**Uniformed Firefighters Ass'n, 43 OCB 11 (BCB 1989) [Decision No. B-11-89 (S)], 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).**

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of
UNIFORMED FIREFIGHTERS ASSOCIATION
OF GREATER NEW YORK,

Petitioner,

Decision No. B-11-89
Docket No. BCB-1117-88
(1-193-88)

-and

THE CITY OF NEW YORK,
Respondent.

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**DETERMINATION AND ORDER**

In petitions filed by the City of New York on November 30, 1988 and December 16, 1988 ("the City"), and by the Uniformed Firefighters Association ("the Union" or "UFA") on December 27, 1988, this Board was requested to determine whether certain demands raised in negotiations between the parties were mandatory subjects of bargaining within the meaning of Section 12-307 of the New York City Collective Bargaining Law ("NYCCBL"). Following the submission of additional pleadings and memoranda by both parties, and after due deliberation, we rendered our determination of most of the issues in dispute in Decision No. B 4-89, issued on February 24, 1989.[1] There remains one further issue raised in the above pleadings, which concerns a portion of what we have characterized as City Demand No. 6. We shall determine this issue herein.

[1]The procedural and factual background underlying our determination therein is set forth more fully at pages 1-5 of Decision No. B-4-89.

Additionally, subsequent to our ruling in Decision No. B-4-89, the Union filed a second scope of bargaining petition, on March 6, 1989 ("Union Second Scope Petition"), with respect to an issue which it claims was raised during the pendency of hearings before the impasse panel that was appointed after the declaration by this Board that an impasse existed in the negotiations between the Union and the City on September 6, 1988. The City filed an answer to the petition on March 8, 1989. The union subsequently filed its reply at 8:30 p.m. on March 8, 1989. We will consider the Union Second Scope Petition initially in this Decision, and then return to consideration of City Demand No. 6.

## Union Second scope Petition

### Background

Decision No. B-4-89

After the formal finding by this Board that an impasse existed in the negotiations between the Union and the City, on November 30, 1988, as noted above, the City filed a petition seeking a determination on whether matters raised in negotiations with respect to Fire Marshals were mandatory subjects of bargaining within the meaning of NYCCBL §12-307. Included among the demands challenged by the City was Fire Marshal Demand No. 25 which sought to amend Article VI (Salaries), §5 of the existing collective bargaining agreement with the following language:

> Provide for $300 increase in uniform

> allowance in Fiscal Year 1987-1988. Further provide that City shall provide at no cost to each employee fire protective equipment (including, but not limited to, helmet, boots gloves, eye shields, fire retardant pants and shirt, turnout coat) and shall defray the cost for the cleaning and maintenance of said fire protective equipment and Fire Marshal work uniforms. Additionally provide that the City shall provide for an upgraded bulletproof vest. Retain §5D as in 1984-1986 [sic] agreement.

On December 16, 1988, the City filed a second petition seeking a determination on the bargainability of additional matters raised in negotiations involving demands related to Firefighters. Among the demands the City challenged was Firefighter Demand No. 15 which, like Fire Marshal Demand No. 25 sought to amend Article VI (Salaries), §5 of the existing collective bargaining agreement with the following language:

> Provide that City shall provide at no cost to each employee fire protective equipment (including, but not limited to, helmet, boots, gloves, eye shields fire retardant ants and shirt, turnout coat) and shall defray the cost for the cleaning and maintenance of said fire protective equipment.

On February 24, 1989 we issued our Decision No. B-4-89 which resolved, inter alia, questions with respect to the negotiability of the above-mentioned demands. We found that in its petition challenging Fire Marshal Demand No. 25 the City did not challenge the Union's demand for a $300 increase in the uniform allowance. We held that the demand-for a uniform allowance was properly

before the impasse panel.

We also found that to the extent the Union sought fire protective equipment enumerated in its demands, its demands were clearly nor-mandatory subjects of bargaining. The demands infringed on the City's prerogative to determine the mission of its agencies as guaranteed by NYCCBL §12-307b, regardless of whether the equipment sought by the Union was to be provided by the City as the result of an agreement or, as the City alleged therein, the equipment was mandated by federal and state regulations. [2]

We also found, with respect to the portion of the Union's demands seeking the provision of protective equipment "at no cost" to employees, that:

> [a]lthough the type of equipment sought by the Union is not bargainable, the issue of whether employees should pay for the equipment is a mandatory subject of bargaining. Thus, to the extent the Union's demands seek the provision of required equipment "at no cost to each employee," they are mandatory subjects of bargaining regardless of whether regulations require that they be provided. We cannot determine from the record which of the Union's demands for specific equipment the City claims it must already supply free of charge.

Finally with respect to the aforementioned equipment demands, we rejected the Union's contention that a directive from New York

[2]The City relied at that time, as it does in the instant matter, upon New York State Administrative Code title XII, Part 800. The code adopts standards set by the United States Occupational Safety and Health Administration ("OSHA") covering employees in the private sector for application to those in the public sector. Specifically at issue is the OSHA standard set forth for "Fire brigades" at 29 C.F.R. §1910.156(e)(1) which provides, in relevant part that an "employer shall provide at no cost to the employee and assure the use of protective clothing which complies with" federal regulations.

State Commissioner of Labor Thomas F. Hartnett, dated December 4, 1987 ("Hartnett Directive") [3] supported its contention that its demands for protective equipment were mandatory subjects of bargaining. we found that the directive merely indicated that if the City agreed to negotiate an allowance in lieu of supplying the requisite equipment, it had to file the parties' agreement with the New York State Department of Labor.

[3]The directive was addressed to "All Fire Districts" and its subject was "Uniform Allowance and Protective Equipment No Cost Requirements of New York State's Public Employee Occupational Safety and Health and Federal OSHA Standards." It provided in relevant part the following:

> A question has been raised about the use of uniform allowances to satisfy [the requirements set forth in the federal OSHA standards adopted by New York State regulation]. After carefully reviewing the law and considering the various arguments and equities involved in resolution of that question, I am writing to advise you that it is the position of the Department of Labor that a uniform allowance in a collective bargaining agreement will not be presumed to constitute compliance with the standard. If the parties to such an agreement intend a negotiated allowance to constitute compliance, they must file with the Department of Labor a written statement detailing their mutual intent and must demonstrate that the allowance is sufficient for the stated purposes. [emphasis in original]

**Proceedings before the Impasse Panel**

After the issuance of Decision No. B-4-89, on March 6, 1989, the impasse panel, which had been designated on December 2, 1988, consisting of Arvid Anderson (Chairman), Lewis M. Gill and Eli Rock, held its first day of hearings. In preparation for the hearings, the Union withdrew Firefighter Demand No. 15 and Fire Marshal Demand No. 25 and submitted a separate demand concerning the amount of the uniform allowance, a subject which had gone unchallenged by the city in its prior scope of bargaining petitions.

In its pre-hearing memorandum for submission to the impasse panel, the City addressed the two aforementioned protective equipment demands. It noted that the UFA was seeking compensation for the cleaning and maintenance of equipment, and that bargaining unit members were receiving a uniform allowance for that purpose "among others" of $705. The City noted that in prior tentative settlements reached with the Union, the parties had agreed that "the uniform allowance paid to these employees would constitute compliance with the December 11, 1987 directive from Thomas F. Hartnett to all Fire Districts and that a written statement to that effect would be executed by the parties." It sought a direction by the impasse panel that parties reach the same agreement as part of its award.

## Positions of the Parties

### Union Position

The Union claims that the City's request that the impasse panel direct the UFA to execute and file with the Department of Labor a written statement which must "[detail] their mutual intent and must demonstrate that the allowance is sufficient for the stated purpose," i.e. that the allowance complies with the OSHA standard, is not properly before the panel.

First, the Union contends that the City's original demands never included a demand that the Union file a statement with the Department of Labor. It notes that the City presents what the Union characterizes as a "new demand" in the section of its memorandum addressing the Union's demands and not in support of the City's demands.

Second, the Union argues that the City's demand is nonmandatory. The Union contends that state law mandates that certain protective clothing be provided to employees at no cost. Just as the City cannot be forced to bargain over its statutorily guaranteed managerial rights, so it is argued, the Union cannot be forced to waive rights of unit employees under a statute; that is to say, the Union cannot be forced to waive the statutorily guaranteed right of unit employees to have protective equipment supplied at no cost, in exchange for an allowance.

The Union rejects the City's argument that the fact that two earlier tentative agreements included this issue demonstrates that the issue has been transformed from a nonmandatory into a mandatory subject of bargaining. The Union notes that this Board previously rejected this same argument when it was proffered by the City in support of its contention that because an agreement on variable supplements fund was reached with other units, it must also be reached with the Union.

City Position

The City argues that in Decision No. B-4-89 this Board already decided the question at issue. It contends that we held that issues relating to the provision of protective equipment at no cost are economic in nature and are, therefore, mandatory subjects of bargaining. The City relies on the fact that it did not challenge the Union's demand for an increased uniform allowance as further support for its contention that all issues relating to who should bear the cost of providing equipment are mandatory issues of collective bargaining.

The City characterizes the Hartnett Directive as encouraging the parties to negotiate a uniform allowance which constitutes compliance with relevant standard for occupational safety and health. It notes that the parties in prior tentative settlements agreed to offset economic benefits achieved by the Union in

exchange for the Union's consent to enter into a letter agreement stating that the negotiated uniform allowance constitutes compliance with the statutory safety standards. Such savings, the City argues, are an integral part of the overall settlement reached with the Union and part of the total economic package upon which other demands are dependent.

## Discussion

Initially, we note that although the request that the Union agree to a letter addressed to the requirements of the Hartnett Directive was not among the specific demands submitted by the City, the Union is clearly not prejudiced merely by its submission. As evidenced by the fact that the prior tentative settlements between the parties have all contained agreements on the issue, it cannot be said that the issue has not been present during earlier negotiations between the parties, or even that it has not been dealt with in the tentative agreements produced by those negotiations. There is, therefore, no prejudice to the Union in the City's attempt to place the matter before the impasse panel.

The issue presented to this Board is whether the City's demand is a mandatory or a nonmandatory subject of bargaining. For the reasons set forth herein, we find that the City's demand that the Union in effect waive the right of members of its

bargaining unit under state law differs in material respects from the Union's purely economic, mandatory demands in Firefighter Demand No. 15 and Fire Marshal Demand No.25, and is a nonmandatory subject of bargaining.

The City seeks a direction from the impasse panel that the Union enter into a letter agreement pursuant to the Hartnett Directive. The directive clearly permits such letter agreements and, in fact, provides the form and content of any such agreement between the parties. The directive provides that such a written statement detail the parties' intent and demonstrate that the allowance is sufficient to assure compliance with the requisite standard. In the absence of such a written statement, the City must supply protective clothing as set forth in the pertinent regulations at no cost to employees. The Union's demands, which are no longer before the panel, were that the City provide protective equipment and clothing free of charge. As we held in Decision No. B-4-89, a demand that the City absorb the cost of required equipment was mandatory.

The body of demands encompassed in the impasse present three instances in which demands relate in some way to statutory benefits. First, to the extent the Union's former demands sought a benefit not provided by statute -- the provision of protective equipment at no cost -- its demands were clearly mandatory

subjects of bargaining.[4] The issue of who should pay for such equipment, in the absence of policy or a statute which vests authority or rights with respect to the provision of such equipment in one party or the other in collective bargaining is, as the City correctly argues, a mandatory subject of bargaining.

Furthermore, to the extent demands such as the Union's former demands sought the duplication in a collective bargaining agreement of statutory benefits which otherwise concerned a mandatory subject of bargaining, they are also mandatory subjects of bargaining. As we noted in Decision No. B-4-89, the threshold inquiry in examining a demand which relates to a matter covered by statute is whether the subject matter concerns wages, hours or working conditions. If the demand concerns one of these matters, as does a demand that protective equipment be provided at no cost, it is within the scope of mandatory collective bargaining unless:

> a. it would require contravention of law;
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> b. the subject has been pre-empted 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.

Applying this standard, we found mandatorily bargainable the Union's former demands restating the statutory rights of unit employees and giving the employees another avenue of redress should the City fail to provide them their legal entitlement. The

[4]See City of Saratoga Springs and Saratoga Springs Firefighters, L. 343, IAFF, 16 PERB 14523 (1983); Police Ass'n of New Rochelle and City of New Rochelle, 10 PERB 13042 (1977).

City's demand at issue herein is another variety of demand which impacts upon a statutory benefit. However, unlike the Union's former demands, the City's demand seeks neither to supplement a statutory benefit which implicates a mandatory subject of bargaining nor merely to restate a statutory benefit in a collective bargaining agreement; the instant City demand seeks a waiver of a right which the state has seen fit, as a matter of public policy, to mandate for certain City employees. The right of bargaining unit employees to receive protective clothing without charge is embodied in state regulations which have incorporated a federal standard of occupational safety and health. In contrast to what the City argues, we note that rather than encouraging the use of uniform allowances as a substitute for providing protective clothing free of charge, the Hartnett Directive, although not determinative of the outcome herein, states that such an allowance in a collective bargaining agreement "will be presumed not to constitute compliance with [emphasis in original)" state standards. This is further evidence of a state policy favoring the free distribution of protective clothing to Firefighters and Fire Marshals.

It would clearly undermine state policy as embodied in regulations and in the state Labor Law[5] to force a Union, which has the power to waive certain rights of employees as their agent,[6] to consent to any compromise of the employees' statutory privileges.[7] The City's demand would require such a compromise by the UFA. Accordingly, we grant the Union's petition and find that the City's demand is a nonmandatory subject of bargaining over which the Union cannot be required to negotiate.

**City Demand No. 6**

Not considered in Decision No. B-4-89 was City Demand No. 6 which seeks the following:

> Delete Article XIII, Section 4 (Vehicle Replacement) and Section 6 (Mask Service Unit)

[5]Labor Law, §27-a.

[6]See Antinore v. New York, 49 A.D.2d 6, 8 PERB 117513 (4th Dep't 1975), aff'd 40 N.Y.2d 921, 9 PERB ¶7528 (1976).

[7]PERB has similarly held that a bargaining demand that a statutory benefit be diminished is not a mandatory subject of bargaining, because the legislature in authorizing collective bargaining did not intend to erode by individual agreement existing statutory protections. See city of Binghamton v. Helsby, 9 PERB ¶7019 (Sup. Ct. Albany Co. 1972) (a city demand that benefits under General Municipal Law, §207-a be diminished was held to be a nonmandatory subject of bargaining); Garden City Police Benevolent Ass'n and Incorporated Village of Garden City, 21 PERB ¶3027 (1988) (PERB held that a union cannot be compelled to negotiate waiver of constitutional or statutory rights); Buffalo Police Benevolent Ass'n and City of Buffalo (Police Dep't), 20 PERB ¶3048 (1987) (a waiver of employees' constitutional rights with respect to random drug testing is a permissive subject of bargaining).

Article XIII, Section 4 of the 1984-1987 Agreement institutes a ten year replacement policy for all first line firefighting vehicles. Article XIII, Section 6 provides for the assignment of six additional Firefighters to the Mask Service Unit.

Union Position

Although the City contends that it has no intention of making any changes in the areas governed by the instant contractual provisions, the Union argues that the only possible reason the City may have for deleting them is to alter the managerial policies and procedures to which they apply. It notes that the City, in its notice informing the Union of intended deletions from the current contract, only states that it has no intention of implementing changes in manning levels. Therefore it argues that the assertion in the City's pleadings that it will maintain the standards currently set forth in the subject provisions, is not credible.

Moreover, the Union makes specific allegations that these deletions will result in a practical impact adverse to the safety of unit employees. It contends that the City has expressly acknowledged the relation of these sections to firefighter safety by placing them in the contract Article entitled "Safety Standards and Equipment".

With respect to Article XIII, Section 4, the Union asserts that the failure of a fire engine's water pumper can result in delays that permit a fire to rage out of control, thereby placing Firefighters at an increased risk of sustaining physical injury. It also argues that the failure of tower or aerial ladders can prevent the rescue of trapped Firefighters as well as civilians, and seriously endanger Firefighters who use them.

With respect to Article XIII, Section 6, the Union contends that "self contained breathing apparatuses" are critical to Firefighters' work conditions because they routinely work in "heavy smoke" situations. It maintains that smoke inhalation is a common cause of work related injuries and that during periods of heavy fire activity, tremendous burdens are placed on employees of the Mask Service Unit who must recharge depleted air tanks. The Union also asserts that this contractual provision was negotiated as a result of prior instances of under-staffing which led to shortages in air tanks.

City Position

The City contends that these contractual provisions deal with subjects that are not mandatorily bargainable (the provision of specific equipment and maintenance of staffing levels). It also asserts that prior negotiations over permissive subjects do not transform them into mandatory subjects.

Moreover, the City argues that the Union's allegations of a practical impact are vague and conclusory. It maintains that in order to demonstrate the existence of a practical impact, the Union must prove that the alleged impact results from a management action, or inaction in the face of changed circumstances. The City asserts that since it is merely deleting the instant provisions, and has no intention of changing any of its current policies or practices in these areas, the Union has failed to demonstrate the existence of a resulting safety impact on its membership, and its challenges must be dismissed.

## Discussion

We have long held matters pertaining to the maintenance of equipment and deployment of personnel to be within the City's statutory managerial prerogative.[8] The City correctly argues that the prior negotiation of, and agreement upon, permissive subjects does not transform them into mandatory subjects.[9]

[8]Personnel assignments: Decision Nos. B-43-86; B-23-85; B-35-82; B-16-81; B-19-79; Equipment: Decision Nos. B-43-86; B-23-85; B-10-81.

[9]Decision No. B-21-87; City of Newburgh and Local 589. International Association of Firefighters, 16 PERB ¶4573 (1983); Police Association of the City of Yonkers and City of Yonkers, 14 PERB ¶4516 (1981); Auburn Teachers Association and Auburn Enlarged City School District, 13 PERB ¶4614 (1980); Buffalo Police Benevolent Association and City of Buffalo, 13 PERB ¶4547 (1980); Buffalo Police Benevolent Association and City of Buffalo, 13 PERB ¶4547 (1980).

Therefore, the instant demand. involves a subject which is beyond the scope of mandatory collective bargaining.

However, where managerial action involving a nonmandatory subject results in a practical impact on employee safety, the employer is required to negotiate over the alleviation of that impact.[10] In this case, we reject the Union's allegations that the deletion of the subject contractual provisions will result in a practical impact on the safety of unit members.

We have held that a practical impact arises from a managerial action, or inaction in the face of changed circumstances which constitutes a clear threat to employee safety.[11] The City maintains that although it intends to delete the instant contractual provisions, it will retain the standards which they have promulgated. Therefore, we find that the City may delete the instant contractual provisions because such an action does not constitute a clear threat to employee safety.

The credibility of the City's stated intention to maintain the level of services provided for in the instant contractual provisions is irrelevant to our determination. The duty to bargain over a practical impact on safety arises only when that impact is in danger of being realized. Only if and when the City acts to alter current procedures with respect to servicing

[10]Decision Nos. B-31-88; B-35-82.

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

firefighting vehicles and staffing the Mask servicing Unit, will inquiry into the effect of the City's action on the safety of Firefighters, and whether any such effect rises to the level of a practical impact, be appropriate.

## 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 City of New York's demand concerning a letter agreement to be filed with the Department of Labor regarding protective equipment is not within the scope of

mandatory collective bargaining; and it is further

DETERMINED, that the contractual provisions referred to in City Demand No. 6 are not within the scope of mandatory collective bargaining, and, therefore may be deleted by the City unilaterally.

Dated: New York, New York
March 30, 1989

MALCOLM D. MacDONALD
CHAIRMAN

DANIEL G. COLLINS
MEMBER

GEORGE NICOLAU
MEMBER

CAROLYN GENTILE
MEMBER

EDWARD F. GRAY
MEMBER

DEAN L. SILVERBERG
MEMBER

Note: City Member Edward Silver did not participate in the Board's discussion or in the decision of this matter.

City Member Dean Silverberg dissents from that portion of this decision which deals with the Union's Second Scope Petition and joins in that portion of the Decision dealing with City Demand No. 6.