Patrolmen's Benevolent Ass'n, 19 OCB 9 (BCB 1977) [Decision No. B-9-77], aff'd, affirmed, City of New York v. Patrolmen's Benevolent Ass'n, No. 6574/77 (Sup. Ct. N.Y. Co. Sept. 30, 1977) (oral decision).

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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PATROLMEN'S BENEVOLENT
ASSOCIATION,

Petitioner DECISION NO. B-9-77

-and

CITY OF NEW YORK,

DOCKET NO. BCB I-14-77

Respondent
- - - - - - - - - - - - - - - - - - X

APPEARANCES:

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for THE CITY OF NEW YORK

DECISION AND ORDER

The one-member impasse panel appointed in the contract dispute for the term July lf 1976 through June 30, 1978, between the Patrolmen's Benevolent Association (PBA) and The City of New York released its Report and Recommendations on June 17, 1977. This panel is referred to herein as the "Levin" panel to distinguish it from a prior panel (the Coulson panel) whose procedures are also discussed in this decision. On JLly 15, 1977, the City of New York accepted the recommendations. On the same day, the PBA rejected the recommendations and on July 25, the PBA filed its Notice of Appeal and Petition. The City filed its Answer on August 4, 1977.

On August 17, 1977, the Board heard oral argument in the matter. By letter of August 22, 1977, the PBA requested that the Board first rule "whether it has jurisdiction or not substantively to consider the award," and that the Board advise the PBA either of its jurisdictional ruling or that it has extended the time within which to rule pursuant to NYCCBL §1173-7.0c(4)(d). The City, by letter of the same date, objected to the PBA requests.

At the oral argument, counsel for the PBA and the City of New York were in agreement and informed the Board that, as a result of neaotiations and ratifications of a contract by the PBA membership on August 10~ 1977, all subjects of the dispute except the status of the panel's recommendation for deferral of a 6% salary increase for the period July 1, 1976 through June 30, 1977 were settled on the basis of the panel recommendations or on the basis of the further negotiations as ratified by the membership. They sharply disagreed as to whether the parties have reached agreement that would be dispositive f the 6% salary deferral issue.

The PBA, although declining to withdraw its appeal of the recommendations of the panel made an oral motion that the Board consider the entire case moot. The PBA argues that the parties had agreed in their negotiations that the issue of the 6% wage deferral for one year be decided by a case now pending in Supreme Court. The City disputes the PBA's contentions, asserting that the issue of the 6% deferral is still pending before the Board, and alleging that the parties only agreed during their negotiations that the City could pursue all its rights in the appeal pending before the Board.

Prior Impasse Award

On April 30, 1975, an impasse panel (the Coulson panel) appointed to make recommendations for a contract period of July 1, 1974 through June 30, 1976, issued its report and recommendations. So far as relevant herein, the panel recommended a "6% wage increase in the basic rate for fiscal 1975-76, effective July 1, 1975" (Docket No. 1-115-74).

The Court of Appeals, in PBA v City of New York, 41 NY 2d 205 (1976), described what ensued thereafter:

> "The Panel's findings were accepted in writing by both parties and neither sought to appeal the determination to the Board of Collective Bargaining, although the avenue was open to them. Subsequently, the Panel's findings were incorporated into a tentative collective bargaining agreement. While the representative of the PBA signed this tentative agreement, the City refused to do so, giving as a reason the City's increasingly grave financial outlook.
>
> "Faced with the City's refusal to execute and perform the agreement, the PBA, by order to show cause, brought on a proceeding under Article 75 of the CPLR to confirm the award of the Impasse Panel. The City cross-moved to dismiss the petition on the ground that the decision of the Impasse Panel did not constitute an award within the meaning of

> Article 75. The City's cross-motion was denied. The City having subsequently failed to timely serve its answer to the petition, the petition was granted upon default, and the Impasse Panel's determination was confirmed by an order and judgment dated and entered on July 1, 1975.
>
> "Thereafter the City commenced computing and paying the retroactive salary increase for the 1974-1975 fiscal year and the increase ordered for the 1975-976 fiscal year, in compliance with the terms of the July lst order. In September 1975, however, the Legislature enacted the law freezing the wages of the City's employees [citations omitted] and the City immediately discontinued paying the 1975-1976 increase."

The Court of Appeals ruled that the Financial Emergency Act (FEA), Laws of 1975, ch. 868, as amended, was not applicable to the judgment obtained by the PBA two months prior to enactment of the FEA. Therefore, the City was obligated to pay the 6% increase for fiscal 1975-76 as recommended by the Coulson panel. Other municipal unions, pursuant to FEA §10, had deferred similar wage increases to which they would have been entitled. Thus, the PBA membership like other City employees, received a wage increase for fiscal 1975-76.

Interim Recommendations of Levin Panel

On April 8, 1977, the panel in the instant impasse, the Levin panel, issued an Interim Report and Recommendations. The panel recommended, in substance:

1) Payment of a cost of living adjustment, effective July 1, 1976, per police officer.

2) Contribution by the City of $400 per/annum. per covered retiree commencing July 1, 1976:

"Prior obligations for the period July 1, 1974 through June 30, 1976 of City payments to retirees welfare fund shall be credited to the PBA's share of the $24 million per annum fringe benefit reduction required by the Hilton Interim Agreement."

3) "Deferral of the City's annual annuity contribution in the amount of no more than $200 per year per employee for the period July 1, 1976 to June 30, 1978."

The panel's finding on item 1 including its retroactive effect was urged by the PBA. The findings as to items 2 and 3 which also have retroactive effects were sought by the City. Doth parties accepted the Interim Award. Neither Darty at any time raised any question as to the panel's authority to make such findings covering the entire contract period including retroactive provisions altering conditions which had prevailed pursuant to the status quo prescribed by Sec. 1173-7.0d.

Litigation In Supreme Court

Subsequent to the appointment of the Levin impasse panel and the issuance of its Interim Award, on April 22, 1977, the PBA commenced an action against the City of New York in Supreme Court for a declaratory judgment. The complaint sought a judgment declaring that "these police officers are entitled to status quo continuation of the salary scales and related benefits established for them and which they began to receive for the 1975-1976 fiscal, year."

The complaint alleged that the City had failed to continue the 6% waqe increase resulting from the earlier wage freeze litigation beyond the June 30, 1976 termination date of the earlier imnasse panel recommendations. The relief sought by PBA, inter alia, was a finding by the Court that "Until the parties enter into a new collective bargaining agreement, the City is required to continue to compute and to pay salaries and related benefits at the same rates for fiscal 1975-1976."

The City of New York served its Answer, dated July 12, 1977, which relied, in substance, on the Report and Recommendations of the Impasse Panel herein that there be a 6% deferral for July 1, 1976 through June 30, 1977.[1] The Answer alleged that the panel, pursuant to its power to rule retroactively in the dispute before it, had recommended the deferral, and that any appeal of the panel's recommendations must be brought before the Board of Collective Bargaining. The City further alleged that payment beyond June 30, 1976 was not required by the judgment in the prior case and was not included in the status quo because it did not arise from the collective bargaining process.

No further action has been taken by either party to advance the litigation of this matter.

[1] These Recommendations are discussed more fully below

Final Recommendations of Levin Panel

The City contended before the Levin panel that its recommendations should include deferral of 6% of the wages for 1976-77 in order to rectify the "imbalance in the total financial structure under which the City has been operating during the fiscal crisis," and on the ground of comparability with other uniformed forces.

The PBA, in its argument to the panel, contended that the imbalance was due to the City's own prior actions, that the status quo provisions of NYCCBL §1173-7.Od barred th,arequested wage deferral, and that the panel should not rule on the 6% deferral because the matter had been presented to the Supreme Court for determination.

The Levin Panel recommended that 6% of the wages of unit members be deferred for the period July 1, 1976 through June 30, 1977. The panel said:

> "Such deferral shall be subject to each and every term and condition of the deferral agreements covering the period 1975-1976 as executed by the other municipal labor unions. It is understood that effective July 1, 1977 the aforesaid deferred 6% salary increase shall be included in the salary of police officers as expeditiously as possible.;" (page 9)

The Panel discussed the rationale which supports its deferral recommendation. Although recognizing that the lack of a prior PBA deferral agreerrent right be "of the City's own making", the Panel found that the imbalance created between the PBA and other municipal unions was "in conflict witK, the statutory crit(-,ria of comparability" of NYCCBL 51173-7.0c(3)(b); and that "the failure of the PBA to defer has created an anomaly in this impasse as well as in the overall municipal labor relations in the City of New York." Further, the panel found that it was not barred by the status quo provisions of the NYCCEL from recommending a wage deferral retroactively to the initial date of the 1976-1977 contract. It held:

> "Since the Panel's mandate is to fashion recommendations commencing July 1, 1976, the Panel is not precluded from exercising its legitimate responsibility to so rule simply because it is considering the issues at a time after July 1, 1976."

Finally, the Panel considered PBA's contention that it should not rule on the 6% deferral because of the litigation pending in Supreme Court.

The Panel rejected this argument, and reasoned that if the Panel did not make recommendations for a 6% deferral for July 1, 1976 through June 30, 1977, it would thereby be precluded from recommending that, upon the end of the deferral period, the 6% be paid to the police officers. The panel found that by failing to rule it would leave the "salary issue in limbo with possible adverse and unintended consequences", since litigation and appeals in this matter could cause police officers to continue to receive less than other comparable City employees, possibly for years. The Panel found that such.a situation would be "most disruptive to the City and financially disadvantageous to police officers."

At Oral Argument, the parties advised us that they entered into extensive negotiations with regard to recommendations of the impasse panel. Following this, the PBA submitted what it considered to be the results of the negotiations to its membership. The ratification by the membership was recorded on August 10, 1977.

Jurisdiction of the Board

As recited above, the parties disagree over the 6% litigation; specifically, they disagree whether the City, as part of the settlement ratified by the PBA membership, was obligated to relinquish its rights before this Board and could continue to press its rights only in Supreme Court. This disagreement, if pursued through legal determination, would he within the exclusive jurisdiction of the Public Employment Relations Board under the Taylor Law, §209-a of Civil Service Law, Article XIV. Thus, we shall not decide what the terms of the settlement were, if any, concerning the 6% litigation. Our decision herein therefore is without impairment of the respective rights of the parties in all other fora with regard to whatever mcalifications of the nanel recommendations they may be found to have agreed upon subsequent to the issuance of the recommendations.

We have the pcwer and the duty, however, not only to construe the status quo requirements of New York City Collective Bargaining Law (NYCCBL) §1173-7.0d, but also the power and the duty to rule on the PBA appeal from the 6% deferral,recommendation of the impasse panel.[2] The PBA has specifically declined to withdraw this appeal, but has urged us to consider this matter moot. Clearly, however,

[2] NYCCBL §1173-5.0a.

the matter is not moot; it continues-to be a subject of contention and dispute between the parties. Nor is our jurisdiction based solely on the pendency of the PBA's appeal nor on such rights as the City may assert to a final adjudication by the Board of the issues thus presented. The Board, itself, is authorized by §1173-7.0c(4)(a) of upon its own initiative [to] review recommendations which have been rejected." However equivocal may be the PRA's position as to its appeal, there can be no question that it rejected the panel's recommendations.

Moreover, to find that we do not have jurisdiction would be to abdicate our statutory duty pursuant to NYCCBL §1173-7.Oc to administer the impasse proceduv#s and to rule on appeals from impasse panel recommendations. As the administrative agency charged with the interpretation and administration of the NYCCBL, this Board has the duty, in the first instance, to issue interpretations of this statute. The suggestion that we defer such interpretation to the Court would be contrary to the statutory scheme of the NYCCBL. Consequently, we view PBA's commencement of an action in Supreme Court for the purpose of litigating its rights under the NYCCBL to be premature because PBA has not exhausted its administrative remedies.

Further, we note that PBA, had it wished timely to raise the issue of the panel's power to recommend retroactive deferral of wages, was free to file a scope of bargaining petition pursuant to NYCCEL §1173-5.0a(2).

Discussion

Neither at the oral argument on August 17, 1977, nor in its letter of August 22, 1977, has the PBA presented to this Board any statutory justification for a separate decision of the question of jurisdiction. Accordingly, we follow our regular practice of ruling on all questions raised upon review of the Report and Recommendations of an impasse panel.

The Board set forth the standards for review of impasse panel recommendations pursuant to NYCCBL §117307.0c(4) in its first decision upon an impasse panel appeal:

> "We interpret this section of the law as creating a form of appeal procedure and not as warranting de novo proceedings following the rejection of an impasse panel's Report and Recommendations; in fact, it may be said that the concept of review is inconsistent with that of hearing de novo except in extraordinary circumstances. We do not conceive it to be our function in such proceedings to substitute our judgment, in determining the facts and adjudicating the merits, for that of an impasse panel. Our principal statutory responsibility is to examine the record to determine whether the parties have been afforded a fair hearing and whether the record provides substantial support for the result reached by the impasse panel; if it does, the fact that an interested party or that the Board might be able to conceive other results is not controlling. If the impasse panel has afforded the parties full and fair opportunity to submit testimony and evidence relevant to the matter in controversy; unless it can be shown that the Report and Recommendations were not based upon objective and impartial consideration of the entire record; and unless clear evidence is

> presented on appeal either that the proceeding have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law, the Report and Recommendations must be upheld."[3]

We find that the Levin panel properly performed its duties pursuant to NYCCBL §1173-7.0c(3). The panel fully and fairly considered the facts in the record, the arguments advanced by the City and the PBA, -- giving special and detailed attention to the 6% deferral -- and made its recommendations in light of the statutory standards set forth in 51173-7.0c(3)(b).

[3] City of New York and Podiatry Society of the State of New York, Decision No. B-23-72.

We find further that the panel's conclusions as to its power and jurisdiction under the status quo provisions of NYCCBL §1173-7.Od are in accord with the statute and with our own prior decisions construing the status quo requirement, and are fully consonant with a recent New York State Court of Appeals decision concerning status quo requirements in public employee labor relations. [4]

The status quo provision of NYCCBL §1173-7.Od provides that:

> "During the period of negotiations between a public employer and a public employee organization concerning a collective bargaining agreement, and, if an impasse panel is appointed during the period commencing on the date on which such panel is appointed and ending thirty days after it submits its report, the public employee organization party to the negotiations, and the public employees it represents, shall not induce or engage in any strikes, slowdowns, work stappages, or mass absenteeism, nor shall such public employee organization induce any mass resignations, and the public employer shall refrain fra, unilateral changes in wages, hours, or working conditions. This subdivision shall not be construed to limit the rights of public employers other than their right to make such unilateral changes, or the rights and duties of public employees and employee organizations under state law. For purpose of this subdivision the term period of negotiations' shall man the period commencingg on the date on which a bargaining notice is filed and ending on the date on which a collective bargaining agreement is concluded or an impasse panel is appointed.,,

[4] See BOCES OF ROCKLAND COUNTY, discussed infra.

We have consistently held that the statutory purpose is to preserve the balance between the parties during their negotiations by preventing unilateral changes by either party. In District No. 1, MEBA and City of New York, Decision No. B-1-72, we held:

> "We are of the opinion that the meaning and purpose of the status quo provision of the NYCCBL is to maintain the respective positions of the parties and the relationship between them essentially unchanged during periods of negotiation, during impasse panel proceedings and for thirty days after issuance of panel reports. This end is obtained, in part, by prohibiting the change of any condition created by a prior contract during the period prescribed by the status quo provision. This interpretation of the status quo provision is consistent with the policy enunciated in the Report of the Tripartite Committee of March 31, 1966. The 'rights normally enjoyed by employees in private employment (but) not available by law to employees in public employment' are, in our view, intended to be replaced by the assurance that upon termination of a prior contract the terms and conditions of their employment cannot be reduced or otherwise changed except by negotiation during the statutory period. The denial of the power to strike is balanced by the maintenance of the status quo."

The status quo provision of the statute was not intended, and has never been construed, to prevent the parties or an impasse panel from making retroactive alterations in terms and conditions of employment, including wages. The essential purpose of a status quo requirement is to preserve

equilibrium while actual negotiations are taking place. This purpose does not forever freeze previously established terms and conditions of employment, nor does it require that the parties or an impasse panel should be barred from effecting changes retroactively to the initial date of the contract at issue once the period of unsuccessful negotiations for said contract has terminated.

Due to the various conditions affecting public employee labor relations in the City of New York, most collective bargaining agreements are executed and implemented after their effective date. Similarly, impasse panel recommendations are issued and become final and binding after the beginning of the new contract period.

The retroactive effect of impasse panel recommendations has not previously been questioned. Indeed, the PBA has in the past accepted the right of an impasse panel to rule retroactively. [5] In the very case before the Board, the Interim Recommendation of the Levin panel, issued on April 8, 1977, provided for retroactive increases and retroactive decreases in the benefits received by police officers. The Interim Report is clear that the PBA argued strenuously for

[5] The Coulson panel issued its recommendations on April 30, 1975, for a contract period of July 1, 1974 to June 30, 1976; it included retroactive increases in the wage levels theretofore prevailing and maintained during the status quo period.

the retroactive increase in the form of "old COLA"[6] while at the same time urging postponement of retroactive "give backs" on the ground that such retroactive decreases in benefits could be considered in the panel's final report. The PBA did not argue that the Levin panel had no power to order "give backs." As described above, the panel's Interim Recommendations provided for both retroactive increases and decreases; the panel recommended "old COLA" payments of $441 per officer, effective July 1, 1976, and the panel recommended retroactive reductions in the City's obligation to make welfare payments and retroactive deferrals in the City's annuity contributions. The City and the PBA accepted these Interim Recommendations. The PBA did not allege that the status quo requirements of NYCCBL §1173-7.0d barred the retroactive ruling contained in the Interim Report. It is clear, therefore, that the PBA position herein is not only contrary to the language and intent of the status quo provision but also inconsistent with PBA's own actions and formal positions taken earlier in this proceeding.

[6] Cost of Living Adjustment.

As indicated above, the PBA position is contrary to the policy expressed in a recent ruling of the Court of Appeals in BOCES of Rockland Count v NYSPERB et al., _____NY2d_____May 12, 1977). In that case, while expressing limited approval of PERB's "Triborough Doctrine" for maintenance of the status quo, the Court nevertheless prohibited any change in the salary of employees during a period of negotiations, even when such changes amounted only to the payment of annual increments. The Court held that the "existing relationship" must be preserved during the negotiations, but that the status quo may not be used to "lock the employees into a guaranteed gain position." An effect of the Court's ruling was that, especially in a time of fiscal crisis in local government, employees covered by contract negotiations should not receive an increase in economic benefits while the negotiations were taking place, because such increase would constitute an inequality and work an imbalance in the respective positions of the government and the union involved. Such an unfair imbalance would result if we adopted the PBA contentions herein. - If no retroactive

treatment of benefits were possible, the employees would profit from a prolongation of impasse procedures. Each day that the negotiations of impasse proceedings continued, unit members would accrue benefits not subject to examination and rulings by the panel. Such a situation would, in the language of the Court of Appeals impermissibly "lock the employees into a guaranteed gain position."

We find that as to all issues covered by its recommendations the impasse panel herein fully and fairly considered the facts in the record, the arguments advanced by the City and the PBA, and properly applied the statutory standards and criteria set forth in NYCCBL §1173-7.0c(3)(b).

We find, further, that the recommendation for deferral of 6% of police officers' basic wage rate for the period July 1, 1976 to June 30, 1977 was properly within the competence of the panel, was consistent with wage policy for all City employees, and constitutes a vital element in the symmetry of rights and duties of the parties established by the panel herein. Accordingly, we shall affirm the entire Report and Recommendations. Such affirmance is without prejudice to the right of the parties regarding such amendments and changes in the terms of the recommendations or of their collective bargaining relationship as they may have reached or may hereafter reach by direct negotiation and mutual agreement.

O R D E R

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

DETERMINED, that the impasse panel's Report and Recommendations including the Interim Report and Recommendations were fair and proper and in accordance with the facts and the law; and it is further

ORDERED, that the Report and Recommendations including the Interim Report and Recommendations be, and the same hereby are, affirmed; and it is further

ORDERED, that the respective rights of the parties with regard to whatever modifications of the Report and Recommendations they may have agreed to are hereby reserved.

DATED: New York, New York
August 23 , 1977

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No.21

At the outset the Court would Like to acknowledge the diligent and dedicated efforts of counsel for the parties. You have exhibited a zealous and professional representation on behalf of your respective clients.

Now turning to the matter at hand, following my examination and consideration of all these papers recently submitted to me on this expedited application, and after listening to extensive and highly competent oral argument it is the opinion of this Court that this application by the City of New York, pursuant to CPLR §7510 for a judgement confirming the Decision and Order of the Board of Collective Bargaining dated August 23, 1977, which affirmed the Report and Recommendations of the Impasse Panel dated June 10, 1977, is granted.

In so doing, the Court finds that with respect to the issues encompassed by its recommendations the impasse panel fully and fairly considered the facts on the record

and the contentions of the respective that it properly performed its obligations pursuant to the pertinent statutory standards as provided in New York City Collective Bargaining Law, Section 1173-7.0c(3)(b).

Inasmuch as the deferral of the 6% wage increase for July 1, 1976 to June 30, 1977 represents the focal point of the controversy as expressed upon, oral argument, the Court feels it is appropriate to point out that the panel's recommendations that he 6% for that period be deferred was properly within the competence of the panel, was given due considerations by it, and was consistent with wage policy considerations for all City employees. The status quo provisions of NYC CBL 1173-7.0d was not intended to bar the parties or on impasse panel from effecting retroactive changes in terms and conditions of employment. This includes wages. What it prescribes are unilateral changes.