work rules, hours of work and salary - both qualifications for employment and the assignment of job duties inherent in the nature of one's employment are

[16] Local 589, International Association of Fire Fighters, AFL-CIO and City of Newburgh, 16 PERB ¶4516 (1983).

management prerogatives.[17] [Footnotes omitted]

In another case, the employer unilaterally imposed a productivity standard and monitoring procedure.[18] The ALJ found that the adoption of the productivity standard was a proper exercise of managerial discretion relating to the level of services to be provided. Relying on a decision in another case (involving an increase in caseload), the ALJ stated that,

> The [employer's] right to assign or to increase the number of such assignments, in order to alleviate a backlog of cases, involves a determination as to the manner, means and extent of services to be rendered to the public.[19]

However, the ALJ found that while the decision to adopt the productivity standard was not bargainable, the impact of the standard on employees was a mandatory subject of bargaining.[20]

Taken together, the above decisions from this Board and the PERB ALJs express the principle that decisions on matters of productivity, including, inter alia, the assignment of duties within the essential or inherent nature of a job title, the determination of caseload, the organization of the work, the

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[17] Id. at 4533.

[18] Board of Education, City School District of the City of New York and United Federation of Teachers, Local 2, AFT, AFL-CIO, 20 PERB ¶4550 (1987).

[19] Id. at 4635, quoting State of New York (Workers' Compensation Board), 14 PERB ¶4534 at 4571 (1981).

[20] 20 PERB ¶4550 at 4636.

determination of staffing levels, and the establishment of productivity standards or goals, are matters within the City's statutory[21] and inherent managerial discretion, limited only by the duty to bargain where there is a finding by this Board of a practical impact resulting from the exercise of that discretion. The cases also stand for the principle that increased productivity may be raised as a partial basis for a general wage demand.

In the present case, the PBA has not identified, nor have we found, any authority creating a legal right or entitlement to a share of any savings that has accrued or will, in the future, accrue to the employer as a result of its productivity decisions.[22] However, the PBA does possess the clear statutory right to bargain over wages, hours and working conditions.[23] The above cases repeatedly affirm that there is no legal entitlement to a share of productivity savings, but there is a legal right

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[21] NYCCBL §12-307b.

[22] We note that the PBA's demand for gainsharing is based upon the savings the City is alleged to have realized from the merger of the Transit and Housing police forces into the New York City Police Department - clearly a matter of management prerogative - and the gains the City is alleged to have realized from a reduction in the crime rate and an increase in tourism, matters for which the PBA claims credit, but which its own footnotes indicate is related, at least in part, to the Safe Streets tax surcharge legislation which funded a substantial increase in the number of police officers available to fight crime - again, a matter of management prerogative.

[23] NYCCBL §12-307a.

under the NYCCBL to bargain over a proposed wage increase, which is based in part upon allegations of productivity. We hold, here, that productivity and gainsharing claims, independently, are not mandatorily bargainable, to the extent that they assert an entitlement to a share of particular alleged gains that are substantially the result of management decisions, where, as here, the union has disavowed any claim of practical impact. We further hold, that claims of productivity or monies and gains available to the City as a general source of funding are permissible as part of the rationale for a general wage demand.[24]

Applying these principles to the specifics of the productivity and gainsharing demands of the PBA at issue herein, we find the following:

Demand No. II.A., which provides for an,

> [i]nitial gainsharing pensionable bonus for each of FY '95 and FY '96 payable on ratification of Agreement

and the first sentence of Demand No. VII.A., which reads,

> The PBA seeks and maintains entitlement to Productivity, Performance and Gain Sharing compensation awards for each of FY 1995, FY 1996, et seq.

are mandatory subjects, only to the extent that they are demands for an economic bonus or compensation award for each year of the

[24] We do not decide in this case whether such claims might be permissible components of mandatorily bargainable demands in any other context.

proposed contract.[25] To this extent, we deem them to be elements of a general wage demand which are mandatorily bargainable.

The City alleges that, to the extent that these demands are construed as a wage demand, such demand is vague and ambiguous, because,

> it does not state how much of a bonus is being sought nor on what basis the share of what gain should be negotiated.

It is true that the demands do not specify the amount or percentage of the bonus or compensation award that is being sought. However, we find that the demands are sufficient to have put the City on notice that the PBA was seeking, in each year of the contract, a bonus or compensation award in addition to the percentage general wage increases specified in PBA Demand No. II.B. In this regard, the demands are not so vague or ambiguous as to render them nonmandatory subjects of bargaining.[26] With regard to the City's objection that the demands fail to state "on what basis the share of what gain should be negotiated," we already have held that, on the facts of this case, there is no

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[25] The demands do not specify exactly what the amount of the bonus or compensation award should be. The remainder of Demand No. VII. merely purports to identify savings in excess of 2% per year that are available to fund the bonus or compensation award and to which the PBA claims entitlement of a share (a claim which we have rejected herein).

[26] We note that these demands are no more vague than at least two of the City's own bargaining demands. See, City Demand Nos. 23 (increase administrative fees by an unspecified amount); 24 (charge a parking permit fee in an unspecified amount).

duty to bargain any share of any particular gain. The identification of alleged gains (which we have characterized as background) serves only as an asserted justification for the PBA's general demand relating to wages, and not as an independent basis for bargaining. Thus, any vagueness on this account relates to the merit of the demands but not their negotiability.

PBA Demand No. VII.B.1. seeks the creation of a labor management committee and a three-person Panel. This Board has held that a demand which seeks to create a committee,

> to meet periodically for the purpose of discussing matters of mutual concern, is a mandatory subject of bargaining to the extent that the matters to be considered by the committee are terms and conditions of employment.[27]

Our policy is consistent with that of the PERB, which has long held that a demand seeking to establish a joint labor management committee empowered to address mandatory matters is a mandatory subject of negotiation.[28] However, to the extent the stated jurisdiction of such a committee goes beyond terms and conditions

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[27] Decision No. B-4-89 at 221. See also, Decision No. B-45-92.

[28] See, City of Albany and Albany Permanent Professional Firefighters, 7 PERB ¶3079 (1974) (demand was mandatory "to the extent that the matters to be discussed by the committee are themselves mandatory subjects of negotiations"); Somers Faculty Ass'n and Somers Central School District, 9 PERB ¶3014 (1976) (demand was mandatory "to the extent that matters to be considered by the committee are terms and conditions of employment").

of employment, the demand would be nonmandatory.[29] Moreover, to the extent that a labor management committee's disputes might be subject to the parties' grievance and arbitration procedure, and thereby extend the parties' grievance procedure to nonmandatory subjects of negotiation, it is nonmandatory and may not be submitted to an impasse panel.[30]

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[29] Rye Police Ass'n and City of Rye, 17 PERB ¶4645 (1984) (a demand for a safety committee "to provide for minimum manpower, backup personnel to respond to emergency calls and guaranteed adequate supervision" would be empowered to decide matters that lie outside the scope of mandatory negotiations and, thus, is nonmandatory); Lackawanna Police Benevolent Ass'n and City of Lackawanna, 16 PERB ¶4604 (1983) (since the City has no obligation to bargain over the number of police officers on duty at any given time, a demand for a committee to study the issue would be nonmandatory); Greenville Uniformed Firemen's Ass'n and Greenville Fire District, 15 PERB ¶4501 (1981) (a demand for a committee whose purpose "shall be to discuss and resolve all problems placed before it" is nonmandatory).

[30] We note that PERB has held that a demand for a general safety committee which provides for grievance arbitration of complaints is mandatorily negotiable if it is limited to individual and specific safety concerns. See, Uniformed Fire Fighters Ass'n and City of New Rochelle, 10 PERB ¶3078 (1977), conf'd, 61 AD2d 1031, 11 PERB ¶7002 (1978); White Plains Professional Firefighters Ass'n and City of White Plains, 11 PERB ¶3089.

Outside the area of safety, however, proposals for labor-management committees empowered to address matters that lie outside the scope of mandatory subjects, with unresolved items to be submitted to binding arbitration, have been found nonmandatory. See, Bridge and Tunnel Officers and TBTA, 15 PERB ¶4570 (1982), aff'd on other grounds, 15 PERB ¶3124 (1982); Albany Permanent Professional Firefighters and City of Albany, 13 PERB ¶4518 (1980) (however, a demand modified to "limit arbitration to those items which 'predominantly affect' terms and conditions" would trigger the application of a balancing test PERB uses to determine negotiability of such demands and, thus,

(continued...)

We find that the subject of the PBA's proposed labor management committee and three-person Panel overlaps matters of management prerogative. As alluded to above, the management rights clause of the NYCCBL[31] provides that the City has the management prerogative to determine the standards of services to be offered by its agencies and the methods, means and personnel by which government operations are to be conducted. This statutory management prerogative includes the right to maintain the efficiency of its operations and to exercise complete control and discretion over its organization and the technology of performing its work. This prerogative authorizes the City unilaterally to make all decisions relating to matters of productivity, subject only to the requirement of bargaining over the practical impact that may result from such decisions.[32] There is no claim of practical impact in the present case.

To the extent that the demand would empower the labor management committee to establish policy guidelines for gainsharing programs, to consider other productivity measures, and to cause gainsharing measures to be implemented, it infringes

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(...continued)
could be found a mandatory subject).

[31] NYCCBL §12-307b.

[32] As stated above, the exercise of this management right does not preclude a demand, as a part of the general negotiation of wages and wage comparability, that is based upon allegations of productivity.

on management's prerogative to determine matters of productivity and is a nonmandatory subject. Additionally, to the extent that the demand would empower the three-person Panel to recommend solutions, alternatives, proposals or other measures relating to productivity and gainsharing issues, and to cause gainsharing measures to be implemented, it further infringes on management's prerogative to determine matters of productivity and is a nonmandatory subject.[33]

All other elements of PBA Demand No. VII. constitute what we have defined as background (i.e., allegations of fact and arguments in support of the merit of the demand), not demands, and therefore are not mandatory subjects of bargaining.

As to the background elements of Demand VII., however, although they are not bargainable demands, they may be considered by the Impasse Panel solely as allegations of fact or argument, if the Panel finds them to be relevant to any of the statutory criteria set forth in §12-311c(3)(b) of the NYCCBL. For example, to the extent that the demand purports to identify savings and

[33] We also note our concern that the portion of this demand concerning the powers of the labor management committee and the Panel, if otherwise bargainable, may well constitute the impermissible delegation of the powers of an impasse panel to another body which could act without regard to the statutory criteria set forth in NYCCBL §12-311c(3)(b). See, Teamsters, Local 687 (Town of Potsdam), 19 PERB ¶3050 (1986); Teamsters, Local 687 (Town of Parishville), 19 PERB ¶3053 (1986). Since we find that this portion of the demand infringes on management rights and, therefore, is a nonmandatory subject of bargaining, we need not decide this further question in this case.

increases in income realized by the City and attributable to various sources, including management actions, such as the merger of the Transit and Housing police forces into the NYPD, it may be relevant to the interest and welfare of the public and, thus, the City's ability to pay.[34] However, as we have stated above, there is no entitlement, as a matter of law, to all or any part of such funds.

The PBA has expressly stated that its "productivity" and "gainsharing" demands do not assert any claim of practical impact. Therefore, we need not decide whether a demand, or the background thereof, purporting to identify savings attributable to the assumption of additional job responsibilities, arguably may relate to a claim of practical impact. However, we note that the claimed assignment of responsibilities within the essential or inherent duties and functions of the position, without more, would not give rise to a duty to bargain.[35] The claimed assignment of responsibilities outside the range of essential duties and functions of the position might give rise to a claim of practical impact, but there would be no duty to bargain unless and until this Board found the practical impact to exist.

PBA Demand No. VIII, 1

[34] NYCCBL §12-311c(3)(b)(iv).

[35] Decision Nos. B-15-92; B-14-92.

> A more effective method must be implemented to insure that funding is readily available so that those members who are out on line of duty injuries can purchase and payment by the City is immediately effectuated for the requisite prescription drugs (e.g., an imprest fund in the control of the PBA and funded by the City).

City Position

The City contends that this demand is a prohibited subject of bargaining because its obligations to pay for the cost of line of duty injury prescription drugs are clearly stated in §12-127 of the New York City Administrative Code. According to the City, this Board has consistently held that where the duties or obligations of a party are fixed by law, such duties and obligations are a prohibited subject of bargaining.[36]

More particularly, the City notes that the Code gives the head of the Police Department responsibility for determining whether an injury is covered by §12-127, and makes the City responsible for paying any bill that has been certified by the Department. The Code also purports to prevent a provider of medical services from attempting to collect money from the injured employee. Thus, according to the City, Demand No. VIII, 1, implicates a prohibited subject of bargaining because "it attempts to contravene the statute by taking those decisions out of the City's control."

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[36] Citing Decision Nos. B-42-91; B-41-87; B-24-75; B-5-75; B-7-72 and B-11-68.

Secondly, in its reply, the City asserts that all issues relating to health benefits are bargained collectively with the Municipal Labor Coalition ("MLC"), of which the PBA is a member. It further asserts that the City and the MLC have already bargained on health benefits. Thus, the City maintains that the PBA has agreed that health benefits will not be negotiated under the unit contract.

Union Position

The PBA acknowledges that this demand concerns a subject covered by the Administrative Code, but it explains that although the Code obligates the City to pay for medical costs associated with line of duty injuries, it does not specify the exact method by which timely payment for prescription drugs must be made. The Union contends that this demand addresses an omission in the statute.

In the Union's view, a demand seeking a more effective payment for prescription drugs is mandatorily bargainable, so long as it does not contravene a statute, which this demand does not. It notes that §12-127 of the Administrative Code is not preemptive. It also notes that its demand does not offend a public policy, such as one that delegates unrestricted judgment and discretion to a body or officer.

The Union concludes that Demand No. VIII, 1, merely seeks a mechanism to insure that statutory benefits are obtained in

timely fashion, "as contrasted with a dilatory process that imposes an undue burden." It points out that in Decision No. B-4-89, this Board held that: "good faith bargaining extends to matters covered by law when they relate to terms and conditions of employment."[37]

With regard to the City's Municipal Labor Coalition waiver/preemption argument, the Union contends that this claim should be stricken as being inappropriately raised for the first time in the reply. Alternatively, the Union argues that the City's new position goes to the merits of the demand, and not to the demand's mandatory nature. The Union points out that even the City admits that "health benefits are a mandatory subject of bargaining."[38] Finally, the Union denies that the subject of prescription drugs for police officers was ever part of MLC bargaining. To the contrary, it asserts that health benefits currently are covered in the PBA contract, and not by the MLC agreement.

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[37] Quoting from Decision No. B-4-89 at 9.

[38] Citing to City's answer at 16.

Discussion

In essence, the PBA claims that a demand seeking a contractual protection, thus being subject to the contractual grievance and arbitration procedure, is not rendered nonmandatory merely because it relates to a matter covered by law.

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

> . . . does not preclude inclusion of the statutory reservation of public employer rights, and duties of public employees and public employee organizations, under state law, or the inclusion of additional clauses not inconsistent with the statutory requirement.[39]

Later, we stated that:

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

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

conditions of employment.[40]

We reaffirmed this policy in Decision No. B-4-89, wherein we said that a demand which involves terms and conditions of employment does not become nonmandatory merely because it duplicates statutory benefits or requires compliance with a law. We saw no reason why a demand which, but for a parallel statutory provision, would be a mandatory subject of bargaining, should be converted into a nonmandatory subject in the absence of evidence of its contravention of a statutory policy or procedure.[41]

We then set forth a two-step test for deciding whether a demand that relates to a statutory obligation is bargainable. First, we determine whether the subject matter of the demand concerns wages, hours, or working conditions. If the demand does not concern these matters, then it is a nonmandatory subject of bargaining regardless of whatever rights or benefits may be conferred by the statute in question. However, if the demand does concern one of these matters, it is within the scope of mandatory collective bargaining unless:

a. it would require a contravention of law;[42] or,

b. the subject has been preempted by

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

[41] Decision No. B-4-89 at 10.

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

statute;[43] or,

c. it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion.[44]

We concluded that this standard represents a proper balance between a union's right to bargain over mandatory subjects of negotiation, and the public's right to enjoy the benefits and protections of law.[45]

In the present case, as the City has acknowledged, a demand dealing with payment or reimbursement of a health benefit clearly falls within the scope of "wages, hours, or working conditions."[46] We also find that the demand does not fall into any of the three exceptions set forth in the second prong of our test. Section 12-127 of the Administrative Code requires the City to pay for medical costs associated with line of duty injuries, but it is silent on the issue of when reimbursement for prescription drugs must be made. A demand that seeks establishment of procedures for the implementation of statutory

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

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

[45] Decision No. B-4-89 at 13-14.

[46] See City reply at 16. See also, Decision No. B-45-92 at 12, and Decision No. B-4-89 at 81-86. Also see: City School District of Corning v. Corning Teachers Ass'n, 16 PERB ¶3056 (1983); and Town of Haverstraw v. Newman, 11 PERB ¶3109 (1978), aff'd 427 NYS2d 880, 13 PERB ¶7006 (2d Dep't 1980).

rights contravenes neither the literal reading nor the intent of the statute.[47] Second, nothing contained in §12-127 can be read as a pre-emption of a bargaining demand concerning the statute's application with regard to timeliness of reimbursement or payment. Third, the City's "judgment and discretion" under the statute concerns only the certification by the head of the Police Department that an injury is employment-related. Since the PBA's reimbursement demand does not interfere with that limited judgment and discretion, public policy is not offended. In sum, Demand No. VIII, 1, satisfies all elements of the test that we devised for determining whether a demand that relates to a statutory obligation must be negotiated, and it is mandatorily bargainable in this respect.

With regard to the City's assertion that the matter of health benefits already has been bargained with the MLC, of which the PBA is a member, and that the PBA has agreed that such benefits will not be negotiated under the unit contract, we note that this assertion was raised for the first time by the City in its reply. We are reluctant to consider whether this allegation states an arguable claim because it advances a new legal theory

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[47] See, CSEA Local 1000 v. County of Greene, 25 PERB ¶3045 (1992); Schenectady PBA v. City of Schenectady, 25 PERB ¶3022 (1992); Schenectady Firefighters Union v. City of Schenectady, 24 PERB ¶3016 (1991); City of Schenectady v. Schenectady PBA, 19 PERB ¶3051 (1986), aff'd 19 PERB ¶7023 (Albany Co. Sup. Ct. 1986); Local 589, International Fire Fighters Ass'n v. City of Newburgh, 17 PERB ¶7506 (Orange Co. Sup. Ct. 1984).

at the penultimate moment, i.e., in a reply submitted only 12 days before the interest arbitration hearings commence, thus limiting the parties' opportunity to present more fully the merits of their respective positions before this Board. Nevertheless, on the basis of the record before us, we conclude that the City's position is without merit. The Union denies that the benefit sought by the PBA is covered by the MLC bargaining, and it alleges that it concerns an item currently contained in the PBA's contract.[48] Given our finding that this demand is otherwise mandatorily bargainable, the fact that the NYCCBL provisions for mandatory City-wide bargaining do not apply to the uniformed forces,[49] and the evidence of prior bargaining on this subject at the unit level, we hold that the City's allegation of waiver through participation in MLC bargaining is conclusory at best, and, without allegations of fact to establish that the subject of this demand was covered by the MLC negotiations or that the PBA agreed to be bound thereby, it is insufficient to remove this demand from the scope of mandatory bargaining in this case.

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[48] The PBA does not specify to which provision of the contract it refers. We take administrative notice of the fact that there is a side letter agreement annexed to the 1991-1995 collective bargaining agreement, signed by Labor Commissioner Randy L. Levine and former PBA President Phil Caruso, that addresses the subject of reimbursement for line of duty injury prescription drugs.

[49] Compare, NYCCBL §12-307a.(2) and (4).

PBA Demand Nos. VIII, 7b and 7d

LEAVE PROVISIONS

7b. Subject to scheduling exigencies of the Department, if any, members shall be entitled to an option of the cash equivalent for unused personal leave days at the end of each fiscal year.

7d. Subject to scheduling exigencies of the Department, if any, members who do not use their line of duty sick leave in a fiscal year, shall be entitled to five days incentive leave to be taken in the same manner as personal leave days. A member shall be entitled to incentive days if he/she is out sick, but such number of incentive days shall be reduced in direct proportion to the number of days of non-line of duty sick leave.

City Position

The City contends that §12-307b of the NYCCBL grants it the right "to schedule, direct and assign its employees and to take necessary action to carry out its mission in an emergency." According to the City, the above demands seek "to limit these statutory rights concerning the accrual of leave time, [and are therefore] outside the scope of bargaining." The City adds that the above demands provide "employees with an incentive not to schedule vacation time or use sick leave." It claims that since it determines its schedules in advance, considering the employees' entitlement to personal leave days for the upcoming year, "these demands which give an employee an economic benefit if leave time is not used, encourages them not to use it" and

creates uncertainty and unpredictability. Finally, the City asserts that the PBA's statement that these demands are "subject to scheduling exigencies of the Department" does not cure them from being a nonmandatory subject of bargaining and adds that this Board's holding in Decision No. B-4-89, regarding the consideration of a department's scheduling exigencies, is not controlling because there, the demands dealt "specifically with not using leave time instead of using leave time."

Union Position

The PBA notes that it does not dispute the fact that the scheduling of employees is a management right. However, asserts the PBA, Demand Nos. VIII, 7b and 7d "simply do not implicate the Department's right to schedule its employees." Instead, suggests the PBA, they "specifically involve the time and leave benefits of PBA members" and are therefore a mandatory subject of bargaining. The PBA adds that the personal days referred to in Demand No. VIII, 7d are indisputably within the general subject of hours and cites this Board as noting, in several decisions, that the use of earned personal days, sick leave, time off, and provisions requiring that accumulated unused sick leave be paid to employees upon retirement, are all mandatory subjects of bargaining.

Regarding the City's assertion relating to the "scheduling exigencies of the department" language in the demand, the PBA

disagrees on two grounds:

> First, ... the referenced demands are indeed mandatory subjects of bargaining -- no cure is necessary. Second, these demands conform to the Board's direction that a condition deferring to the scheduling exigencies of the City is an effective way of removing that portion of a demand which may have otherwise been non-negotiable.

Discussion

Regarding the City's assertion that Decision No. B-4-89 is not controlling with regard to the above demands and Demand Nos. VIII, 9c & 9d[50], we note that Decision No. B-4-89 addressed, among other things, the regulation of unused leave time and the accrual of leave time, issues specifically included in these demands. In light of this fact, we find the City's assertion to be without merit.

Also, the City suggests that the potentiality of a scheduling problem warrants a finding that the above demands, as well as Demand Nos. VIII, 9c & 9d[51], are nonmandatory. We have long held that demands which seek an inflexible right without recognizing the exigencies of the department would infringe upon management's right and would be nonmandatory.[52] Accordingly, the PBA's statement that its demands are "subject to the scheduling exigencies of the department" recognizes and avoids any interference with the City's

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[50] Infra, at 59-61.

[51] Id.

[52] Decision Nos. B-4-89 at 104; B-16-81 at 32.

managerial rights.

In Demand No. VIII, 7b, the PBA seeks to bargain over its members receiving the cash equivalent of their unused personal days. The City challenges the bargainability of this demand arguing that it limits its statutory rights. We disagree.

In Decision No. B-4-89, we specifically addressed the issue of compensation for accrued time, and found that such "demands address an appropriate subject for consideration by the impasse panel ..."[53]. This Board's precedent clearly establishes that a demand to bargain on the receipt of the cash equivalent of accrued personal time is an issue which is proper for resolution by the impasse panel.

The City contends that the above demand limits its statutory right; it speculates that the demand will create an incentive to "not schedule vacation time or use sick leave." We are not persuaded by this speculative and conclusory statement and find that this demand concerns the use of accrued time and leave and not scheduling, as purported by the City. Not only have we found that the accrual of time and leave, and other benefits relating to time

[53] In Decision B-4-89, the Uniformed Firefighters Association sought to bargain over its members' receipt of the cash value of their accrued vacation time upon retiring from service. There, we found the matter bargainable. However, we noted that, to the extent that the union's demand required that the cash equivalent of vacation leave be included in the employee's pensionable base salary, which would violate an express legislative restriction on that subject, it fell outside of the scope of bargaining. Decision No. B-4-89 at 129.

and leave, are within the scope of collective bargaining,[54] but we have found that the regulation and procedure governing the proper use of time and leave benefits are also mandatorily bargainable.[55] In light of our well established precedent holding that the regulation and procedure governing the proper use of time and leave benefits are mandatory subjects of bargaining,[56] we find that this demand is appropriate for consideration by the impasse panel.

Regarding the City's contention that the PBA's demand is not cured by making it "subject to the scheduling exigencies of the department," we note that the demand herein is clearly a mandatory subject of bargaining and thus requires no curative language.

In Demand No. VIII, 7d, the PBA seeks to provide its members, who have not used any of their "line-of-duty" sick leave days by the end of the fiscal year, with incentive days equal to their remaining line-of-duty sick leave days. The parties' arguments relating to this demand are the same as those indicated above, regarding Demand No. VIII, 7b. As in the discussion above, the City's argument is unavailing.

To the extent that a demand seeks to bargain over a specific number of paid leave days, per employee, per year, to be used as personal days, it is an appropriate and lawful subject of

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[54] Decision Nos. B-16-81 at 114; B-3-75 at 16.

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

[56] Id.

bargaining.[57] Furthermore, a demand which seeks to negotiate on unused earned time, is bargainable.[58] Because Demand No. VIII, 7d, seeks negotiation on earned, unused, leave time, which is well established as a mandatory subject of bargaining, we find that it may be considered by the impasse panel.

PBA Demand Nos. VIII, 7c and 7f

LEAVE PROVISIONS

> 7c. Subject to scheduling exigencies of the Department, if any, members shall be entitled to an option of the cash equivalent of the unused personal leave days standing to their credit at separation from service.
>
> 7f. A member shall be entitled to unused vacation, lost time, etc., in cash, at the time of separation from service. Such cash entitlement shall be provided to a beneficiary of a member who deceases.

City Position

The City asserts that the demands are prohibited subjects of bargaining insofar as separation from service means resignation or dismissal for disciplinary reasons. The City argues that the demands' proposed compulsory conferral of economic benefits upon separation, would limit the Police Commissioner's statutory power to discipline his work force as it directly affects a disciplinary penalty specifically enumerated in §14-115 of the New York City

[57] Decision B-4-89 at 104.

[58] Id. at 106.

Administrative Code.[59] The City also argues that as Demand No. VIII, 7f, sets forth economic benefits for officers whose separation from the force results from cause, "it actively seeks to limit the Police Commissioner's power to administer a disciplinary

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[59] The relevant portion of §14-115 of the Administrative Code, provides:

> a. The commissioner shall have power, in his or her discretion, on conviction by the commissioner, or by any court or officer of competent jurisdiction, of a member of the force of any criminal offense, or neglect of duty, violation of rules, or neglect or disobedience of orders or absence without leave, or any conduct injurious to the public peace or welfare, or immoral conduct or conduct unbecoming an officer, or any breach of discipline, to punish the offending party by reprimand, forfeiting and withholding pay for a specified time, suspension, without pay during such suspension, or by dismissal from the force; but no more than thirty days' salary shall be forfeited or deducted for any offense. All such forfeitures shall be paid forthwith into the police pension fund.
>
> b. Members of the force, except as elsewhere provided herein, shall be fined, reprimanded, removed, suspended or dismissed from the force only on written charges made or preferred against them, after such charges have been examined, heard and investigated by the commissioner, or one of his or her deputies upon such reasonable notice to the member or members charged, and in such manner or procedure, practice, examination and investigation as such commissioner may, by rules and regulations, from time to time prescribe.

The City also cites §891 of the Unconsolidated Laws and §434 of the New York City Charter.

penalty of termination to members of his workforce." Union Position

The Union contends that personal leave days, as well as the other leave benefits sought, are within the general subject of hours and, therefore, are "indisputably" a mandatory subject of bargaining.[60] The Union argues that this Board and PERB have both found personal leave and other leave benefits to be mandatorily bargainable.[61] The Union further argues that the City's objections to these demands on the ground that it infringes on the Police Commissioner's "admitted right to discipline employees" are without merit. The Union recognizes that the legislature has removed certain matters from the bargaining arena, but asserts that these preempted matters are related solely to disciplinary procedures. The Union argues that the demands relate, "not to such procedures, but to entitlement to benefits already accrued and do[ ] not infringe on the Department's established disciplinary procedures" (emphasis in original).

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[60] The Union cites NYCCBL § 12-307a; City of N.Y. v. Uniformed Firefighters Ass'n, B-4-89 at 103. The Union points to the similarity in the subject matter of the demand in the Uniformed Firefighters Ass'n case and the demand at issue.

[61] Village of Spring Valley Policemen's Benevolent Ass'n v. Village of Spring Valley, 13 PERB ¶ 4608 (1980); City of N.Y. v. COBA, B-16-81, 30, 114 "[T]ime and leave benefits are mandatory subjects of bargaining."; City of New York v. MEBA, B-3-75, 16 (same); Police Ass'n of New Rochelle, Inc. v. City of New Rochelle, 13 PERB ¶ 4540 (1980)(same).

Discussion

Inasmuch as there is no dispute that demands for the cash equivalent of unused leave are mandatory subjects of bargaining, the only challenges that must be dealt with are the City's assertions that the demands are non-mandatory in that they could result in an infringement on the Police Commissioner's disciplinary authority.

A demand may be outside the scope of mandatory collective bargaining if it would offend a public policy embodied in a statutory scheme which requires that a body or officer be given unrestricted judgment and discretion.[62] The issues to be determined with respect to the bargainability of these demands are whether they do in fact infringe upon the Police Commissioner's unrestricted judgement or discretion in the general area of discipline and whether Demand No. VIII, 7f, infringes on the Police Commissioner's authority to terminate a police officer.

Administrative Code §14-115 provides specific authority to the Police Commissioner to "to punish the offending party . . . by dismissal from the force." There is no question that under the statute the Police Commissioner may, as one of the enumerated penalties, terminate a police officer. A demand which interfered

[62] Decision No. B-15-77 at 13-14.

with that discretion would presumably be outside the scope of mandatory bargaining. Demand No. VIII, 7f, however, does not infringe on the Police Commissioner's authority to impose a disciplinary termination in that it only seeks an economic benefit for employees at separation from service.

Among other things, Administrative Code §14-115 also empowers the Police Commissioner to impose disciplinary penalties of forfeiture and withholding of pay of no more than thirty days' salary. We view the instant demands for "the cash equivalent of the unused personal leave days standing to their credit at separation from service" and "unused vacation, lost time, etc., in cash, at the time of separation from service" as demands for the payment of salary for the unused leave time.[63] As payment of salary these demands are subject to the Police Commissioner's power to impose a monetary penalty under §14-115 of the New York City Administrative Code.

While the Union is correct that these are accrued leave benefits; they are however, accrued leave for which salary would be paid under the demands. Thus, to the extent that Demand No. VIII, 7c, and Demand No. VIII, 7f, seek benefits that the grant of which in some circumstances might infringe on the Police

[63] See, Teachers Ass'n, Cent. H.S.D. No.3 v. Board of Ed., etc., 312 NYS2d 252, at 255. (finding a similar request for payment of accrued leave time - a form of compensation withheld or deferred).

Commissioner's power to impose a monetary penalty they are outside the scope of bargaining and may not be considered by an impasse panel. In all other respects Demand No. VIII, 7c, and Demand No. VIII, 7f, are mandatory subjects of bargaining as to all Police Officers who are not the subject of an exercise of the Police Commissioner's disciplinary powers.

PBA Demand No. VIII, 7e

LEAVE PROVISIONS

> Subject to scheduling exigencies of the Department, if any, members who give blood on two occasions shall be provided two blood days per year.

City Position

The City argues that this demand infringes on its management rights because the Union does not specify when the time off will be taken. Allowing employees to take time off "at will," it contends, violates its statutory rights concerning scheduling; therefore, the demand concerns a nonmandatory subject of bargaining. In the alternative, it maintains, the demand is vague and ambiguous as to how the time off will be taken and is, therefore, a nonmandatory subject of bargaining.

Union Position

The Union argues that this demand concerns leave time, which is a mandatory subject of bargaining. In addition, it maintains, to demonstrate that it does not seek for its members the right to

take the blood days at will, it included in its demand the phrase "subject to the scheduling exigencies of the Department." This phrase, it contends, eliminates potential scheduling problems for the City and, thus, complies with Decision No. B-4-89.

Discussion

The City argues that Demand No. VIII, 7e, is a nonmandatory subject of bargaining because it is vague and ambiguous as to when time off will be taken. A demand is considered to be vague and ambiguous when it is not specific enough for the City to understand it[64] or if it is unclear whether the demand relates only to mandatory subjects of negotiation.[65]

Here, the Union asks that members who give blood two days a year be given two days off each year, "subject to the scheduling exigencies of the Department." It is clear enough that this demand concerns only the Union's request to bargain about leave days, which is a mandatory subject of bargaining.[66]

The City also contends that this demand violates its right to schedule its employees because "the demand does not specify when the time off will be taken, which could mean 'at will.'" In Decision No. B-16-81, we found that a demand which seeks "an

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[64] Decision Nos. B-59-89; B-4-89. See also, Fairview Professional Firefighters Ass'n, 12 PERB ¶3083 (1979).

[65] Decision No. B-4-89 at 98-99.

[66] Decision No. B-4-89 at 104, and the decisions cited therein.

inflexible, absolute right to time off ... without recognition of the exigencies of the department ... infringes on management's right to establish manpower levels and schedule employees and is, therefore, a nonmandatory subject of bargaining."[67] Here, however, the Union has presented a demand in which the leave days would be taken subject to the Department's scheduling needs, not "at will." For these reasons, we find that Demand No. VIII, 7e, is a mandatory subject of bargaining and may be considered by the impasse panel.

PBA Demand No. VIII, 8b

> TERMINAL LEAVE
>
> A member may take his/her terminal leave entitlement in the form of sabbatical leave (not to exceed six months) after 10 years of service, or the cash equivalent thereof. Any amount so taken shall be subtracted from his/her eventual entitlement. Ten days' advance written notification of the member's desire to so elect shall be provided or such other advance written notification (and such other reasonable attendant requirements) as the Department may by published rule or regulation provide.

City Position

The City argues that because the demand does not fully define the term 'sabbatical leave,' it is vague and ambiguous and, therefore, not a mandatory subject of bargaining. In addition, it claims, this demand would interfere with its right

[67] See also, Decision No. B-4-89 at 104-105.

to determine work schedules and, as such, is a nonmandatory subject of bargaining. This is so, it contends, despite the addition by the Union of language giving the Department the right to establish regulations, because the decision to take sabbatical leave would still be the employee's.

Union Position

The Union maintains that time and leave provisions are mandatory subjects of bargaining. It argues that it simply seeks to substitute for accrued terminal leave entitlements the option to take a pre-termination sabbatical leave under such "reasonable requirements" as "the Department may by published rule or regulation provide." Whatever is vague about this demand, the Union maintains, is within the Department's power to correct, since it is the Department which will prescribe applicable rules and regulations governing sabbatical leave.

Discussion

The City argues that Demand No. VIII, 8b, is vague and ambiguous because it does not fully define the term "sabbatical leave." A demand is considered to be vague and ambiguous when it is not specific enough for the City to understand it[68] or if it is unclear whether the demand relates only to mandatory

[68] Decision Nos. B-59-89; B-4-89. See also, Fairview Professional Firefighters Ass'n, 12 PERB ¶3083 (1979).

subjects of negotiation.[69] It is clear enough that the Union seeks to bargain about allowing its members to use some terminal leave time as sabbatical leave. Terminal leave and sabbatical leave are both mandatory subjects of bargaining.[70]

The City also contends that this demand violates its right to schedule its employees because, although it requires that advance notice be given of an employee's intention to take the leave time, the decision is still the employee's. We agree. In Decision No. B-16-81, we found that a demand which seeks "an inflexible, absolute right to time off ... without recognition of the exigencies of the department ... infringes on management's right to establish manpower levels and schedule employees and is, therefore, a nonmandatory subject of bargaining."[71] Here, the Union's demand seeks the right for its members to decide unilaterally when and how they will take terminal leave. Such a demand is an impermissible restriction of the City's right to schedule its employees.

For these reasons, we find that, to the extent that the Union seeks to bargain about the right to take terminal leave in

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[69] Decision No. B-4-89 at 98-99.

[70] Decision No. B-4-89 at 104, and the decisions cited therein. See also, Mineola Teachers Ass'n v. Mineola Union FSD No. 10, 6 PERB ¶3023 (1973); East Meadow Teachers Ass'n v. Board of Education, Union FSD No. 3, Town of Hempstead, 4 PERB ¶3018 (1971).

[71] See also, Decision No. B-4-89 at 104-105.

the form of sabbatical leave, Demand No. VIII, 8b, is a mandatory subject of bargaining and is appropriate for consideration by the impasse panel. Further, to the extent that the Union seeks to include in its demand the right for its members to decide unilaterally when they will take such terminal or sabbatical leave, Demand No. VIII, 8b, is not a mandatory subject of bargaining and may not be considered by the impasse panel.

PBA Demand Nos. VIII, 9c and 9d

VACATION

9c. Subject to scheduling exigencies of the Department, if any, members shall be entitled to take the cash equivalent of his/her unused vacation days each year and be compensated at the overtime rate.

9d. Subject to scheduling exigencies of the Department, if any, an employee, at his/her option, may accrue his/her entire vacation time from one year to the next.

City Position

The City contends that these demands violate its right, under §12-307b of the NYCCBL, to determine the level of manning in its agencies, to carry out its mission in emergencies, and to determine the "methods, means and personnel by which government operations are to be conducted." The City adds that in order for it to determine its schedules, it must factor in the number of vacation days employees will be entitled to for the coming year. The City alleges that the above demands encourage employees not

to schedule vacation time, thereby creating unpredictability and encroaching upon its right to schedule its employees. According to the City, earlier Board and PERB decisions indicate that "the demand to provide the employee with the unilateral option of not taking his/her vacation time is a non-mandatory subject of bargaining."

Union Position

The PBA asserts that since Demand Nos. VIII, 9c and 9d, relate to time-off and leave, and cash equivalency, they fall within the scope of mandatory bargaining. Regarding the City's contention that this demand is nonmandatory because it would encroach upon its right to schedule, the PBA asserts that "[i]f implemented, Demand Nos. VIII, 9c and 9d, would not raise any scheduling uncertainties.

Discussion

In Demand No. VIII, 9c, the PBA seeks to bargain over its members receiving the cash equivalent of their unused vacation days at the overtime rate. For the reasons noted in our discussion of Demand No. VIII, 7b, above,[72] we find this demand to be bargainable.

Demand No. VIII, 9d, seeks to negotiate over the employees' right to accrue their entire vacation from one year to the next at their option. The City claims that allowing vacation time to

[72] Supra at 46-48.

accrue from year to year will prevent it from determining its schedules in advance, as is its policy. It also contends that this accrual will create uncertainty as to the number of scheduled days off.

Demand No. VIII, 9d, presents an issue of time and leave, which this Board has deemed to be a mandatory subject of bargaining. We have held that time and leave benefits are mandatory subjects of bargaining which include the duty to negotiate on the regulation and procedure governing their proper use.[73] Furthermore, in Decision No. B-16-81, we were asked to determine whether employees had the right to bargain on the accrual of their vacation time with no maximum limitation.[74] There we found that demands that seek to negotiate on earned vacation time, that do not limit the City's right to determine the number of employees needed at any given time, are mandatory subjects of bargaining.[75]

Accordingly, to the extent this demand seeks the accrual of unused vacation days from one year to the next, at the option of the PBA's members, and is subject to the scheduling exigencies of

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[73] Decision Nos. B-16-81 at 114; B-3-75 at 17.

[74] Decision No. B-16-81 at 112.

[75] Id. at 116.

the department, we find that it is bargainable.[76]

[76] See, Decision B-4-89 at 105. Here, we found that a similar demand, regarding personal days, was mandatorily bargainable. See also, supra at 45, for our discussion of the applicability of this decision and our discussion of the PBA's recognition of the scheduling exigencies of the Department.

PBA Demand Nos. VIII, 10a and 10b

MEAL PERIOD

10a. A member shall be entitled to premium pay in cash and on a pro rata basis for any portion missed of a one hour guaranteed meal period.

10b. A member shall be entitled to an additional meal period upon performing 4 or more hours of overtime work, subject to Departmental scheduling exigencies.

City Position

The City argues that because these demands are vague and ambiguous with regard to the meaning of "premium pay" and "meal period," the City cannot respond to them and they are, therefore, nonmandatory subjects of bargaining. Furthermore, it maintains, to the extent that these demands encourage police officers not to take meal periods or seek additional meal periods, these demands encroach on the City's right to schedule its employees according to the needs of the Department. Finally, the City argues, police officers, unlike all other non-uniformed City employees, are already paid for meal periods whether they take them or not.

Union Position

The Union maintains that the term "meal period" is "explicitly defined to be one hour in length," and is "quite obviously, a period in which one eats a meal." It states that the current contract provides for meal areas and meal scheduling. The demand concerning premium pay is not vague, the Union argues, because that term has "the well-established meaning of pay which

is greater than that ordinarily received."

Discussion

In Demand No. VIII, 10a, the Union seeks to bargain about premium pay for working during parts of meal periods. The City alleges, without elaboration, that the terms "premium pay" and "meal period" are vague and ambiguous, rendering the demands nonmandatory subjects of bargaining. It claims, again without explanation, that these demands would interfere with its right to schedule its employees.

A demand is considered to be vague and ambiguous when it is not specific enough for the City to understand it[77] or if it is unclear whether the demand relates only to mandatory subjects of negotiation.[78] Article XVI, §11 of the current contract is entitled "Meal Scheduling." We must assume that the City understands the meaning of "meal period" well enough to have bargained over that section of the contract in the past. Furthermore, although the term "premium pay" is not found in the current contract, it is clear that the demand concerns wages, which is a mandatory subject of bargaining.

Premium pay itself can be a mandatory subject of bargaining

[77] Decision Nos. B-59-89; B-4-89. See also, Fairview Professional Firefighters Ass'n, 12 PERB ¶3083 (1979).

[78] Decision No. B-4-89 at 98-99.

if it is an alternate economic benefit.[79] We find that where the demand is for premium pay as an alternative to the bargained-for right to a meal period, the subject of premium pay is a mandatory subject of bargaining. To the extent the City alleges that police officers are already paid whether or not they take a meal period, this argument goes to the merits of the demand and not to the question of its bargainability.

We do not agree with the City's contention that these demands encroach upon its ability to schedule work. Rather, we find that the Union is seeking only monetary compensation in Demand No. VIII, 10a, and additional leave time in Demand No. VIII, 10b, if the City exercises its statutory right to schedule overtime work or work during a meal period.[80]

For these reasons, we find that PBA Demands No. VIII, 10a and 10b are mandatory subjects of bargaining and may be considered by the impasse panel.

PBA Demand No. VIII, 13

WORKING OUT OF TITLE

Employees shall be compensated for all hours, while performing duties of any higher rank or designation at the pay rate of such higher rank or designation. If an employee works out of title for at least two (2) hours, he/she shall be paid for the full tour.

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[79] Decision Nos. B-59-89; B-4-89; B-19-79.

[80] See, e.g., Decision No. B-4-89 at 37-38.

City Position

The City maintains that this demand attempts to restrict the City's managerial prerogative to "schedule, direct and assign its employees" pursuant to §12-307b of the NYCCBL. "Such a demand also infringes on the City's right to carry out its governmental functions and take all necessary actions to carry out its mission in emergencies. This demand concerns the determination of job content which is an express management right."

Union Position

The Union claims that this demand represents "no more than payment for work performed." The Union maintains that this demand does not impinge upon the City's managerial prerogative, does not attempt to determine job content, or otherwise limit the City's facility to perform its governmental duties.

Discussion

We find that the Union is correct in its assessment of the duty to bargain with regard to out of title work. This Board has long held that,

> "The employer may assign its employees as it sees fit; but it may not avoid its duty to bargain on the demand that "all [employees] serving at a higher title ... be compensated as such." We, therefore, find that bargaining for all wage differentials based upon work assignments is mandatory ..."[81]

We do not find that the City is compromised by this demand

[81] Decision No. B-2-73 at 5.

in its ability to function on a day to day basis, or in situations of emergency. Nor do we find this to be an attempt by the Union to determine job content.[82] The Union is not seeking a change in job duties for payment received, but rather, a change in the amount received for increased services rendered. Hence, we find this to be an issue of wages, which is a mandatory subject of bargaining. We also find that the issue of whether an employee shall be paid for a full tour after working out of title for at least two (2) hours to be one which speaks solely to the amount of money an employee shall be paid, and therefore a mandatory subject of bargaining.

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[82] In its reply, the City correctly cites Decision Nos. B-59-89 and B-10-81 for the proposition that it is the function of the Department to determine actual job content. However, Decision No. B-10-81 also states,

> Although the issue of performance of out-of-title work is covered by statute, it is also an issue involving working conditions, and agreement on a contractual prohibition of such work is not inconsistent with the statute, but rather is contemplated by the law. Therefore, we hold that this issue is within the scope of mandatory bargaining. (Citations omitted.)

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 demands of the Patrolmen's Benevolent Association, the negotiability of which were challenged in the scope of bargaining petition filed by the City of New York, are within or without the scope of mandatory collective bargaining between the parties to the following extent:

Demand Nos. VIII, 1, 7b, 7d, 7e, 9c, 9d, 10a, 10b and 13, as set forth herein, are within the scope of mandatory bargaining in their entirety;

Demand No. II.A., to the extent it seeks to bargain independently over a claim for productivity and gainsharing, is not mandatorily bargainable, under the circumstances of this case as set forth herein. It is within the scope of mandatory bargaining only to the extent that it is a demand for an economic bonus or compensation award for each year of the proposed contract and, thus, is an element of a general wage demand;

Demand No. VII., to the extent it seeks to bargain independently over a claim for productivity and gainsharing, is not mandatorily bargainable, under the circumstances of this case

as set forth herein. It is within the scope of mandatory bargaining only to the extent that it is a demand for an economic bonus or compensation award for each year of the proposed contract and, thus, is an element of a general wage demand. To the extent this demand seeks a labor management committee with powers relating to productivity and gainsharing, it is outside the scope of mandatory bargaining;

Demand No. VIII, 7c, is within the scope of mandatory bargaining to the extent that it is a demand for the cash equivalent of unused personal leave days standing to a Police Officer's credit at the time of separation from service and is subject to the Police Commissioner's power to impose a monetary penalty under §14-115 of the New York City Administrative Code, as set forth herein;

Demand No. VIII, 7f, is within the scope of mandatory bargaining to the extent that it is a demand for the cash equivalent of unused vacation time, lost time, etc., standing to a Police Officer's credit at the time of separation from service and is subject to the Police Commissioner's power to impose a monetary penalty under §14-115 of the New York City Administrative Code, as set forth herein;

Demand No. VIII, 8b, is within the scope of mandatory bargaining only to the extent that it seeks to bargain about the right to take terminal leave in the form of sabbatical leave. To the extent that it seeks the right for its members to decide unilaterally when they will take such terminal or sabbatical leave, it is not mandatorily bargainable.

Dated: New York, New York
May 30, 1997

Steven C. DeCosta
CHAIRMAN

Daniel G. Collins
MEMBER

George Nicolau
MEMBER

Jerome E. Joseph
MEMBER

Robert H. Bogucki
MEMBER

Richard A. Wilsker
MEMBER

Dennison Young, Jr.
MEMBER

Note: City Member Saul G. Kramer did not participate in the Board's discussion or in the decision of this matter.

INDEX OF DEMANDS