Detective Investigators Association of the District Attorneys' Offices, 79 OCB 13 (BCB 2007)

[Decision No B-13-2007] (Scope) (Docket No. BCB-2573-06) (I-246-06)

Summary of Decision: The City petitioned for a determination that eight bargaining demands proposed by the DIA were outside the scope of mandatory bargaining under the NYCCBL and, therefore, could not be submitted to an impasse panel. The DIA argued that each of its demands concerned mandatory subjects of bargaining. The Board found that several demands were mandatory subjects in their entirety, one demand was a nonmandatory subject in its entirety, and several other demands were bargainable in part and not bargainable in part. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of
Scope of Bargaining Proceeding

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

DETECTIVE INVESTIGATORS ASSOCIATION OF THE DISTRICT ATTORNEYS' OFFICES OF THE CITY OF NEW YORK, INC.,

Respondent.

DECISION AND ORDER

On September 28, 2006, the City of New York, appearing by its Office of Labor Relations ("City"), filed a scope of bargaining petition. The petition seeks a determination on whether eight demands proposed by the Detective Investigators Association of the District Attorneys' Offices of the City of New York, Inc. ("DIA" or "the Union"), which have not been resolved in negotiations

between the parties, are mandatory subjects of bargaining within the meaning of Section 12-307 of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").

On January 17, 2007, the Union filed an answer to the City's petition; a reply was received from the City by the Board on February 20, 2007.

BACKGROUND

DIA represents employees holding the titles of County Detective, Detective Investigator, Senior Detective Investigator, Rackets Investigator, Senior Rackets Investigator, Supervising Rackets Investigator; Rackets Investigator (Special Narcotics Court), Senior Rackets Investigator (Special Narcotics Court) in Certification No. 30-75, as amended. These titles are employed by the District Attorneys' Offices for the five counties comprising New York City, and the Office of the Special Narcotics Prosecutor. The offices of the five District Attorneys are "public employers" but not "municipal agencies"within the meaning of NYCCBL § 12-303.[1] A consequence of this status is that, pursuant to NYCCBL § 12-304, the provisions of the NYCCBL do not automatically apply to

[1] NYCCBL § 12-303 defines the relevant terms as follows:

> d. The term "municipal agency" shall mean an administration, department, division, bureau, office, board, or commission, or other agency of the city established under the charter or any other law, the head of which has appointive powers, and whose employees are paid in whole or in part from the city treasury, *other than the agencies specified in paragraph two of subdivision g of this section.*
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> * * *
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> g. The term "public employer" shall mean . . . ; (2) the board of education, the New York city health and hospitals corporation, the New York city off-track betting corporation, the New York city board of elections and the public administrator *and the district attorney of any county within the city of New York*; . . . . (Emphasis added.)

these offices, absent an election of coverage approved by the Mayor.[2] In the absence of such an election, by default the employees of these offices would be covered by the provisions of the New York State Public Employees' Fair Employment Act (New York Civil Service Law, Article 14) ("Taylor Law") and would be under the jurisdiction of the Public Employment Relations Board ("PERB"). However, in November 1968 the five District Attorneys each elected, with Mayoral approval, to make the NYCCBL applicable to the employees of their respective offices. *See Association of New York City Assistant District Attorneys*, Decision No. 13-74 at 2, n. 1. Therefore, the NYCCBL is the applicable law in this case.

In or about October 2004, the Union and the City began bargaining for a successor agreement to the one covering the period May1, 2000 to April 12, 2003. Between October 2004 and February 2006, the parties engaged in a series of negotiation sessions. The Union filed a Request for Appointment of Impasse Panel on February 27, 2006. The Request alleged that the parties have not reached agreement on any proposals, and included the proposals each party had submitted to the other. By letter dated July 7, 2006, the Board of Collective Bargaining informed the parties that it had declared an impasse at its July 6, 2006 meeting. The impasse has been docketed as Docket No. I-246-06. The City's petition seeks a determination of whether the disputed Union demands are

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[2] NYCCBL § 12-304 provides, in pertinent part:
This chapter [the NYCCBL] shall be applicable to:

* * *

c. any other public employer, and to the public employees and public employee organizations thereof, upon the election by the public employer or the head thereof by executive order of the chief executive officer to make this chapter applicable, subject to approval by the mayor . . . .

mandatory subjects of negotiation which may be considered by the impasse panel.[3]

RELEVANT STATUTORY PROVISIONS

Section 12-307 of the NYCCBL provides as follows:

> Scope of collective bargaining; management rights.
>
> a. Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage 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:
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> (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;
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> (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;
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> (3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department;

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[3] The City's petition included a challenge to the Union's demand for a Salary Schedule, which the City alleged was vague and ambiguous. The Union, in its answer, provided a more detailed proposal for a salary schedule. Based upon this clarification of the demand, the City has withdrawn its objection (Reply, p. 14), and therefore the demand will not be discussed in this decision.

> (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;
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> (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.
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> 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 12-309 of the NYCCBL provides, in pertinent part, as follows:

> a. Board of collective bargaining. The board of collective bargaining, in addition to such other powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:
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> * * *
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> (2) on the request of a public employer or public employee organization to make a final determination as to whether a matter is within the scope of collective bargaining;

Section 12-311(c)(3)(c) of the NYCCBL provides, in relevant part, that:

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

PRELIMINARY ISSUES

The scope of mandatory collective bargaining is defined in NYCCBL §12-307. Mandatory subjects of bargaining generally include wages, hours, and working conditions and any subject with a significant or material relationship to a condition of employment. *See, e.g., EMS Superior Officers Association*, Decision No. B-15-2005 at 5; *District Council 37*, Decision No. B-7-2004 at 15. Pursuant to NYCCBL § 12-311(c)(3)(c), demands which are not mandatory subjects of negotiation may not be considered by an impasse panel unless submitted to the panel by the mutual agreement of the parties. *See EMS Superior Officers Ass'n,* Decision No. B-15-2005 at 5; *Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 3-4; *District Council 37*, Decision No. B-16-71 at 9. However, as the Court of Appeals has recognized:

> Although terms and conditions of employment (subject to bargaining) and management prerogatives (exempt from bargaining) may be neatly separated in principal, the practical task of assigning a particular matter to one category or the other is often far more difficult. Indeed, many instances a matter may partake of both categories, requiring a balancing of the interests involved [citation omitted]. No litmus test has yet been devised that automatically identifies a term or condition of employment, or a management prerogative, or establishes whether a particular subject should be placed into the first category or the second.

Matter of Levitt v. Board of Collective Bargaining, 79 N.Y. 2d 120, 127 (1992); *see District Council 37*, Decision No. B-8-2005 at 7.

In a scope of bargaining proceeding pursuant to NYCCBL §12-309(a)(2), this Board's task is to apply the language of NYCCBL §12-307 as well as relevant precedent to each of the disputed demands in order to determine whether and to what extent the demand is within the scope of bargaining.

In cases in which 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. *Uniformed Firefighters Association*, Decision No. B-4-89 at 15-16, *aff'd, Uniformed Firefighters Association v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept 1990). This practice is consistent with our authority under NYCCBL §12-309(a)(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.

We will discuss *seriatim* the seven Union demands which have been challenged, the positions of the parties, and our decision on the bargainability of each demand. For the sake of easier reference, we have assigned numbers to the demands, although they have not been numbered by the parties. We wish to repeat that a finding that a matter is bargainable does not constitute an expression of any view on the merits of a demand. *Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 8, n. 6; *Patrolmen's Benevolent Ass'n*, Decision No. B-34-93 at 6; *Uniformed Firefighters Ass'n*, Decision No. B-42-92 at 17.

THE DEMANDS

UNION DEMAND NO. 1: Savings equal to 4.24%. Savings above 4.24% will be used to fund other economic benefits.

City's Position

The City alleges that this demand is vague and ambiguous and is, therefore, non-mandatory. The City also alleges that since the Union fails to identify the "economic benefits" it suggests should be funded by any savings in excess of 4.24%, the demand may include non-mandatory items and,

therefore, cannot constitute a mandatory subject of collective bargaining. Finally, the City requests that, should the Board reject its argument that the entire demand is non-mandatory, that the Board eliminate "those elements of the demand that seek to fund additional economic benefits" as non-mandatory.

Union's Position

The Union argues that the demand is not vague or ambiguous but rather anticipates the City's established bargaining stance with regard to "every other uniformed union that has entered into a collective bargaining agreement with the City." The Union explains that this bargaining stance has been advanced by the City in the past and that this position is known to the Union. As an example, the Union points to the interest arbitration award resolving negotiations between the City and the Patrolmen's Benevolent Association (Arbitrator Eric J. Schmertz, June 2005), in which the grant of annual 5% wage increases for two years was conditioned on the union providing a 4.24% savings to the employer. The Union also asserts that this demand is mandatory pursuant to §12-307(a) of the NYCCBL since it relates to the subject of wages. The Union argues that this Board has rejected claims of vagueness "if the circumstances behind a bargaining demand adequately put the City on notice of the union's intent." Finally, the Union explains that the demand was the subject of prior negotiations and that its presentation at those sessions was "clear and unequivocal."

DISCUSSION

Admittedly, the Union's demand does not explain the meaning of the term "savings," does not explain where the savings will come from, and does not particularize what the "other economic benefits" will be. However, we have held consistently that where the circumstances surrounding a demand adequately put the employer on notice of the union's intent, a demand will not be found to

be so vague as to require its exclusion from bargaining or to preclude its submission to an impasse panel. *Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 31; *Local 621, S.E.I.U.*, Decision No. B-34-93 at 15-16; *Uniformed Firefighters Ass'n*, Decision No. B-45-92 at 10. Here, we are satisfied that in the context of the record in this case, the demand is sufficient to have put the City on notice that the Union was seeking to negotiate cost-saving measures that would save the employer at least 4.24%, and that any savings negotiated beyond 4.24% would be applied to granting other economic benefits. The undisputed fact that the parties actually bargained over this demand, together with the example of the Patrolmen's Benevolent Association's 2005 interest arbitration award, submitted by the Union herein, which contains a similar savings provision, is persuasive evidence that the City should have understood the intent of this demand. Therefore, we will not preclude consideration of the demand on this ground alone.

In this regard, we also note that the demand's reference to "savings" is not dissimilar to demands for a general wage increase funded, in part, by "gainsharing" or "productivity," which this Board has held to be mandatorily bargainable. *Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 27; *Correction Captains Ass'n*, Decision No. B-28-93 at 10-11; *Sergeant's Benevolent Ass'n*, Decision No. B-9-91 at 14-15. In reviewing our earlier decisions on this subject, we explained:

> [W]hen this Board stated:
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> > 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.

Patrolmen's Benevolent Ass'n, Decision No. B-24-97 at 27. In the present case we find that to the

extent the Union's demand seeks to provide "savings" as a source of funding for a wage increase and "other economic benefits," it is mandatorily bargainable.

The City contends that the demand, because it fails to specify what the "other economic benefits" are, may include non-mandatory items. This Board has recognized that the term "wages," which pursuant to NYCCBL § 12-307(a) are mandatorily bargainable, has been broadly defined to include "direct and immediate economic benefits flowing from the employment relationship." *Uniformed Firefighters Association*, Decision No. B-4-89 at 202, *aff'd Uniformed Firefighters Association v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept 1990); *Local No. 3, IBEW*, Decision No. B-23-75 at 14, n. 11, citing with approval *W.W. Cross & Co., Inc. v. NLRB*, 174 F.2d 875 (2d Cir. 1949). The City has not suggested what "economic benefits" might be outside the scope of bargaining. We take administrative notice that the subject of pension benefits, which is a form of economic benefit for employees upon their retirement, legislatively has been declared to be outside the scope of bargaining. Taylor Law § 201(4); Retirement and Social Security Law §470. Thus, the requested "economic benefits" may not include any pension benefit. As no other limitation has been identified by the City nor otherwise come to our attention, we find that the demand is a mandatory subject of bargaining.

UNION DEMAND NO. 2: Private hospital accommodations for all line of duty injuries or illnesses.

City's Position

The City alleges that this demand concerns a prohibited subject of bargaining because

General Municipal Law § 207-c "governs the payment of salary, wages, medical and hospital expenses of any detective investigator with injuries or illness incurred in the performance of duties."[4] The City alleges that the Court of Appeals has found that the language of this section reserves to the employer "the right to make initial medical and eligibility determinations" and that "only review procedures" are mandatorily bargainable. The City argues that because the demand, on its face, applies to "all line of duty injuries or illnesses," the demand would interfere with the City's statutory right to make the initial determination as to the nature of an employee's injury and whether the employee is entitled to the medical benefits provided in the statute. The City also contends that the private accommodations demanded by the Union do not implicate a term or condition of employment and that "[s]pecific hospital accommodations are determined as part of an initial assessment of the employer's injury." Lastly, the City alleges that this demand is not subject to a "conversion theory of negotiability" because, notwithstanding the incorporation of a Line of Duty Injury provision in the current collective bargaining agreement, the contractual provision is devoid of any language addressing hospital accommodations.

Union's Position

The Union contends that its demand for particular hospital accommodations concerns health benefits, a subject that falls within the scope of bargaining set forth in §12-307(a) of the NYCCBL.

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[4] General Municipal Law § 207-c provides, in pertinent part, that any enumerated law enforcement officer, including detective investigators employed by District Attorneys,

> who is injured in the performance of his duties or who is taken sick as a result of the performance of his duties so as to necessitate medical or other lawful remedial treatment shall be paid by the municipality by which he is employed the full amount of his regular salary or wages until his disability arising therefrom has ceased, and, in addition such municipality shall be liable for all medical treatment and hospital care necessitated by reason of such injury or illness.

The Union also states that it seeks only to "update and improve" the benefits provided by the current agreement. The Union asserts that the City's claim that the demand is prohibited because these benefits are provided by General Municipal Law § 207-c is unfounded because the demand in no way interferes with the determination process set forth in the statute. The demand does not address the determination of whether an injury or illness was incurred in the line of duty, but seeks to provide enhanced hospitalization benefits should a covered employee be determined to have been injured in the line of duty.

DISCUSSION

The threshold inquiry in examining a demand that relates to a matter allegedly covered by statute is to 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 applicable statute. 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; or (b) the subject has been preempted by statute; 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. *EMS Superior Officers Association*, Decision No. 15-2005 at 9; *Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 40-42; *Uniformed Firefighters Ass'n*, Decision No. B-4-89 at 7-9, *aff'd, Uniformed Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251, 558 N.Y.S.2d 72 (1st Dep't 1990).

Here, the demand seeks a specific level of hospital care, specifically private room accommodations, for any member of the bargaining unit injured or taken ill in the line of duty. We

find, as alleged by the Union, that this concerns an employee health benefit, which is a mandatory subject of bargaining. The law specifies that the term "wages" includes health and welfare benefits. NYCCBL § 12-307(a); *Uniformed Firefighters Ass'n,* Decision No. B-13-2003 at 6-7; *see also City Employees' Union, Local 237, IBT*, Decision No. B-37-2001 at 6. Therefore, this demand would be within the scope of bargaining unless it falls within one of the three elements of the second prong of our test.

Initially, a review of the background of General Municipal Law § 207-c is instructive to our analysis of this question. It has been held regarding General Municipal Law § 207-c that this is a remedial statute, enacted for the benefit of law enforcement personnel injured in the line of duty, and as such, is to be liberally construed in their favor. *Miller v. City of Poughkeepsie*, 185 A.D.2d 594, 595 (3d Dep't 1992); *Matter of Crawford v Sheriff's Dep't*, 152 A.D.2d 382, 385 (2d Dep't 1989), *lv. denied*, 76 N.Y.2d 704 (1990). The enactment of this section has been described as a compromise by the Legislature,

> extending salary and wages to disabled officers, but giving the City authority to conduct medical evaluations of officers in order to determine who can, and cannot, return to work.

City of Watertown v. New York State Pub. Empl. Relations Bd., 95 N.Y.2d 73, 81 (2000). While the courts have been protective of the employer's right under this statute to make the initial determination of whether an employee has been injured or become ill in the performance of duties, and thus, is eligible for benefits, *see Poughkeepsie Professional Firefighters' Ass'n v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 514, 522 (2006) (construing similar provision for injured firefighters), the Court of Appeals has held that procedures for the implementation of § 207-c that do not infringe on that right to determine eligibility are mandatorily bargainable. *City of Watertown,*

supra, 95 N.Y.2d at 80-81. Apart from procedures, PERB has held that the negotiation of benefits that are greater than or in addition to those provided by General Municipal Law § 207-c are not, for that reason alone, nonmandatory subjects. *City of Newburgh*, 18 PERB ¶ 3065 at 3139 (1985), *aff'd*, *City of Newburgh v. Newman*, 19 PERB ¶ 7005 (Sup. Ct. Albany Co. 1986), *cited in Uniformed Firefighters Association*, Decision No. B-4-89 at 12, *aff'd Uniformed Firefighters Association v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept 1990); *see generally*, *City of Cohoes*, 31 NYPER ¶ 3020 at 3043 (1998) (contract provision can be source of "additional and different rights" compared to statute).

Considering the Union's demand in the above context, we find that the demand does not fall into any of the three exceptions set forth in the second prong of our test. First, General Municipal Law § 207-c requires the public employer to pay for medical costs associated with line of duty injuries, but it is silent on the issue of the level or type of hospital care to be provided. We believe that a demand that seeks to specify the room accommodations for hospitalized employees contravenes neither the literal reading nor the intent of the statute. Second, nothing contained in General Municipal Law § 207-c can be read as a preemption of a bargaining demand concerning the type of room accommodations for which the employer will be contractually liable. Third, the employer's "judgment and discretion" under this statute concerns only the determination whether a covered employee has been injured or become ill in the performance of the employee's duty, *i.e.*, whether the employee is eligible for benefits under the statute. Since the Union's hospitalization demand need not be read as interfering with that limited judgment and discretion, public policy is not offended. In this regard, we are mindful of the City's concern that the demand, on its face, might be read to affect the determination of line of duty injuries. The Union has disclaimed any intent to

interfere with that determination, and we find that the language of the demand need not be read to have that effect. Accordingly, for purposes of determining negotiability, we construe the demand as seeking a health benefit for those unit members whom the *employer* has determined to have become injured or ill in the performance of their duties. If this demand were read otherwise, it would offend the statutory scheme and we would hold it to be a nonmandatory subject.

In sum, this demand, as construed above, satisfies all elements of the test that we have applied for determining whether a demand that relates to a statutory obligation must be negotiated, and it is mandatorily bargainable. *See Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 40-43 (demand for payment procedure for prescription drugs needed by employees suffering line of duty injuries held mandatorily bargainable).

UNION DEMAND NO. 3: Portal to Portal Travel Allowance: Reporting to work and/or leaving from work at a location other than the office of employment. One hour overtime each event.

City's Position

The City alleges that this demand is vague and ambiguous and, therefore, non-mandatory. The City contends that the assignment of overtime is a management right and that on its face the demand may be construed so as to include non-mandatory subjects which would require that the entire demand be considered non-mandatory.

Union's Position

The Union denies that the demand is either vague or ambiguous since this demand has been the subject of prior discussion during negotiations. The Union explains that the demand is a proposal that its members be compensated for time spent traveling from home to work location when

the employee "is asked to report to a work location other than his regular work-site." The Union contends that overtime compensation is appropriate since the "time spent traveling to an alternate location goes beyond the member's ordinary working hours" and that overtime falls within §12-307(a) of the NYCCBL

DISCUSSION

We do not find this demand to be so vague and ambiguous as to preclude bargaining. Although perhaps inartfully drafted, on its face it seeks, in essence, a "portal to portal travel allowance," payable when an employee reports to work at and/or leaves work from a location other than the office of employment. Given that the parties have bargained this demand in prior negotiations and that portal to portal pay provisions are found in the City's contracts with other City unions, *see, e.g.*, *Uniformed Firefighters Ass'n*, Decision No. B-43-86 (firefighters); *Patrolmen's Benevolent Ass'n*, Decision No. B-23-86 (police officers), we find that the City should have been on notice of what the Union intended. Generally, we have found that portal to portal pay issues are a matter of compensation, and thus a mandatory subject of bargaining. *Uniformed Firefighters Ass'n*, Decision No. B-43-86 at 21. Therefore, we hold that the part of this demand that seeks a "portal to portal travel allowance" is mandatorily bargainable.

However, the demand here seeks not only a travel allowance, but a guarantee of one hour of overtime on each occurrence. We find that this part of the demand goes beyond the matter of compensation and interferes with the employer's right to determine when and in what quantity to assign the performance of overtime work. A union is free to demand bargaining over the rate of compensation to be paid when overtime work is performed; but, the decision whether and when to assign overtime belongs to management. *Fire Alarm Dispatchers Benevolent Ass'n*, Decision No.

B-1-95 at 12. This is because the assignment of overtime is within the employer's management right to determine the "methods, means and personnel by which government operations are to be conducted," and therefore an employer is under no obligation to order the performance of such an assignment. *Patrolmen's Benevolent Ass'n*, Decision No. B-7-99 at 8; *Correction Officers Benevolent Ass'n*, Decision No. B-69-89 at 6; *Patrolmen's Benevolent Ass'n*, Decision No. B-12-89 at 4-5, *aff'd, Caruso v. MacDonald*, No. 9240/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 169 A.D.2d 644 (1st Dep't 1991). Therefore, we find that so much of this demand as requires payment for "one hour overtime each event" is a nonmandatory subject of bargaining.

UNION DEMAND NO. 4: Include employees in the title of Deputy Chief into the bargaining unit.

City's Position

The City contends that this demand falls outside the scope of bargaining because §12-307(b) of the NYCCBL reserves to the City the right to "determine the content of job classifications" among other things. The City also argues that the Board has held that creation or reclassification of titles is a management prerogative. The City alleges that the title of Deputy Chief is an in-house title and that the demand would infringe on its managerial prerogative to conduct governmental operations. Finally, the City argues that the demand would change the existing bargaining unit, thereby intruding on the Board of Certification's exclusive authority to determine appropriate bargaining units.

Union's Position

The Union contends that the collective bargaining agreement lists the titles for which the Union is the bargaining representative. It explains that the title Deputy Chief is not classified

pursuant to the Civil Service Law and has no job description, yet it is assigned to employees represented by the Union. The Union wishes only to amend the recognition clause of the agreement to reflect current practice. Finally, the Union claims that PERB has held that "the clarification of which titles" are represented by the Union and covered by the agreement is a mandatory subject of bargaining.

DISCUSSION

It is not disputed that a demand to negotiate a recognition clause, which sets forth the titles of the employees in the bargaining unit covered by the terms of the agreement, is a mandatory subject of bargaining. Rather, the City objects to the Union's demand on the ground that it seeks to include in the contract a title which is not a part of the current bargaining unit. The City asserts, and we agree, that it is within the exclusive statutory responsibility of the Board of Certification to make final determinations of units appropriate for purposes of collective bargaining.[5] Therefore, to the extent the demand would alter the bargaining unit by adding a new title, it is a nonmandatory subject of bargaining. *See Uniformed Firefighters Ass'n*, Decision No. B-4-89 at 303-304, *aff'd, Uniformed Firefighters Ass'n v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251, 558 N.Y.S.2d 72 (1st Dep't 1990) (demand for the transfer of title from existing bargaining unit to a separate unit held nonmandatory).

Both parties allege that the Deputy Chief title has not been classified pursuant to the Civil Service Law, nor is there a job description for the title. They characterize this as an "in-house title."

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[5] We note that our decision is in accord with *City of Binghamton*, 10 PERB ¶3092 (1977). In that case, PERB held that a change in a negotiating unit is not a mandatory subject of bargaining. Instead, PERB stated that "[s]uch a change may be sought through the institution of a representation proceeding, but not by the filing of an improper practice charge."

The Board of Certification has held that the classification status of a position is irrelevant to the determination of the title's eligibility to be represented in an appropriate bargaining unit. *United Federation of Law Enforcement Officers,* Decision No. 11-87 at 12; *City Employees Union, Local 237, I.B.T.*, Decision No. 60-69 at 3. It is not clear from the record whether Deputy Chief is, in fact, a separate civil service position, or rather, just an assignment designation for employees serving in other Investigator titles. If the latter, the Union already represents the employees in the titles certified by the Board of Certification. If the former, the Union's recourse would be either to petition the Board of Certification to represent the Deputy Chief title, or to grieve the assignment of unit members to work out-of-title in the Deputy Chief title. In any event, we find that the ambiguity regarding the status of this position does not provide any legal basis to make an otherwise nonmandatory subject into a mandatory one.

UNION DEMAND NO. 5: Delete all references in Contract to Terms and Conditions of the Alternate Career and Salary Pay Plan.

City's Position

The City alleges that the demand is vague and ambiguous because it fails to identify with specificity the sections of the agreement complained of. Further, the City alleges that since the right to classify employees is reserved to the municipal civil service commission in § 814(a)(2) of the City Charter, the reclassification of employees should be considered a prohibited subject of bargaining. The City alleges that the employees covered by the agreement have been designated by the Department of Citywide Administrative Services ("DCAS") pursuant to the Charter's grant of authority to the municipal service commission as career and salary pay plan employees. Further, the

City alleges that the classification of employees is a non-mandatory subject since it is a managerial right articulated in § 12-307(b) of the NYCCBL and that this Board has recognized this right, while PERB has recognized a parallel right under the Taylor Law.

Responding to the Union's argument based on a Stipulation of Settlement, the City contends that the union has misconstrued the intent and effect of the Stipulation. In that document, the parties agreed that, for purposes of collective bargaining, the unit employees would be covered by NYCCBL §12-307(a)(4). The Stipulation gives the Union the right to bargain separately with the City – a right not enjoyed by the representatives of other employees who are classified under the Career and Salary Plan and are bound by the Citywide agreement negotiated by the union that represents more than 50% of the employees who are subject to the Career and Salary Plan. The Stipulation is limited to bargaining rights; it says nothing about the unit employees' classification under the Career and Salary Plan. The Alternative Career and Salary Pay Plan referenced in the existing agreement provides rules, regulation, and definitions that continue to be applicable to unit employees.

Union's Position

The Union explains that, in settlement of a lawsuit, the City and the Union entered into a Stipulation of Settlement whereby the parties agreed that specific titles employed by the five district attorneys' offices and the Office of the Special Narcotics Prosecutor would be covered by §12-307(a)(4) of the NYCCBL for purposes of collective bargaining. The Union alleges that it merely seeks to have the agreement brought into conformity with the Stipulation since "those provisions [of the the Alternative Career and Salary Pay Plan] are no longer applicable to affected employees." The Union explains that the current agreement contains two references to the Alternative Career and Salary Pay Plan, specifically, Articles III and X, from which it seeks to the references. Lastly, the

Union argues that by virtue of the Stipulation the City has waived its rights regarding classification.

DISCUSSION

We do not find this demand to be vague or ambiguous. It clearly specifies the terms it seeks to remove from the contract, and the Union, in its answer, has pointed out the two articles of the current agreement in which those terms appear. However, we find that this demand concerns a reference to a consequence of the classification of unit employees, a nonmandatory subject of bargaining, which the City has not waived in the Stipulation relied on by the Union. We will consider whether it may be bargained nonetheless.

As alleged by the City, pursuant to § 814(a)(2) of the City Charter the Commissioner of DCAS is authorized:

> To make studies in regard to the grading and classifying of positions in the civil service, establish criteria and guidelines for allocating positions to an existing class of positions, and grade and establish classes of positions; . . . . (Emphasis added.)

It is not disputed that this power to classify positions was exercised by DCAS, which placed the positions covered by this bargaining unit in the class of positions that are subject to the Career and Salary Pay Plan.[6] This classification has consequences on levels of bargaining under the NYCCBL.

Under the system of levels of bargaining embodied in NYCCBL § 12-307(a),

> (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 . . . . (Emphasis added.)

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[6] Although the petition refers to the Career and Salary Pay Plan, the answer, the reply, and the current agreement refer to the Alternative Career and Salary Pay Plan. The parties have not explained the significance, if any, of this distinction. For purposes of this decision only, we will treat the two classifications as being interchangeable.

In contrast, in the case of certain other specified categories of employees, including members of the police service,

> (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;

Since the positions in the Union's bargaining unit have been classified by DCAS as being subject to the Career and Salary Pay Plan, they ordinarily would fall within the purview of NYCCBL § 12-307(a)(2) and, for all terms that must be uniform for such employees, they would be bound by the terms of the Citywide Agreement negotiated by the Citywide representative (District Council 37). However, because the parties, in settlement of a lawsuit, have stipulated that for purposes of collective bargaining the unit titles will be covered by the provisions of NYCCBL § 12-307(a)(2)(4), the Union possess the right to bargain individually with the City as to all matters.

We find that the Stipulation of Settlement, on its face, clarifies and insures the Union's right to bargain individually with the City, but it does not purport to affect the DCAS classification or the applicability of the terms of the Career and Salary Pay Plan. As explained by the City, the Career and Salary Pay Plan provides rules, regulation, and definitions that affect employees completely apart from any question of levels of bargaining under the NYCCBL. We find no evidence that the Stipulation of Settlement rendered those rules, regulation, and definitions inapplicable to unit employees.

For the foregoing reasons, we have rejected the City's argument that this demand is vague and ambiguous. We have agreed with the City that the Stipulation of Settlement addresses only the level of bargaining issue. We have rejected the Union's contention that the Career and Salary Pay

Plan no longer is applicable to unit employees. Nevertheless, given these rulings, we must reach one remaining aspect of this demand: whether the removal of the references in the agreement to the (Alternative) Career and Salary Pay Plan would have the effect of interfering with the classification powers of DCAS, as alleged by the City. We conclude that it would not. The Board is not aware of any legal principle that requires collective bargaining agreements specifically to list those laws, regulations, or administrative bodies to which they are subject. The failure of an agreement to acknowledge by its own provisions that it is subject to a law or a legally promulgated set of regulations, such as the (Alternative) Career and Salary Pay Plan, would not in any way nullify the applicability of the law or regulations. Accordingly, we find that there no reason why the Union's demand may not be bargained. Whether the removal of the references to the still-applicable (Alternative) Career and Salary Pay Plan is advisable, or will lead to confusion and misunderstandings, concerns the merits of the demand and not its negotiability.

Finally, we note that the right to "classify" employees asserted by the City is properly based on § 814(a)(2) of the City Charter and not on NYCCBL § 12-307(b) as contended by the City. The latter section gives the City the right to "determine the content of job classifications," which we have interpreted to mean the right to establish and change the job descriptions for positions, and to assign employees to duties within their job description. *District Council 37*, Decision No. B-37-2002 at 6; *Local 1757, District Council 37*, Decision No. B-10-2001 at 13-14; *Licensed Practical Nurses and Technicians, Local 721, SEIU*, Decision No. B-59-89 at 12, n. 21 and cases cited therein. The exercise of this right regarding job descriptions is not called into question by the Union's demand.

UNION DEMAND NO. 6: Time and Leave: Once each month each member shall have the right to review the accrual, crediting, deduction and use of all time and leave. Disputes shall be grievable.

City's Position

The City alleges that leave balances already appear on employees' biweekly paychecks. It asserts that this demand would interfere with its right to maintain the efficiency of governmental operations pursuant to §12-307(b) of the NYCCBL, because it would be "unduly burdensome" to permit employees to review all leave balances on a monthly basis at a time and place of their own choosing. Since this demand infringes on a management right, it is non-mandatory subject. In its reply, the City also argues that the part of the demand that states "Disputes shall be grievable" is so vague and ambiguous as to make it impossible to determine whether it includes nonmandatory subjects. The City further alleges that to the extent this demand may be found to be an admixture of mandatory and non-mandatory elements, the Board should follow the example of PERB and find that the entire demand is non-mandatory.

Union's Position

The Union argues that the current collective bargaining agreement provides that employees receive an annual statement of leave balances (Article X, Section 4) and that this demand merely seeks an enlargement of that provision. Further, the Union argues that pursuant to PERB caselaw, a demand to negotiate over enlargement of an existing contractual benefit is mandatory. Lastly, the Union requests that if the Board finds that the demand contains both mandatory and nonmandatory elements, it so advise the parties of its findings and hold accordingly.

DISCUSSION

We have long held that the accrual of time and leave, and other benefits relating to time and

leave, are within the scope of mandatory collective bargaining. *Patrolmen's Benevolent Ass'n*, Decision No. B-24-97 at 48-49; *Uniformed Firefighters Association*, Decision No. B-4-89 at 88, *aff'd Uniformed Firefighters Association v. Office of Collective Bargaining*, No. 12338/89 (Sup. Ct. N.Y. Co. Oct. 30, 1989), *aff'd*, 163 A.D.2d 251 (1st Dept 1990); *Corrections Officers' Benevolent Ass'n*, Decision No. B-16-81 at 101-102; *Marine Engineers Beneficial Ass'n, District No. 1*, Decision No. B-3-75 at 16-17. In fact, the subject of leave is expressly included within the statutory duty to bargain under NYCCBL § 12-307(a).[7] We believe that this demand to permit employees to review their leave balances on a regular basis is reasonably related to, and thus a permissible extension of, the right to bargain over leave benefits.

The City alleges that it would be "unduly burdensome" for the employer to permit employees to review all leave balances on a monthly basis. This claim is hard to understand, inasmuch as the City also alleges that it already provides, on a unilateral basis, employees' leave balances on their biweekly paychecks. We read this demand as seeking to insure, contractually, less frequent but perhaps more detailed review than the City alleges it already provides.

The City argues that implementation of this demand would infringe upon its management right to "maintain the efficiency of governmental operations" pursuant to NYCCBL §12-307(b). This Board has never construed that provision of the law to negate the duty to bargain over a subject expressly stated in the statute to be within the scope of bargaining. It might be more "efficient" for the City not to be required to allow employees to have annual leave days, but a desire for efficiency

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[7] This section provides, in pertinent part:
[P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on . . . hours (including but not limited to overtime and time and leave benefits . . .). (Emphasis added.)

does not supersede the duty to bargain over leave benefits. Since we find this demand's request to review leave balances to be encompassed within the subject of leave benefits, we hold that it is mandatorily bargainable.

We agree with the City, however, that the part of the demand that states "Disputes shall be grievable" is so vague and ambiguous as to make it impossible to determine whether it includes nonmandatory subjects. We have recognized, for example, that management's actions to monitor the use of sick leave to avoid abuse is a nonmandatory subject. *District Council 37*, Decision No. B-24-2006 at 15; *Correction Officers Benevolent Ass'n*, Decision No. B-26-2002 at 7. We cannot determine from the demand whether it would render grievable a "dispute" over actions to prevent the abuse of sick leave. On the other hand, a dispute over the correct accrual or crediting of leave would not appear to involve any nonmandatory subject. Accordingly, we find that, as presently written, this part of the demand is so vague that it may include both mandatory and nonmandatory elements; therefore it is not mandatorily bargainable.

UNION DEMAND NO. 7: Disciplinary Procedures: Each employee served with disciplinary charges shall have the option to select final and binding arbitration as the final step in lieu of the current disciplinary procedures final step.

City's Position

Initially, the City in its petition argued that it lacked the authority to bargain over disciplinary matters because the District Attorneys, in their 1968 letters electing coverage under the NYCCBL, expressly excluded the subject of discipline from the scope of their designation of the Office of Labor Relations as their bargaining representative. However, in its reply the City has attached copies of what it alleges to be the most recent election letters from the five District Attorneys, each of which

designates the Office of Labor Relations as the District Attorneys' representative "in all matters relating to labor relations and collective bargaining."[8] Discipline no longer is excluded from the scope of that representation. Accordingly, the City withdraws its "lack of authority" argument.[9]

The City asserts that the subject of disciplinary procedures is a prohibited subject of bargaining for the majority of employees in the bargaining unit because it would contravene an express public policy against providing disciplinary protection to such employees. The City alleges that a majority of the employees in the unit are classified in the confidential non-competitive class of the civil service.[10] Civil Service Law § 42(2-a) authorizes a municipal civil service commission to designate among positions in the noncompetitive class in its jurisdiction "those positions which are confidential or require the performance of functions influencing policy." Here, according to the City, the majority of employees in the unit have been so designated by DCAS, which exercises the

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[8] The election letters bear various dates in 1992, except for the letter from the District Attorney of Richmond County which is dated in March 1993. The City further has submitted copies of letters from Mayor David N. Dinkins, dated April 26, 1993, approving each of the District Attorneys' elections. The Mayor's approval letters, together with the District Attorneys' revised election letters, were filed with the Office of Collective Bargaining in May 1993.

[9] The Board notes that it determines whether a demand is within the scope of mandatory bargaining under the NYCCBL based upon the nature of the subject(s) addressed in the demand, regardless of whether the negotiability of the demand is placed in issue by the employer directly or by its agent for collective bargaining. Therefore, if there were any remaining question of the scope the bargaining agent's authority, it would not affect the substance of our determination of negotiability.

[10] The City contends that while Detective Investigators and County Investigators are in the competitive class and possess due process rights under the Civil Service Law, few (14) employees serve in those titles. The majority of unit employees serve in the titles Rackets Investigator, Senior Rackets Investigator, and Supervising Rackets Investigator, all of which it alleges are confidential noncompetitive titles.

powers of a municipal civil service commission.[11] Such employees serve at the pleasure of the appointing authority. The courts have recognized that the appointing authority must be free to remove and replace confidential noncompetitive employees as he deems necessary.

The City further argues notes that the statutory disciplinary safeguards of Civil Service Law § 75 were amended to explicitly exclude noncompetitive titles designated as "confidential or requiring the performance of functions influencing policy" from the due process rights granted to other noncompetitive employees under § 75(1)(c). Pursuant to this section, the courts have consistently upheld the termination, without due process protection, of noncompetitive employees designated as confidential or policy-influencing. Bargaining over due process rights for those unit employees holding confidential noncompetitive titles would render the statutory exclusion meaningless and would contravene the legislative intent. Therefore, to the extent the Union's demand pertains to the Rackets Investigator titles, it is a prohibited subject and should be excluded from the scope of bargaining.

In response to the Union's argument that the confidential noncompetitive designations identified by the City only apply to certain Rackets Investigator titles employed in some but not all of the District Attorneys' offices, the City asserts that those titles and offices not included in the 1988 designations are "temporary," not permanent, titles. The city contends that they should be treated the same as the other employees in the same titles.

Lastly, the City alleges that this demand is vague and ambiguous and, therefore, is non-mandatory in that the Union fails to identify the specific titles the demand is meant to encompass,

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[11] The City submits copies of Department of Personnel Resolution 88-14, and the approval thereof by the State Civil Service Commission, dated April 12, 1988, in support of this contention.

and that the demand may be construed to include non-mandatory subjects of bargaining and should therefore be considered non-mandatory in its entirety.

Union's Position

The Union asserts that the demand for disciplinary procedures is both mandatory and within the scope of bargaining. The City has conceded that the titles Detective Investigator and County Investigator are in the competitive class of employees and are afforded due process rights under Civil Service Law § 75. Given this status, PERB and the courts have held that there is a duty to bargain disciplinary procedures as they relate to these employees.

Regarding the Rackets Investigator, Senior Rackets Investigator, and Supervising Rackets Investigator titles, the Union argues that the City has failed to demonstrate that each title has been classified noncompetitive and designated confidential as to each of the separate public employers involved here. The documentation submitted by the City shows that in 1988 all three titles were designated confidential noncompetitive only in the New York, Kings, and Queens County District Attorneys' offices. In the Bronx County District Attorney's office, only one title – Rackets Investigator – has been so designated. In the Richmond County District Attorney's office, none of these titles has been so designated. As to the employees serving in any of the titles not designated confidential noncompetitive in any of the District Attorneys' offices, the employees are eligible for due process rights under Civil Service Law § 75 and the parties are required to bargain over alternate disciplinary procedures under established case law.

DISCUSSION

Generally, disciplinary procedures, including procedures for the review of disciplinary action are mandatorily bargainable. *District Council 37*, Decision No. B-25-2001 at 6; *District Council 37*,

Decision No. B-36-2000 at 9-10; *District Council 37*, Decision No. B-3-73 at 8-11. However, where there is a general, special or local law or charter provision that deals with the subject of discipline, the provisions of that law or charter may not be repealed or modified by collective bargaining. *Patrolmen's Benevolent Ass'n*, Decision No. B-12 2004 at 24-26; *Sergeants Benevolent Ass'n*, Decision No. B-22-98 at 19-22; *see Patrolmen's Benevolent Ass'n v. New York State Public Employment Relations Board*, 6 N.Y.3d 563 (2006) (in a case involving New York City police officers, the court held that because there was a local law relating to police discipline, the union's demands or contract provisions relating to police disciplinary procedures were prohibited subjects of bargaining).

It is undisputed that the titles Detective Investigator and County Investigator are in the competitive class of the civil service and, as such, are afforded due process rights under Civil Service Law § 75. No basis has been alleged, and none appears in the record, that would preclude the Union from bargaining disciplinary procedures, including arbitral review of disciplinary action, for the employees serving in these titles. Accordingly, as to these employees, this demand is a mandatory subject of bargaining.

In contrast, this Board finds that those titles that have been designated "confidential noncompetitive" in accordance with Civil Service Law § 42(2-a)[12] are covered by an express

[12] The record shows that the titles Rackets Investigator, Senior Rackets Investigator, and Supervising Rackets Investigator in the offices of the New York, Kings, and Queens County District Attorneys, and the title Rackets Investigator in the office of the Bronx County District Attorney have been designated confidential noncompetitive by the local municipal civil service commission, the Department of Personnel (the predecessor agency of DCAS).

exclusion from disciplinary due process protections under Civil Service Law § 75(1)(c).[13] The application of this exception to investigators employed by a District Attorney is consistent with the judicially recognized policy that a District Attorney must have personnel directly accountable to him, privy to his confidence and enjoying his unquestioned trust; and that implicit in this kind of relationship must be authority in the appointing officer to remove and replace investigators at such times and under such circumstances as he deems necessary.[14] *Matter of Holcombe v. Gusty*, 51 A.D.2d 868 (4th Dep't 1976). Therefore, we find it would be against the public policy expressed in the Civil Service Law, as interpreted by the courts, to permit bargaining over disciplinary procedures that would contravene the limited statutory exception. Thus, as to the confidential noncompetitive titles, this demand is a prohibited subject of bargaining.

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[13] Civil Service Law § 75(1) provides, in pertinent part:

> A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.
>
> * * *
>
> (c) an employee holding a position in the non-competitive class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, ... (Emphasis added.)

[14] This Board further observes that "confidential" status conferred under Civil Service Law § 42(2-a), though effective to remove certain employees from eligibility for disciplinary rights under § 75(1), is not dispositive of their eligibility for collective bargaining rights. "Confidential" under § 42(2-a) is defined differently than the same term as used in Taylor Law § 201(7)(a) for purposes of exclusion from bargaining rights. The application of the term under § 42(2-a) is determined by the local municipal civil service commission while, in New York City, the application of § 201(7)(a) is determined by the Board of Certification. All the titles in the bargaining unit, here, have been certified for collective bargaining in Certification No. 30-75, as amended.

However, there has been no showing that the Rackets Investigator, Senior Rackets Investigator, and Supervising Rackets Investigator titles in the Richmond County District Attorney's office, and the Senior Rackets Investigator, and Supervising Rackets Investigator titles in the Bronx County District Attorney's office have been designated confidential noncompetitive. The City's suggestion, in a footnote in its reply, that these are "temporary" titles is not persuasive, in light of the fact that the titles that are designated confidential were made so in 1988, and there is no evidence that the undesignated titles were only recently created. To the contrary, it appears that the undesignated titles have existed at least in recent years. Further, we cannot accept the City's suggestion, in the same footnote, that these titles should be treated the same as the titles that have been designated confidential. The general rule is that disciplinary procedures are mandatorily bargainable. The public policy exception advocated by the City is based upon a statutory exclusion set forth in Civil Service Law 75(1)(c) which, because it runs contrary to the general rule, must be narrowly construed. It is undisputed that the titles in question here have not been designated confidential in accordance with Civil Service 42(2-a). Therefore, there is no basis to assume that they are excluded from the due process protections of Civil Service Law 75 (which do extend to certain noncompetitive employees). We note that the courts expressly have recognized that while some investigators employed by District Attorneys may be excluded from the due process protections of Civil Service Law § 75, others may be properly classified as eligible for those benefits. *Matter of Dillon v. Nassau County Civil Service Commission*, 43 N.Y.2d 574 (1978) (combination of classifications within a county held not arbitrary). For this reason, we find no public policy impediment to the mandatory nature of the demand to bargain disciplinary procedures on behalf of these titles. Accordingly, unless and until these titles are designated confidential noncompetitive in

accordance with Civil Service Law § 42(2-a), the Union's demand is a mandatory subject of bargaining.

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 Detective Investigators Association of the District Attorneys' Offices of the City of New York, Inc., the negotiability of which was challenged in the scope of bargaining petitions filed by the City, as representative of the offices of the District Attorneys, on September 28, 2006, are within or without the scope of mandatory collective bargaining between the parties to as set forth in the specific rulings contained in the foregoing decision, to the following extent:

The demands designated herein as Nos. 1, 2, and 5 are mandatory subjects of bargaining in all respects, as indicated in this decision;

The demand designated herein as No. 3 is a mandatory subject of bargaining as to the portal to portal travel allowance, and a nonmandatory subject of bargaining as to the overtime guarantee, as indicated in this decision;

The demand designated herein as No. 4 is a nonmandatory subject of bargaining, as indicated in this decision;

The demand designated herein as No. 6 is a mandatory subject of bargaining as to the review of leave balances, and a nonmandatory subject of bargaining as to disputes being grievable, as indicated in this decision;

The demand designated herein as No. 7 is a mandatory subject of bargaining as to the unit titles that have not been designated by DCAS or its predecessor agency as confidential noncompetitive, and a nonmandatory subject of bargaining as to the unit titles that have been so designated as confidential noncompetitive, as indicated in this decision.

Dated: March 29, 2007
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

ERNEST F. HART
MEMBER

GABRIELLE SEMEL
MEMBER

Note: City Member M. David Zurndorfer recused himself and did not participate in the decision in this case.