# *Law Enforcement Employees Benevolent Ass'n*, 79 OCB 18 (BCB 2007)

[Decision No B-18-2007] (IP) (Docket No. BCB-2556-06)
(IP) (Docket No. BCB-2559-06)
(IP) (Docket No. BCB-2593-07)

***Summary of Decision:*** The City and the Union both allege that during the course of negotiations for a new collective bargaining agreement for Environmental Police Officers, each party committed improper practices by bargaining in bad faith, among other things. The Board determined all questions of law in this interim decision, including: the dismissal of those claims that were untimely, were beyond its jurisdiction, or were too vague and unspecific to render a determination; a determination that those in the title Environmental Police Officer do not fall within NYCCBL § 12-307(a)(4); and a determination on several scope of bargaining issues, among other things. The Board also ordered that a hearing be held on the remaining question of fact – whether either party had indeed failed to bargain in good faith – and urged the parties to return to bargain until a final determination can be reached. ***(Official decision follows.)***

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

**In the Matter of the Improper Practice Proceeding**

***-between-***

**LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,**

***Petitioner,***

***- and -***

**CITY OF NEW YORK,**

***Respondent.***

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## INTERIM DECISION AND ORDER

The City of New York ("City") and the Law Enforcement Employees Benevolent Association ("Union") both allege that during the course of negotiations for a new collective bargaining

agreement for Environmental Police Officers ("EPOs"), the other party committed improper practices by bargaining in bad faith, among other things. The Board dismisses those claims that are untimely, involve matters beyond our jurisdiction, or are too vague and unspecific to render a determination; determines that those in the EPOs title do not fall within NYCCBL § 12-307(a)(4); and determines the negotiability of several subjects raised in the bargaining, among other things. The Board orders that a hearing be held on a remaining question of fact – whether either party had indeed failed to bargain in good faith – and urges the parties to return to bargaining until a final determination can be reached.

## PROCEDURAL HISTORY

On June 22, 2006, the City filed a verified improper practice petition against the Union, which was docketed as BCB-2556-06. Petitioner alleges that the Union violated § 12-306(b)(2) and (c)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL") in several ways during the course of negotiations for a new collective bargaining agreement.[1] The City claims that the Union did not bargain in good faith when

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[1] NYCCBL § 12-306 provide, in pertinent parts:

> b. Improper public employee organization practices. It shall be an improper practice for a public employee organization or its agents:
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> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer . .
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> c. Good faith bargaining. The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:

it insisted upon the same collective bargaining agreement as the Patrolmen's Benevolent Association ("PBA"), insisted on bargaining over non-mandatory and prohibited subjects, unilaterally declared impasse, insisted on preconditions for future collective bargaining, refused to respond to the City's bargaining proposals, and refused to negotiate with the City after only two bargaining sessions. On July 10, 2006, the Union filed its verified answer to the petition and a cross-petition, alleging that the City's failure to consider EPOs as police officers and grant them the same collective bargaining agreement as other uniformed members of the City work force, among other things, violated the spirit and intent of the NYCCBL.

On July 21, 2006, the Union filed a "Petition to Resolve Unfair Labor Practice and for Injunctive Relief" against the City, docketed as BCB-2559-06. The Union alleges that the City has violated the spirit and intent of NYCCBL §§ 12-305, 12-306, and 12-307 through the same set of facts as those involved in BCB-2556-06. In its answer, the City maintained that it had not violated the NYCCBL because many of the subjects over which the Union had unilaterally declared impasse were non-mandatory subjects, and that the Union had insisted on bargaining over prohibited subjects such as retirement benefits, among other things.

On January 19, 2007, the City filed another verified improper practice petition against the Union, docketed as BCB-2593-07, claiming that, after the City had filed BCB-2556-06, the Union further violated NYCCBL § 12-306(b)(2) because bargaining had commenced anew in late 2006 and early 2007, then failed because the Union placed preconditions on the resumption of collective

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(1) to approach the negotiations with a sincere resolve to reach an agreement;

* * *

(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays . . .

bargaining.

After both parties submitted their positions on the issue of consolidation of the three petitions, the Board consolidated them.

## BACKGROUND

EPOs are responsible for protecting the watershed areas, water supply systems and installations maintained by the Department of Environmental Protection of the City of New York ("DEP"). Furthermore, EPOs enforce the City's Watershed Rules and Regulations. According to the EPO job specification, of which we take administrative notice, EPOs are classified in the Miscellaneous Service under Rule X of the Personnel Rules and Regulations of the City of New York. Those employees who are classified under Rule X are not included in the Career and Salary Plan. Rules of the City of New York, Title 55, Appendix A, Rule X.

Prior to October 20, 2005, employees in the EPO title were included in a bargaining unit represented by Local 300, Service Employees International Union ("Local 300"). During Local 300's representation of EPOs, it negotiated unit agreements ("Local 300 unit agreements"), which pertained to EPOs and other titles Local 300 represented. Included in those agreements was the 2002-2005 Local 300 unit agreement. Local 300 also negotiated a Supplemental Agreement, pertaining only to EPOs, which took effect in March 2000. The provisions of the Supplemental Agreement cover the subjects of psychological clearances, drug testing, educational requirements, and background checks, among other things.

On June 17, 2003, the Union filed a petition with the Board of Certification to represent employees in the EPO title in a separate bargaining unit. At this time, the City and Local 300 were

parties to a unit collective bargaining agreement for the period of April 1, 2002 through March 31, 2005. During the representation hearings, and while the parties awaited a decision from the Board of Certification, the City and Local 300 negotiated a Memorandum of Agreement extending the Local 300 unit agreement for the period from June 1, 2005 through January 31, 2006.

On June 20, 2005, in *Law Enforcement Employees Benevolent Ass'n*, Decision No. 3-2005, the Board of Certification determined that a separate bargaining unit was appropriate, ordered a separate unit created, and ordered an election to be held. The Union prevailed in the election and was subsequently certified to represent EPOs on October 20, 2005, under Certification No. 5-2005. Subsequent to this decision, the City and Local 300 agreed to a successor unit agreement for the period from February 1, 2006 through February 12, 2007.

The City and the Union held their first bargaining session on November 29, 2005. According to the City, the Union's attorney began the session by demanding that the City recognize the Union as part of the "uniform coalition" because the Board of Certification decision allegedly stated that EPOs are uniformed police officers. He further stated that the negotiations could not go forward unless the City stated affirmatively that EPOs would be negotiating as a uniformed unit, and not a clerical unit. The City's negotiator, an Assistant Commissioner, suggested that the Union submit contract proposals and begin negotiations. At this point, again, according to the City, the Union's attorney declared that the parties were at impasse and asked the City to which forum it should proceed. After a caucus, the Union's attorney stated that the Union wanted the entire "NYPD Police Officers' contract," (BCB-2556-06 City ¶ 7), including all benefits and pensions phased in over a two year period. The Union denies the City's account of how the session transpired but asserts that the Union did request that the City recognize EPOs as police officers and that the City negotiate in

accordance with the collective bargaining law which it asserts provides for such items as pensions, wages, work rules, and benefits.

Shortly after the bargaining session ended, the Assistant Commissioner and the Union President spoke via telephone. The City contends that the Assistant Commissioner advised the Union President that it would be better if the Union submitted written proposals detailing its collective bargaining demands, rather than ask for a "me too" police officer contract. The Union claims that the Assistant Commissioner demanded, rather than asked, the Union to submit a written proposal before it would consider negotiating.

On February 4, 2006, the Union submitted its opening proposal in writing. The City contends that the proposal included numerous items that were either nonmandatory or prohibited subjects of bargaining, including demands regarding retirement benefits.

The parties held a second bargaining session on March 22, 2006. The City contends that at the bargaining session, the Assistant Commissioner responded to each of the Union's proposals and informed the Union which proposals were economic and thus subject to an overall economic agreement and which proposals that the City believed were either nonmandatory or prohibited subjects of bargaining. The City alleges that the Union's attorney, in response, stated that the parties were at impasse over nonmandatory subjects of bargaining. In addition, the Union's attorney insisted that the City negotiate retirement benefits for EPOs, which the City maintained were prohibited subjects of bargaining. The Union denies the allegations, but avers that the Union's attorney read aloud from the NYCCBL after the Assistant Commissioner stated that the City would not negotiate pension benefits for EPOs.

The City further contends that at the meeting, the Union continued to insist that it was

entitled to the same collective bargaining agreement that covers employees holding the title of Police Officer for the New York City Police Department ("NYPD").

The Union, through its attorney, wrote a letter to the City regarding the March 22 bargaining session. He stated that *Law Enforcement Employees Benevolent Ass'n,* Decision No. 3-2005 made it clear that EPOs are police officers entitled to a collective bargaining agreement dedicated specifically to police officers. It continued:

> . . . the City and the DEP have refused to recognize this simple fact and have refused to bargain in good faith. I informed all present at the March 22 bargaining session that LEEBA will not tolerate further bad faith tactics and specifically requires a formal counter-proposal to be delivered within 30 days and with a minimum of two weeks lead time before any further bargaining session [sic] are scheduled. If a counter-proposal is not received in the next 30 days, LEEBA will consider that negotiations have reached impasse.

(City Petition in BCB-2556-06, Exh. 5.)

The Commissioner of the New York City Office of Labor Relations ("Commissioner") responded by letter dated April 7, 2006, on behalf of the City. The Commissioner informed the Union that Decision No. 3-2005 does not require the City to agree to any specific set of demands, but to negotiate in good faith for a collective bargaining agreement for EPOs. In addition, he stated that the Union's insistence on written proposals and unwillingness to meet until said receipt of said proposals potentially constituted an improper practice.

The City sent the Union its proposals for the EPO unit agreement on June 9, 2006. A bargaining session was scheduled for June 12, 2006. Upon receipt of the City's proposals on June 9, the Union President informed the City via the Assistant Commissioner's voicemail that the City's counter-proposals were late under the Union's deadline and could not truly be considered proposals because the City did not submit a police contract for consideration. The Union President then stated

that the Union would thus not attend the bargaining session scheduled for June 12, that it would file an impasse petition with the Public Employment Relations Board ("PERB").

The Union President spoke to the Assistant Commissioner on the morning of June 11, 2006, at which time the City contends that the Union President again stated that EPOs were entitled to a police officer collective bargaining agreement, and that the Union was no longer going to negotiate with the City. The Union denies the allegations except admits that EPOs are police officers entitled to negotiate a police officer collective bargaining agreement. At this time, the City contends, the Assistant Commissioner informed the Union President that the City was prepared to discuss its proposals in greater detail in a face-to-face bargaining session, to which the Union President responded that it would be a waste of time and that the Union planned to file for impasse with PERB. The Union denies this allegation. According to the City, the Union President again insisted that retirement benefits were negotiable subjects of bargaining, and the Union avers that under NYCCBL § 12-307, pension benefits are specifically mentioned as bargainable.

On June 13, 2006, the Union's attorney, on behalf of the Union, submitted an application for injunctive relief and improper practice petition with PERB, asking for them to "take jurisdiction over the case and conduct hearing and arbitration functions to aid in the proper resolution of a police officer collective bargaining agreement for [EPOs] with the City of New York." (City Petition in BCB-2559-06, Exh. 8). The Union named the Office of Collective Bargaining, but not the City, as Respondent. In his supporting affidavit, the Union President stated that the Union's request "was for the NYPD contract to be phased in over a two year period."[2] (Id.).

The charges at PERB were deemed deficient on June 22, 2006. On several occasions in June

[2] The Union did not submit PERB's Declaration of Impasse form.

and July, the Union resubmitted amended charges to PERB, which were dismissed for deficiency and lack of jurisdiction. *LEEBA*, 39 PERB ¶ 3030 (2006).

On July 21, 2006, the Union filed BCB-2559-06.

The City and the Union appeared before a Trial Examiner at a conference regarding the issues presented in BCB-2556-06 and BCB-2559-05. After the conference, the parties considered a resumption of bargaining. On December 13, 2006, the City's Assistant General Counsel wrote to the Union's attorney regarding the issue. The City proposed that both of the then-pending improper practice petitions be held in abeyance while the parties resume bargaining, and responded to a Union request that the City place in writing a list of the proposals which it considered to be non mandatory or prohibited subjects of bargaining. The Assistant General Counsel gave examples of what had been deemed by PERB and the Board of Collective Bargaining as non mandatory or prohibited subjects, but noted that the Union was free to draw its own conclusions as to the bargainability of the proposed subjects of bargaining. The Assistant General Counsel concluded by stating that the City was committed to reaching an agreement and asked the Union to contact the City so that they could arrange for further negotiations.

The Union responded to this letter in writing on December 21, 2006. The Union's attorney wrote:

> . . . One issue must be decided by the City before LEEBA can agree to commence collective bargaining.
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> The essential issue is that the City must recognize EPOs as police officers employed by the City of New York and that they are entitled to unlimited sick leave for injuries sustained in the performance of their police officer duties. Without this official recognition, LEEBA feels any attempt to negotiate will fail. Treating EPOs as though they have police like functions is simply unacceptable and LEEBA hereby declares that it will litigate this issue if necessary. The State of New York has officially granted EPOs Police Officers status and the City must make formal

> recognition. Answer to the issue is essential for LEEBA to agree to place its IP in abeyance and the answer must be 'yes' and official.

(City Petition in BCB-2593-07, Exh. E).

An Assistant General Counsel, on behalf of the City, replied in writing to the Union's letter on January 3, 2007. The Assistant General Counsel responded that the Union's sick leave demand would be best addressed through collective bargaining and requested again that the parties meet to resume bargaining. He also advised the Union that the City considered the placement of preconditions of future bargaining to constitute an improper practice.

The City asserts that on January 5, 2007, the Union President called the Assistant Commissioner and informed her that the Union would not resume bargaining until the improper practice petitions are resolved. The Union denies these allegations but asserts that it cannot negotiate with an employer who conducts unlawful business practices and discriminates against police officers.

On January 8, 2007, the Union's attorney wrote a letter to the Assistant General Counsel, accusing the City of being unwilling to accept the New York State Criminal Procedure Law ("CPL") and recognize EPOs as police officers. Also, the Union asserted that under the General Municipal Law, police officers are entitled to unlimited sick leave. The Union then stated that the parties should just let the Office of Collective Bargaining resolve the issue.

The City filed its second verified improper practice petition against the Union, docketed as BCB-2593-07, on January 19, 2007.

## POSITIONS OF THE PARTIES

### City's Position

The City contends that the Union failed to bargain in good faith and violated: NYCCBL §§ 12-306(b)(2) and (c)(1) by insisting upon the terms and conditions contained in the collective bargaining agreement between the City and PBA; NYCCBL § 12-306(b)(2) by insisting on non mandatory and prohibited subjects of bargaining, including but not limited to retirement benefits; NYCCBL §§ 12-306(b)(2), (c)(1), and (3) by insisting on preconditions for future collective bargaining, by refusing to respond to the City's bargaining proposals, and by refusing to negotiate with the City after only two bargaining sessions were held.

As for the Union's claims against the City, they are untimely and fail for lack of specificity. Furthermore, the Union, despite being represented by counsel, fails to understand the difference between a potential improper practice and a potential contractual grievance; misconstrues mandatory, non mandatory, and prohibited subjects of bargaining; misunderstands the jurisdictional boundaries of the Board and PERB; and continues to commit an improper practice by expressly requesting that EPOs be provided, without bargaining, a collective bargaining agreement identical to the agreement covering police officers of the NYPD.

### Union's Position

The Union contends that: by negotiating with Local 300 for agreements to the Local 300 unit agreement during the time that the Union sought to represent EPOs, and after the time the Union was certified as EPOs' bargaining representative, the City committed an improper practice in violation of NYCCBL §§ 12-305 and 12-306; by negotiating and signing a 2000 Supplemental Agreement, which acknowledges EPOs as police officers, and then "suppressing" EPOs' rights in a "clerical

agreement," the City has committed an unfair labor practice; and that the 28-day work cycle found in the Supplemental Agreement deprives EPOs of overtime pay, which is an unfair labor practice.

Regarding the current round of negotiations, the Union contends that after the City demanded a written contract proposal, and after the Union provided it, the City refused to bargain in good faith on any item contained in the proposal. The City's general refusal to bargain in good faith is exemplified in its purported counter-proposal of June 9, 2006, which fails to include traditional provisions from a police officer agreement. EPOs are considered "police officers" under the CPL and the NYCCBL and the reluctance of the City to recognize EPOs as police officers has lead to an impasse in negotiations. Further, the Union contends that the City has refused to negotiate while claiming that DEP was a necessary party to negotiations, which is violative of NYCCBL §§ 12-305 and 12-306.

The Union also claims that the City has refused to consider implementation of a standard police officer retirement policy, which violates NYCCBL §§ 12-306 and 12-307. Under the NYCCBL, the Union contends, pensions are not a prohibited subject of bargaining, since NYCCBL § 12-307 specifically states as such, and since the City claims the subject is prohibited, it is bargaining in bad faith. The Union further contends that since the City has refused to negotiate and implement a proper police officer sick leave policy for EPOs with unlimited sick leave, like Police Officers from the NYPD receive, the City has committed an unfair labor practice. The Union also contends that the two-year probationary period for EPOs is unnecessary and the City's failure to bargain over it because the City claims it is a non-mandatory management function constitutes an unfair labor practice.

The Union asserts that it has right to file for impasse at PERB since EPOs are New York City

Police under statutory law, and that by filing an improper practice petition with OCB, the City is intentionally trying to block action on the Union's petition at PERB, which is an unfair labor practice.

The Union argues that, upon information and belief, the City has entered into a contractual agreement with a security company, allowing employees of that company to perform EPO job functions and that this agreement constitutes an improper practice.

Further, the Union asserts that, upon information and belief, the City makes the false claim that it is solely responsible for compensating EPOs while knowing that the "Water Authority" budget contains provisions for EPO compensation, and the City refuses to produce the "Water Authority" budget to aid the Union in negotiations, which is an improper practice.

The Union also claims that the City: bases promotions not on a competitive examination but the "whim and desire" of the Chief, in direct violation of the New York State Civil Service Law ("CSL"); regularly schedules of out-of-title work without the existence of a temporary emergency in violation of § 61.2 of the CSL; requires EPOs to use Worker's Compensation benefits and accrued sick leave for injuries sustained in the line of duty, as Worker's Compensation laws provide an exception for police officers injured in the line of duty; and has no provision in the clerical agreement in which EPOs are submerged for light duty or consideration for pregnant female police officers.

The Union also alleges that the City has committed improper practices by failing to implement a proper command discipline policy for EPOs and refusing to take action on the high EPO attrition rate, which causes schedule disruptions.

## DISCUSSION

This case presents numerous issues for the Board to resolve. In reviewing this matter, the Board will resolve all preliminary questions of law in this Interim Decision before it commences a hearing on the remaining question of fact. In so doing, this Board intends this Interim Decision to provide the parties involved with guidance on several issues in controversy in order to facilitate their return to bargaining.

The first issue we shall address is the City's challenge to the timeliness of the allegations found in the Union's petition. Under NYCCBL § 12-306(e), claims of violations of the NYCCBL must be made within four months of the accrual of the claim.[3] *See also* § 1-07(b)(4) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1).

Several of the Union's claims are untimely. First, the Union's allegation that the City committed an improper practice by negotiating with Local 300 for unit agreements, namely the 2002-2005 Local 300 agreement, during the representation process, is untimely. The City's agreement between the City and the Union was executed on May 31, 2005. Since the Union's petition was not filed until July 21, 2006, after the four-month statute of limitations had passed, this allegation is untimely.

Similarly, the Union's claims regarding the 2000 Supplemental Agreement must be dismissed as untimely. The Supplemental Agreement was signed in, and made effective in March

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[3] NYCCBL § 12-306(e) provides in relevant part:
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 this section may be filed with the board of collective bargaining within four months of the occurrence of the acts alleged to constitute the improper practice or of the date the petitioner knew or should have known of said occurrence. . . .

2000, nearly six years prior to the filing of the Union's instant improper practice petition. Therefore, we dismiss these claims. Additionally, the Union had not been certified by the Board of Certification to represent EPOs at the time any of these agreements were negotiated. The Union, throughout its pleadings, continually complains that the City negotiated agreements with Local 300 after the Union had filed its petition, and, therefore, the City had committed an improper practice. However, the mere filing of a petition and the beginning of representation proceedings does not make the Union the certified bargaining representative for EPOs. It was not until the Union was certified as the bargaining representative on October 20, 2005 through Certification No. 5-2005 that the Union became the EPOs' bargaining representative. We find that the Union's remaining claims were filed in a timely manner.

As for the Memorandum of Agreement that extended the 2002-2005 Local 300 unit agreement from 2005-2006, the Union claims that the City committed an improper practice when it negotiated with Local 300 for the extension, which was signed on March 24, 2006. However, on June 20, 2005, the Board of Certification held, in *Law Enforcement Employees Benevolent Ass'n*, Decision No. 3-2005, that EPOs' unit placement was no longer appropriate and that a separate bargaining unit was appropriate for EPOs. Therefore, at the time Local 300 and the City negotiated the extension to the Local 300 unit agreement, EPOs were no longer in the unit covered by the extension. Thus, the Union has not shown that the City committed an improper practice when it negotiated this extension. For these same reasons, we also find that the City did not commit an improper practice by negotiating the 2006-2007 Local 300 unit agreement since it, too, was negotiated after the Board of Certification had determined that EPOs should be in a separate bargaining unit.

A number of the Union's claims concern matters that are beyond our jurisdiction. This Board has the exclusive power to remedy improper practices by both an employer and an employee organization under NYCCBL § 12-309. NYCCBL § 12-309(a) provides, in relevant part:

> 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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> (4) to prevent and remedy improper public employer and public employee organization practices, as such practices are listed in section 12-306 of this chapter . . . .

Several times, the Union claims that the City's actions violate a statute other than our own. The Union claims that the promotion policy at DEP "constitutes an unfair labor practice in direct violation of New York State Civil Service Law" and also claims that the regular scheduling of out-of-title work without the existence of a temporary emergency violates CSL § 61.2. The Union, while directly specifying a violation of a statute other than our own, has not specified how these claims would violate any of the provisions of the NYCCBL. Therefore, these claims are beyond our jurisdiction and must be dismissed. Similarly, the Union's claim that the City requires EPOs to use Worker's Compensation benefits for injuries sustained in the line of duty because Worker's Compensation laws provide an exception for police officers injured in the line of duty also raise an issue that is beyond our jurisdiction. Furthermore, the Union's claim that pregnant EPOs are disparately treated from other City employees is also a claim that is beyond our jurisdiction. Since the Union does not specify how either of these last two claims violate the NYCCBL, we dismiss these claims as well.

Although both parties' assertions primarily involve allegations that the other party has not bargained in good faith, in determining the parties' bargaining obligations we must first consider the

applicable level of bargaining. In this regard, we examine whether EPOs qualify for bargaining under NYCCBL § 12-307(a)(4), as asserted by the Union. Answering that question will guide our determination of whether the subjects of bargaining over which the parties are in dispute are mandatory, non-mandatory or prohibited subjects of bargaining, whether those subjects that are mandatory may be bargained at the unit level, aid the parties in future bargaining, and ultimately assist us in our determination of whether either party did not bargain in good faith.

NYCCBL § 12-307(a)(2) provides, in pertinent part:

> [ P]ublic employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . , hours (including but not limited to overtime and time and leave benefits) [and] working conditions . . . except that . . . :
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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 employees 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 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; . . .

Furthermore, NYCCBL § 12-307(a)(4) states, in pertinent part, that:

> [A]ll matters, including but not limited to pensions, overtime, and time and leave rules which affect employees in the uniformed police . . . services, or any other police officer as defined by subdivision thirty-four of section 1.20 of the criminal procedure law who is also defined as a police officer in this code, shall be negotiated with the certified employee organizations representing the employees involved.

We first address whether EPOs, as a class of employees, fall within the "uniformed police . . . services" clause of NYCCBL § 12-307(a)(4). Under CSL § 20 the Department of Citywide Administrative Services ("DCAS") has the sole authority to create and classify titles. In order to

understand the statutory meaning of the "uniformed police . . . services", we take administrative notice that DCAS did not classify the EPO title in the class of positions titled "Police Service [007]". Rather, EPOs are classified as "Miscellaneous Service[037]", as set forth in the job specification for the EPO title. Since DCAS has defined a class of positions entitled "police service", and the EPOs are not part of this class of positions, we find that EPOs fall outside the provisions of the first clause of § 12-307(a)(4).

We next consider whether EPOs fall under the second definitional clause of § 12-307(a)(4). Under this provision, EPOs must be defined as a police officer under § 1.20 of the CPL, *and* be defined as a police officer in the New York City Administrative Code to qualify as "police officers" pursuant to the NYCCBL. The CPL and the Administrative Code are two separate bodies of laws and, to qualify for the uniformed force level of bargaining under the NYCCBL, EPOs must be defined as "police officers" under *both* sets of laws. In *LEEBA*, Decision No. 3-2005, the Board of Certification recognized that EPOs were police officers under § 1.20 of the CPL. Thus, the remaining question is whether EPOs are defined as "police officers" in the Administrative Code.

Despite being requested to do so, the Union has not identified a section of the Administrative Code that specifies that EPOs are police officers. Our own review of the Administrative Code reveals that several sections define other titles employed by the City as police officers. Administrative Code §§ 14-101 - 14-151 make it clear that those in the title of Police Officer working for the police department of New York City are police officers. EPOs do not fall under that definition, as they do not have that title, and they are not employed by NYPD. Additionally, in at least two different areas, the Administrative Code defines certain other titles as "police officers." These titles, which are specifically enumerated in their respective sections, include an array of fire

marshal titles in Administrative Code § 15-117, and detective investigator and related titles in Administrative Code § 12-134. The employees in these specified titles thus are covered by NYCCBL § 12-307(a)(4).

However, in the instant matter, rather than identifying any provision in the Administrative Code which would define EPOs as "police officers," the Union primarily relies on the EPOs' status as police officers under the CPL, which is a different statute than the Administrative Code and cannot, on its own, suffice to define EPOs as police officers for purposes of NYCCBL § 12-307(a)(4).

Therefore, we find that the Union has not shown that the provisions of NYCCBL § 12-307(a)(4) are applicable to EPOs because they are not defined as "police officers" in the Administrative Code.[4] However, we note that EPOs are classified as Rule X employees in the Miscellaneous Service and, by definition, Rule X excludes them from the Career and Salary Plan. Since EPOs are not included in the Career and Salary Plan, the provisions of NYCCBL § 12-307(a)(2) do not apply to them for bargaining purposes. So as to issues raised in § 12-307(a)(2), these may be negotiated at the unit level.

Taking all of the above into consideration, we move on to address the bargainability of the remaining specific subjects of bargaining in question. One of the Union's primary contentions is that pensions and retirement issues are a mandatory subject of bargaining under NYCCBL § 12-307.

Despite the reference to pensions in our statute, the Union is flatly incorrect in its assertion:

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[4] The Union had requested that the entire record from Decision 3-2005 be entered into this record so that it may aid in the Board's determination of whether EPOs were "police officers" pursuant to the NYCCBL. We will not enter the record from the Board of Certification's earlier decision into this record because it is not probative of whether EPOs fall under NYCCBL § 12-307(a)(4).

pensions and retirement are a prohibited subject of bargaining. The superseding provisions of New York State Retirement and Social Security Law ("RSSL"), Article 12, § 470 impose a moratorium on pension bargaining and specifically prohibit changes negotiated between any public employer and public employee with respect to any benefit provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries.[5] Moreover, pensions and retirement are also rendered a prohibited subject under § 201(4) of the Taylor Law.[6] This Board and the courts have recognized that these statutes supersede the reference in the NYCCBL and that these are now prohibited subjects under the NYCCBL, as well. *Detective Investigators Ass'n of the District Attorneys' Offices*, Decision No. B-13-2007 at 10; *Uniformed Firefighters Ass'n*, Decision No. B-45-92 at 44; *Uniformed Firefighters Ass'n*, Decision No. B-44-

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[5] The full text of Article 12, § 470 of the RSSL provides:

> Temporary suspension of retirement negotiations. Until July first, two thousand seven, changes negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees or their beneficiaries, shall be prohibited. Thereafter, such changes shall be made only pursuant to negotiations between public employers and public employees conducted on a coalition basis pursuant to the provisions of this article; provided, however, any such changes not requiring approval by act of the legislature may be implemented prior to July first, two thousand seven, if negotiated as a result of collective bargaining authorized by section six of chapter six hundred twenty-five of the laws of nineteen hundred seventy-five.

[6] Section 201(4) of the Taylor Law provides:

> The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

92, *modified*, *City of New York v. MacDonald*, No. 45920/92 (Sup. Ct. N.Y. Co. June 23, 1993), *aff'd,* 213 A.D.2d 287, 624 N.Y.S.2d 827 (1st Dep't 1995), *appeal dismissed,* 86 N.Y.2d 773, 631 N.Y.S.2d 600 (1995); *Local 3, IBEW, AFL-CIO*, Decision No. B-23-75 at 9. Therefore, it is well-established that pensions and retirement are a prohibited subject of bargaining, and the parties may not negotiate over this subject.

We now consider whether the remaining subjects in dispute are mandatory or non-mandatory subjects of bargaining. The pertinent provisions of NYCCBL § 12-307 provide:

> (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), working conditions . . . .
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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; . . . 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 terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

The Union claims that the City has committed an "unfair labor practice" because it has refused to negotiate and implement a "proper police officer sick leave policy." The Union refers to "unlimited sick leave" as provided for in the PBA agreement, which, we take administrative notice, is in excess of that provided for by the General Municipal Law ("GML"). *See* GML § 207-c . We acknowledge that the GML provides for unlimited sick leave for line-of-duty injuries, but it is not for this Board

to determine who is covered by that statute. We note that the subject of a sick leave benefit is a mandatory one under NYCCBL § 12-307(a). *District Council 37, AFSCME*, Decision No. B-34-2006; *Correction Officers Benevolent Ass'n*, Decision No. B-26-2002. In light of the Union's reference to the PBA agreement, however, we caution that while this benefit is bargainable, there is no automatic entitlement to a benefit exactly as negotiated by another union.

Additionally, the Union's assertion that the two-year probationary period for EPOs is a mandatory subject of bargaining is again incorrect. Probationary periods are the subject of statutory discretion given the local civil service commission pursuant to CSL § 63.[7] Thus, the subject of probationary periods is a non-mandatory subject because the topic involves the exercise of the City's statutorily-mandated discretion. In so holding, we note that this ruling would be the same for both

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[7] CSL, Title B, § 63, entitled, "Probationary Term", provides:

> 1. Every original appointment to a position in the competitive class and every interdepartmental promotion from a position in one department or agency to a position in another department or agency shall be for a probationary term; provided, however, that upon interdepartmental promotion the appointing officer may waive the requirement of satisfactory completion of the probationary term. The state civil service commission and municipal civil service commissions may provide, by rule, for probationary service upon intradepartmental promotion to positions in the competitive class and upon appointment to positions in the exempt, non-competitive or labor classes. When probationary service is required upon promotion, the position formerly held by the person promoted shall be held open for him and shall not be filled, except on a temporary basis, pending completion of his probationary term. Notwithstanding the foregoing or any other law or rule to the contrary, when a permanent appointment or promotion to a position in the competitive class is conditioned upon the completion of a term of training service or of a period of service in a designated trainee title, such service and the probationary term for such competitive position shall run concurrently.
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> 2. The state civil service commission and municipal civil service commissions shall, subject to the provisions of this section, provide by rule for the conditions and extent of probationary service.

uniformed and civilian City employees.

Reaching the other actions alleged to be improper practices, the Union argues that it has the right to file for impasse at PERB since EPOs are considered police officers and that, by filing an improper practice petition with the Board of Collective Bargaining, the City is intentionally trying to block any action on the Union's petition at PERB. We note that, as in so many other instances, the Union has failed to identify a provision in the NYCCBL that the City has violated. We find that the City's exercise of its right to file an improper practice with the Board – which has exclusive jurisdiction over such matters (*See Patrolmen's Benevolent Ass'n, Inc. v. City of New York*, 97 N.Y.2d 378, 390-391 (2001)) – cannot be construed to constitute an improper practice under any provision of the NYCCBL. We further note that there is no evidence that the Union has filed a Declaration of Impasse form with PERB.[8]

The Union claims that the City has entered into a contractual agreement with a security company to allow employees of that company to perform EPO job functions, but apart from one reference in an affidavit to a May and June 2006 Union investigation into EPOs' (undated) complaints, the Union does not specify when it was first made aware of those complaints. Indeed, the Union's legal arguments regarding this matter are completely devoid of dates and other pertinent information, and it makes the assertions "upon information and belief." Therefore, we dismiss this claim without prejudice to the Union's re-filing the claim in a new petition with greater specificity and detail than it has provided here.

The Union also argues that the City refuses to produce the Water Authority budget to aid the

[8] The Union did file an improper practice charge with PERB that was dismissed for deficiency and lack of jurisdiction. *Law Enforcement Employees Benevolent Ass'n,* 39 PERB ¶ 3030 (2006).

Union in negotiations. The Union's allegations in this regard are vague and unspecific, so we are uncertain as to which Water Authority budget it refers, as there are numerous water authorities throughout the state that are not mayoral agencies, including the New York City Municipal Water Finance Authority, which is an independent corporate body, a public benefit corporation, and not a mayoral agency. Therefore, the Union has not established an entitlement to this information and this claim is dismissed.[9]

We dismiss those remaining claims that are too vague to state an improper practice claim under the NYCCBL, and/or fail to identify a provision of the NYCCBL that has been violated. Those claims include the City's alleged failure to take action on the alleged high EPO attrition rate and the failure of the City to implement a proper command discipline policy for EPOs. To the extent that the parties may attempt to bargain over a disciplinary policy, we note that with regard to discipline, the decision to take such action is within management's prerogative under NYCCBL § 12-307(b). Any procedures used to implement that decision and/or review that decision and its consequences are, however, mandatory subjects of bargaining. *Locals 2507 and 3621, District Council 37*, Decision No. B-16-96 at 13. The failure to have existing disciplinary procedures, prior to the negotiation of that subject, is not an improper practice.

Finally, we find that the remaining issues concerning bargaining require a hearing before we can make a determination. We order that hearing be held on the subject of the actual conduct of the parties' negotiations to adduce a factual record upon which this Board may make legal findings as to whether either party did not bargain in good faith. We limit the hearing to those events which

[9] We take administrative notice of the fact that the financial statements of the Municipal Water Finance Authority are contained in that body's annual report, which may be accessed via the internet.

occurred in the four months prior to the filing of each of the parties' petitions.

Until this Board can hold a hearing on this matter and render a final determination, we encourage the parties to meet and re-commence negotiations utilizing the holdings of this decision to guide them. In considering a return to the bargaining table, we note that should the City or the Union ultimately prevail on this remaining claim, the Board would order the parties to bargain in good faith. Accordingly, as described above, we dismiss the all of the Union's claims other than that of a failure to bargain in good faith on behalf of the City. As to each parties' claims that the other failed to bargain in good faith, we order that a hearing be held to determine that sole remaining question.

**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 improper practice petition docketed as BCB-2559-06, be and the same hereby is, dismissed in part, and it is further

ORDERED, that a hearing be held on the timely, remaining allegations found in BCB-2556-06, BCB-2559-06, and BCB-2593-07, to determine the actual conduct of the parties' negotiation sessions before we make a final determination.

Dated: New York, New York
May 3, 2007

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

I dissent.

CHARLES G. MOERDLER
MEMBER