

**NYSNA, 6 OCB2d 23 (BCB 2013)**  
(IP) (Docket No. BCB-3080-13)

**Summary of Decision:** The Union alleged that the City and HHC violated NYCCBL § 12-306(a)(1) and (4) when HHC presented a modified proposal concerning the duration of the contract and wage increases to the Impasse Panel that had not been presented to the Union prior to impasse. Respondents argue that the Union has actually brought an untimely scope of bargaining petition which, nevertheless, fails to establish a violation of the NYCCBL. The Board found the petition timely but determined that the petition did not establish a breach of the duty to bargain in good faith. Accordingly, the Board denied the Union's petition. (*Official decision follows.*)

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of the Improper Practice Petition**

*-between-*

**NEW YORK STATE NURSES ASSOCIATION,**

*Petitioner,*

*-and-*

**NEW YORK CITY HEALTH AND HOSPITALS CORPORATION and  
THE CITY OF NEW YORK,**

*Respondents.*

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**DECISION AND ORDER**

On June 12, 2013, the New York State Nurses Association (“NYSNA” or “Union”) filed a verified improper practice petition against the New York City Health and Hospitals Corporation (“HHC”) and the City of New York (“City”) (collectively “Respondents”) alleging that Respondents violated § 12-306(a)(1) and (4) of the New York City Collective Bargaining Law (City of New York Administrative Code, Title 12, Chapter 3) (“NYCCBL”). The Union claims that by presenting demands relating to wages and the duration of the contract to the

impasse arbitration panel that were never raised at negotiations, HHC failed to bargain in good faith and thus violated NYCCBL § 12-306(a)(1) and (4). Respondents argue that, although the Union claims to have brought an improper practice petition, it has actually brought a scope of bargaining petition and, as such, should be time-barred from bringing the claim. Further, Respondents claim that the Union's claim is devoid of evidence that would establish an improper practice under § 12-306(a)(1) and (4). The Board finds that the Union's petition is timely, but does not establish a violation of § 12-306(a)(1) or (4).

### **BACKGROUND**

The Union is the certified collective bargaining representative for employees in the title of Staff Nurses, Head Nurses, and other titles employed at HHC, as well as other agencies of the City. HHC is a public benefit corporation that was created to provide health and medical services. The City's Office of Labor Relations is the designated bargaining agent for HHC.

The Union, the City, and HHC are parties to a collective bargaining agreement ("Agreement") covering Staff Nurses, Head Nurses, and other titles that expired on January 20, 2010. The parties commenced negotiations for a successor agreement on March 5, 2009, and met at least 13 times to bargain. Bargaining proposals including the terms at issue were presented on four occasions. At the first negotiation session, the Union proposed a 24-month contract term, an increase in welfare fund contributions, and a wage increase. On January 29, 2010, Respondents presented written proposals offering among other things, a 24-month contract term. At the January 6, 2011 negotiation session, the Union presented Respondents with revised proposals that included a 24-month contract term. At the May 8, 2012 session, Respondents presented revised proposals that also included a 24-month contract term. At the same session, the Union presented a second revised proposal, which included a 24-month contract term. Each

of the Union's proposals sought an annual wage increase while the Respondents' proposals limited any wage increases to those funded by productivity improvements.

On May 10, 2012, the Union filed a request for a declaration of impasse with the Director of the New York City Office of Collective Bargaining ("OCB") and requested appointment of an interest arbitration panel. This Board declared an impasse and authorized appointment of an impasse panel on November 13, 2012.

The impasse panel requested that the parties submit their positions on the outstanding issues.<sup>1</sup> On February 6, 2013, the Union informed the panel that "NYSNA's position at impasse and with respect to all matters related to this proceeding have been accurately presented." On February 13, 2013, Respondents submitted its "most recent version of the employer demands in the City of New York/NYC Health and Hospitals Corporation and NYSNA (I-261-12) proceeding." Respondents' proposal included a demand for a seven-year contract term from January 21, 2010 to January 20, 2017.<sup>2</sup> Prior to the February 12, 2013 submission, Respondents had not proposed an agreement with a seven-year term. On June 12, 2013, the Union filed an improper practice petition alleging that the Respondents' proposal to the impasse panel in February 2013 breached its duty to bargain in good faith pursuant to § 12-306(a)(4). The petition requested that the Board order the Respondents to withdraw the February 2013 bargaining proposal, refrain from submitting a bargaining proposal to the impasse panel that

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<sup>1</sup> The impasse panel's request for the parties' bargaining positions was made during a conference call. Therefore, there is no record of the panel's exact request.

<sup>2</sup> In addition to a seven year contract term, HHC's February 12, 2013 proposals offered zero percent wage increases for the first five years of the agreement and 1.25% wage increases on January 21, 2015 and January 21, 2016.

includes duration longer than 24 months, and refrain from submitting any proposal that was not discussed in the course of negotiations.

## **POSITIONS OF THE PARTIES**

### **Union's Position**

The Union charges that the City and HHC violated the NYCCBL by introducing proposals during the impasse proceeding that had not previously been discussed during negotiations. By presenting demands to the impasse arbitration panel that were never raised at negotiations, the City and HHC failed to bargain in good faith and violated NYCCBL § 12-306(a)(1) and (4). The Union asserts that the presentation of items that were neither discussed during negotiations nor at mediation subverts the impasse process, frustrates efforts to reach agreement, and therefore violates the duty to bargain in good faith.

Additionally, the Union claims that the Respondents' actions violate NYCCBL § 12-306(a)(1) by interfering with its employees' rights. The Union claims that the Respondents "bypass[ed] the negotiating process by seeking a recommendation covering terms that were never negotiated." (Rep. ¶ 56) By submitting a modified bargaining proposal to the impasse panel, the Respondents sought to impose terms and conditions over five years the Union never had the opportunity to bargain over. (Rep. ¶ 55) The Union asserts that this action interfered with, restrained, and coerced the Union and its members in the exercise of their §12-305 rights.

The Union denies the Respondents' argument that the charge they have brought is actually a scope of bargaining petition and is, accordingly, time barred. The Union argues that it has not sought a determination as to whether a particular demand falls within the jurisdiction of the impasse panel; instead it seeks a finding that the City and HHC failed to negotiate in good

faith by misusing impasse procedures to obtain contract terms that were neither discussed nor proposed during negotiations. Accordingly, the Union argues, the claim is correctly identified as an improper practice petition, not a scope of bargaining petition, and is not time barred because it was filed within four months of the alleged violation.

The Union further argues that *LEEBA*, 5 OCB2d 18 (BCB 2012), *affd. in part, vacated in part, Matter of City of New York v. Law Enforcement Employees Benevolent Assn.*, Index No. 154223/12 (Sup. Ct. N.Y. Co. July 23, 2013) does not support the Respondents' position that the petition is untimely. The Board's opinion in *LEEBA* did not address whether a party bargained in bad faith by submitting a proposal it had not raised during negotiations, which is the issue in this case. The facts in *LEEBA* are distinct from this case because both parties agree that the parties in *LEEBA* never discussed a contract with the duration awarded by the impasse panel. (Rep. ¶ 50) In contrast, the Union submits that the parties in the instant case consistently and mutually understood that they were negotiating for a two-year contract term during negotiations.

Additionally, the Union argues that the absence of a specific rule providing that it is bad faith bargaining to submit a demand to an impasse panel that was not made in negotiations does not necessitate that its petition must be denied. The Union reasons that neither the NYCCBL nor the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) ("OCB Rules") set forth an exhaustive list of conduct constituting bad faith bargaining. Accordingly, the improper practice petition was properly and timely filed. Furthermore, Respondents' actions violate NYCCBL § 12-306(a)(1) and (4).

### **Respondents' Position**

Respondents argue that the Union's claim should be denied in its entirety. Although the Union brought this claim as an improper practice petition, Respondents assert that it is actually a

scope of bargaining petition because it seeks a determination from the Board that the Respondents' seven-year contract term proposal is outside the scope of collective bargaining. As such, the Union's claim is time barred under OCB Rule § 1-05(g). Section 1-05(g) requires that a scope petition be filed within thirty calendar days of the authorization of the appointment of the impasse panel. Here, the impasse panel was appointed on November 13, 2012, yet the improper practice petition was not filed until June 12, 2013, over six months later.

Respondents further argue that the Union cannot circumvent the 30-day limitations period for filing its scope petition by instead labeling it an improper practice petition. The purpose of § 1-05(g) is to ensure the prompt submission of a scope of bargaining petition so that these matters may be adjudicated before the commencement of an impasse proceeding. The Union's filing of the petition, without any request for an extension, is antithetical to the OCB Rule and its purpose. If the Union were to prevail, Respondents argue, it would mean that a party could raise a scope objection, under the guise of an improper practice petition, anytime within four months of submission of demands to an impasse panel. This would enable a party to challenge bargaining proposals even after the conclusion of impasse hearings, which is in conflict with OCB Rule § 1-05(g).

Further, Respondents claim that even if the Union's petition had been timely filed, it still must be denied because it fails to establish a violation of the NYCCBL. Unlike PERB, neither the NYCCBL nor the OCB Rules provide that it is an improper practice to submit to an impasse panel a demand that has not been the subject of pre-impasse negotiations. Specifically, Respondents point to the Board's decision in *LEEBA*, 5 OCB2d 18. According to Respondents, the Board held that the length of a contract term is a mandatory subject of bargaining and that an impasse panel operating under the NYCCBL has the discretion to determine the appropriate term

for a contract notwithstanding the fact that the parties may not have proposed the same term in bargaining or at the hearing. Respondents argue that if an impasse panel has the authority to award a contract term that was neither discussed in negotiations nor proposed by either party, there is no rational basis to preclude a party from submitting a demand for a contract term that likewise had not been proposed in negotiations.<sup>3</sup>

Finally, Respondents argue that the Union has failed to show that submission of a demand to an impasse panel on a matter that the panel has the authority to consider constitutes a failure to bargain in good faith. Therefore, the petition should be rejected as untimely and meritless.

### **DISCUSSION**

As a threshold matter, the Board must consider whether the Union's petition is timely. Pursuant to OCB Rule § 1-07(b)(4), an improper practice petition must be filed "within four months of the alleged violation."<sup>4</sup> Here, the Union filed a petition on June 12, 2013, alleging that Respondents breached its duty to bargain in good faith by submitting the February 12, 2013

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<sup>3</sup> Although not alleged by Petitioner, Respondents also asserts that the Union has not alleged facts sufficient to support an independent claim for a violation of §12-306(a)(1).

<sup>4</sup> OCB Rule § 1-07(b)(4) provides:

One or more public employees or any public employee organization acting on their behalf or a public employer may file a petition alleging that a public employer or its agents or a public employee organization or its agents has engaged in or is engaging in an improper practice in violation of § 12-306 of the statute and requesting that the Board issue a determination and remedial order. The petition must be filed within four months of the alleged violation and shall be on a form prescribed by the Office of Collective Bargaining.

bargaining proposal to the impasse panel. The petition was filed within four months of the alleged violation and therefore, is timely.

The Board is not persuaded that the Union's improper practice petition must be considered a scope of bargaining petition and, therefore, be found untimely. The Board finds that the legal issues raised in the Union's petition were properly filed as an improper practice. The bargaining proposal at issue involves the duration of the contract and associated yearly wage increases, which are both clearly mandatory subjects of bargaining and thus within the jurisdiction of the impasse panel. *See LEEBA*, 5 OCB2d 18, at 23 (citing *Buffalo Police Benevolent Association*, 43 PERB ¶ 4562 (ALJ 2010); *Old Brookville Policemen's Benevolent Association*, 16 PERB ¶ 3094 (1983)). The Union does not dispute this. Rather, the Union claims that Respondents' late presentation of a modified proposal was bad faith bargaining. Accordingly, the Board does not find the scope of bargaining, or the impasse panel's jurisdiction, at issue in this petition. Instead, the legal question raised by the petition is whether Respondents breached the duty to bargain in good faith by submitting the February 12, 2013 bargaining proposal.

Additionally, the Board is not persuaded that it must view the petition as a scope of bargaining petition because the Union seeks a remedy traditionally awarded in a scope decision. The nature of the relief sought alone does not necessarily define the nature of a party's claim. The Board has broad authority to craft an appropriate remedy to an improper practice and is not confined by the remedy sought. *See NYCCBL* § 12-309(a); *see also UFT*, 5 OCB2d 26 (BCB 2012). Therefore, the Board does not consider the Union's petition as a scope of bargaining petition and finds that the improper practice petition was timely filed.



Turning to the merits of the improper practice petition, NYCCBL § 12-306(a)(4) requires an employer to bargain collectively in good faith on mandatory subjects of bargaining with the designated bargaining representatives of its public employees. NYCCBL § 12-306(c) specifies that the duty to bargain in good faith includes the following obligations:<sup>5</sup>

- (1) to approach the negotiations with a sincere resolve to reach an agreement;
- (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
- (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
- (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the scope of collective bargaining;
- (5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.”

It is well settled that a party breaches this duty by refusing to bargain over mandatory subjects of bargaining. However, short of an express refusal to bargain, the Board will evaluate a party’s conduct in light of the totality of the circumstances surrounding the events in question. *See LEEBA*, 2 OCB2d 29, at 8-9 (BCB 2009); *Cheatham*, 27 OCB 13, at 8; *see also Town of Southampton*, 2 PERB ¶ 3011 (1969). “This determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party’s conduct.” *LEEBA*, 2 OCB2d 29 at 8 (quoting *Erie Co.*, 35 PERB ¶ 4560 (2002)). In addition to the indicia listed in § 12-306(c), the Board will consider a party’s preparation for bargaining sessions, punctuality, refusal to adequately explain proposals, and its refusal to adequately justify a bargaining position. *See LEEBA*, 2 OCB2d 29, at 9; *see generally Bryant & Stratton Bus. Inst.*,

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<sup>5</sup> “The standards set forth in this section are essentially the same as those found in the private sector and PERB cases.” *Cheatham*, 27 OCB 13 at 9 (BCB 1981).

*Inc. v. NLRB*, 140 F.3d 169 (2d Cir. 1998); *NLRB v. Billion Motors*, 700 F.2d 454, 456 (8th Cir. 1983).

The NYCCBL and the OCB Rules do not prohibit a party from submitting modified bargaining proposals to an impasse panel. Further, it is the policy of this Board to facilitate the impasse process and encourage voluntary resolution of contract disputes. This Board recently held that an impasse panel is empowered to exercise discretion in arriving at a reasonable decision and is not limited by the parties' prior bargaining proposals. *See LEEBA*, 5 OCB 18, at 24.<sup>6</sup> Here, after considering Respondents' actions in total, the Board does not find that it breached its duty to bargain in good faith. Respondents met with the Union thirteen times from March 2009 through May 2012. These bargaining sessions led to the exchange of five bargaining proposals. In fact, there is no claim that Respondents violated the duty to bargain prior to the Board's declaration of impasse. Instead, the Union claims the sole breach of Respondents' good faith duty was the proposal of a longer contract duration and associated wage terms to the impasse panel. However, this one action is not sufficient evidence to establish a breach of NYCCBL § 12-306(a)(4).

Indeed, Respondents' proposal to the impasse panel in February 2013 included a duration term and wage terms not previously offered during negotiations with the Union. During negotiations, both parties submitted proposals for a 24-month contract. The Union sought a four percent yearly wage increase funded by Respondents and consistently rejected the Respondents' wage proposals, which included increases funded by "mutually agreed-upon productivity

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<sup>6</sup> The Supreme Court of New York, New York County affirmed the Board's determination that the duration of a contract is a mandatory subject of bargaining and therefore within the impasse panel's purview. However, the court vacated the duration term and remanded that portion of the decision because the impasse panel had not notified the parties it was considering a different duration than previously discussed. *See Matter of City of New York*, Index No. 154223/12 slip op. at \*23.

improvements that generate measurable savings.” (Pet. Ex. D) Respondents’ February 2013 bargaining proposal was a modification to terms, namely wages and contract duration, discussed by the parties during prior negotiations. The proposal included a significantly longer duration (including an additional 60 months), but included 1.25% wage increases funded by Respondents in the final two years of the contract. Without evaluating the desirability of the proposal, there is no dispute that it relates to terms previously discussed by the parties during the negotiation process. In light of the totality of the circumstances presented, the Respondents’ other conduct during the bargaining process, and the introduction of funded wage increases; the Board does not find a breach of the duty to bargain in good faith.

Nothing in this decision removes the obligation for an employer or a union to bargain in good faith during the bargaining process and through impasse proceedings. An impasse panel is only authorized where a voluntary agreement will not result from further good faith bargaining. The impasse panel is empowered to evaluate each party’s bargaining positions and arguments concerning the negotiation. Modified demands presented to an impasse panel will not be given any undue weight but will be viewed in light of all the information available. Drastic changes will, most likely, warrant close scrutiny. Here, there is no evidence that Respondents withheld bargaining proposals during negotiations to force impasse proceedings. Furthermore, the impasse panel will afford the Union ample time and opportunity to be heard with regard to its position on all terms that the panel considers, including Respondents’ modified proposal.

**ORDER**

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

ORDERED, that the verified improper practice petition filed by the New York State Nurses Association, docketed as BCB 3080-13, alleging a violation of NYCCBL § 12-306(a)(1) and (4) be dismissed.

Dated: September 23, 2013  
New York, New York

MARLENE A. GOLD  
CHAIR

CAROL A. WITTENBERG  
MEMBER

PAMELA S. SILVERBLATT  
MEMBER

GWYNNE A. WILCOX  
MEMBER

PETER B. PEPPER  
MEMBER