City v. MEBA, 15 OCB 3 (BCB 1975) [Decision No. B-3-75 (Scope)]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK
Petitioner
-and

MEBA DISTRICT NO. 1 PACIFIC
COAST DISTRICT

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

DECISION NO. B-3-75
BCB-194-74
DOCKET NO. BCBI-7-74
(I-112-74)

DECISION AND ORDER

The City of New York and the Marine Engineers Beneficial Association, District No. 1, Pacific Coast District have been engaged in the negotiation of a new contract to replace the prior agreement, which covered the period of July 1; 1970 to August 31, 1973. The employees covered by the agreement, which is currently in force pursuant to the Status Quo provision of the NYCCBL, are Captains, Assistant Captains, Mates, Chief Marine Engineers and Marine Engineers working on ferry boats operated by the City (Economic Development Administration These employees are licensed ferry officers.

On July 11, 1974 MEBA filed a request for the appointment of an Impasse Panel to make recommendation on thirteen Union demands over which the parties are in disagreement. The City raises no objection to the submission of these thirteen demand s to an Impasse Panel.

However, on July 30,1974, the City filed a petition alleging that it has not agreed to continue in the new contract certain provisions contained in the expired contract. In this regard, it is the City's position that:

Article II - Job Security
Article XIII, Section 2 (d) - Sick Leave
Article XIV, Section 3 - New Vessels
Article XIV, Section 4 - Job Binding
Article XIV, Section 7 - Provisional Appointments
Article XIV, Section 8 - Temporary Appointments
Article XVI, Section 3 - Union Representative

are not mandatory subjects of bargaining, and the City further alleges that these topics may not be raised before an impasse Panel over the City's objection.

The Union filed its Answer on August 20th, request that the Board find all of the above - enumerated contract provisions to be mandatory subjects of bargaining.

On July 22, 1974, the Board notified the parti of the designation of Benjamin Wolf, as Chairman, and Monroe Berkowitz and John Sands as members of the Impasse Panel. Chairman Wolf informed the parties that hearings before the Impasse Panel would be held on September 30 and October 1, 1974.

On September of 1974, the City apprized Chairman Wolf that a postponement of the Impasse Panel hearings Would probably be required in view of the city's Petition challenging the negotiability of the items enumerated above,
and in view of the pending departure of Messrs. Grossman and

and Mase from the Office of Labor Relations, the two individuals who had been handling the case. By letter dated September 12, 1974 Joel Glanstein, Attorney for the Unions notified the Impasse Panel of the Union's objection to any delay in the hearings, and on September 16, Chairman Wolf informed the parties that the hearings would not be postponed.

On September 24, 2974, the City filed a Motion to Stay the scheduled proceedings before the Impasse Panel pending a decision on the scope of bargaining matters currently before the Board.

In Support of this Motion, the City cited two extensions of time which were granted by the Board to Mr. Glanstein within which to file an Answer and Brief to the City's Petition. The City posed no objection to these extensions. The City also claimed it would be severely disadvantaged if it were forced to proceed on the previously scheduled dates inasmuch as Mr. Grossman left the employ of the OLR on September 20, 1974,, and Mr. Mase would leave on September 27, 1974. The City further alleged:

> "Any hearings before the Impasse Panel prior to a decision by the Board regarding the issues of scope of bargaining would not only needlessly protract litigation but necessarily dictate the means and matter by which the parties will present their

> respective cases since neither party could be expected to present evidence on issues which may ultimately be determined outside the scope of collective bargaining and thus not fact-findable ana thereby require the parties to sever their presentations into pre-decision and post-decision segments.

In response to the City's Motion to Stay the Impasse proceedings, Chairman Anderson conferred with the parties in an effort to bring about a compromise on the City's request to postpone the September 30th hearing.

On September 25, 1974, Chairman Anderson wrote to Benjamin Wolf and recommended that the City's request for adjournment be granted for a reasonable time in order for the City to secure representation for its presentation before the Impasse Panel. Chairman Anderson also asked Mr. Wolf to defer any decision on the issues submitted to the Panel until the Board of Collective Bargaining resolved the scope of bargaining matters before it.

In a letter dated September 25, 1974, Mr. Wolf notified counsel for the City and Union that the hearing before the Impasse Panel would be adjourned to October 16,1974.

On September 270 1974, tho Board received an Answer and Cross-Motion, dated September 25, 1974, from MEBA'S counsel.

The Union, answering the City's Motion to Stay the Impasse Panel proceedings alleged that the Board of Collective Bargaining has no power or jurisdiction to overrule the determination of the Impasse Panel Chairman as to when
Impasse hearings will be held, and cross-moved that the hearings scheduled for September 30 and October.1, 1974 be ordered to proceed as scheduled.

In Decision B-17-74, the Board denied the City's motion to stay the Impasse Panel proceedings, subject to the following conditions:

> 1. The Impasse Panel may consider the matters before it as to which there is no dispute as to bargainability.
>
> 2. Absent the consent of both parties, the panel may not hear arguments on or make any determination on matters the bargainability of which has been challenged by the City until such time as the Board rules.
>
> 3. Absent the consent of both parties, the panel is not to issue a report or recommendation on any issue until the Board has ruled on the scope of bargaining questions which have been presented to it.

On September 27, 1974 Anthony DiMaggio Inland and Harbor Representative District No. 1, Pacific Coast District, MEBA filed an Affidavit with the Board to supplement the Answer previously filed herein. In this Affidavit, the Union contends that a letter of understanding written by Philip Ruffo, then Counsel to the Office of Labor Relations, dated January 29, 1969 obligates the City to continue prior contract provisions, be they mandatory or permissive subjects, and also requires the City "to make available to

licensed officers any additional provisions extended to unlicenced personnel if respondent so desires, as well as any previously outstanding contract provisions covering unlicenced personnel, if preferable to those applicable to licensed officers, if respondent so desires."

On the basis of this letter, the Union urges that the Board find that the City has waived its right to claim, that prior contract provisions are non-mandatory or that the city is stopped from making such a claim.

In a letter dated October 7, 1974, the City responded to the Union's submission of Mr. DiMaggio's supplementary affidavit. The City disputes the Union's contention that the letter written by Mr. Ruffo bars the City from asserting that certain issues are non-mandatory subjects of bargaining. The City's letter makes clear that Mr. Ruffo's letter of January 29, 1969 supplemented another letter written by Mr. Ruffo to the union two days earlier, which transmitted to the Union the 1967-70 contract agreed upon by the parties. The City claims that the supplemental language in the January 29, 1969 letter was clearly tied to the contract and by no stretch of the imagination may it be regarded as a grant by the City to the Union of such benefits in perpetuity." The City also argues that tho Union itself recognized the limited duration of the January 29, 1969 supplemental language

because it included a proposal for renewal of this language among its 1970 contract demands. The City did not agree to such a renewal, and the language of the Ruffo letter was not included in the 1970-73 contract.

We conclude that the supplemental language of the Ruffo letter was conterminous with the parties' 1967-70 contract and cannot be construed to endure indefinitely and, in any event, has no bearing upon our consideration here of the bargainability of the particular demands objected to by the City. The January 29th letter refers to the January 27th letter which, in turn, was attached to the parties' recently negotiated contract.

We conclude that the contract and supplemental language contained in the OLR's January 29th letter were inter-related and established the parties' relationship for the 1967-70 period. When the contract expired so did any commitments made by the City in the Ruffo, letter.

THE SCOPE OF BARGAINING ISSUES DISPUTE

In a letter dated November 26, 1974, the Board notified the parties and the Impasse Panel that it had reached a decision an the negotiability of two of the demands challenged by the City. The Board decided that Article XIII, Section 2(d) - Sick Leave and Article XVI, Section 3 Union Representative are mandatory bargaining subjects.

The Board stated that while all other scope of bargaining questions were reserved for further consideration, the Impasse Panel could hear arguments on the Sick Leave and Union Representative demand. Absent the consent of both parties, however, the Panel was not to make any recommendation on any issues until the Board ruled on all of the scope of bargaining all before it.

Our decision herein resolves the bargainability of all of the provisions challenged by the City as non-mandatory The contentions of the parties and our determination with respect to each issue in dispute are reviewed individually and presented below. Inasmuch as our letter of November 26, 1974 did not include a full discussion of the Sick Leave and Union, Representative demands they are included and formally determined herein.

Article II Job Security

"During the term of this agreement, the Employer will attempt to retain all per annum employees who hold positions by permanent appointment. If curtailment because of a reduced number of runs becomes necessary the Employer will make every effort to re-employ such Employee in vacancies or to replace persons who have provisional appointments to positions for which such Employees are eligible, at the rates and working conditions prevailing in the department in which such Employees are re-employed. However no such curtail-ment shall become effective without prior discussion with the Union."

The City's claim of non-bargainability is based upon its position that the issue of job security is a management right covered specifically by Section 1173-4.31(b) of the NYCCBL. Under that section, the Employer has the right to relieve its employees from duties because of lack of work or for other legitimate reasons" as well as the right to determine standards of services to be offered, to maintain efficiency of government operations and to maintain complete control and discretion of over its organization and the technology of performing its work.

The City also argues that the Board has previously held (in B-4-71 and B-1-70) that layoffs are a managerial right. Thus, the City is not obligated to negotiate a contract provision committing itself to "attempt to retain. The City further contends that terms and conditions of laid off employees are either covered by the Civil Service system or a contract covering the position into which the re-employed employee is returning.

The Union asserts that the Job Security provision challenged by the City is identical with a provision in the Agreement between the City and Local 333, United Marina Division, National Maritime Union, covering unlicenced ferry crew members employed in the same department. The Union alleges that the City's attempt to have this article of the prior agreement declared non-mandatory is based on discriminatory motivation of the City designed to interfere with employee rights and to discredit the Union.

Section 1173-4.3b of the NYCCBL specifically gives the City the right "to relieve its employees from duty because of lack of work or for other legitimate reasons." Where the employer is authorized by law to lay off employees for lack of work, that authority is not diminished by requiring the employer to negotiate a pledge that he will attempt not to lay off per annum permanent employees.

A second element of the Union's Job Security demand provides that the employer attempt to re-employ permanent per annum employees if vacancies occur. As we noted in Decision No. B-4-71 (Assoc. of Building Inspectors and HDA), however, the rights of competitive civil service employees with respect to Job Security are governed and protected by Civil Service Law.

Section 80 of the Civil Service Law provides that where competitive class employees are laid off, suspended, or demoted, "because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, "layoff shall be in inverse order of seniority in the department. Section 8l provides that employees who have been laid off shall be placed on a "preferred list" and

> ...shall be certified for filling a vacancy in any such position before certification is made from any other list, including a promotion eligible list, notwithstanding the fact that none of the persons on such preferred list was suspended from or demoted in the department or suspension an demotion unit in which such vacancy exists. No other name shall be certified from any other list for any such position until such preferred list is exhausted.

The job rights of laid off employees are thus defined and governed to a large extent by Civil Service Law.

In short the cited provisions of the civil service Law limit the discretion of management, acting unilaterally, or of management and the union, by agreement, to deal with the subject of layoffs of competitive civil service employees.[1]

The Union urges that the Job Security clause it seeks is supported by the United States Supreme Court's. decision in Fibreboard Paper Products Cor p. V. NLRB, 379 U.S. 203 (1964). That decision, however, dealt only with tine narrow issue of private sector subcontracting under certain circumstances, and Chief Justice Warren, writing for the Court, noted that the Fibreboard holding was limited to "the facts of this case."

Clearly, the Fibreboard decision was based on a factual situation quite different from that in the instant matter, and it promulgated a narrow rule requiring bargaining in those circumstances where an employer, through subcontracting, replaces his own employees with others who will perform the same work under the same conditions, but for less money. Moreover, Fibreboard applies to the private sector and does not establish a precedent applicable to the matter before this Board.

In City School District of New Rochelle v. New Rochelle Federation of Teachers, Local 280, AFL-CIO, 4 PERB 3060 (1971), the Public Employment Relations Board determined that a managerial decision to approve budgetary cuts resulting in reduction of work force is a non-mandatory bargaining subject.

[1] No similar Civil service regulation on the application of siniority to layoffs applies to non-competitive NYC employees.

Citing Justice Stewart's concurring opinion in Fibreboard, PERB stated:

> A public employer exists to provide certain services to its constituents, be it police protection, sanitation or, as in the case of the employer herein, education. Of necessity, the public employer, acting through its execution or legislative body, must determine the manner and means by which such services are to be rendered and the extent thereof, subject to the approval or disapproval of the public so served, as manifested in the electoral process. Decision of a public employer with respect to the carrying out of its mission , such as a decision to eliminate or curtail a service, are matters that a public employer should not be compelled to negotiate with its employees.

PERB concluded that although a decision to layoff workers necessarily affects working conditions, the employer is obligated to negotiate only the impact of its managerial decision.

This brings us to the third element of the instant Job Security demand, which would require discussion with the Union prior to effectuation of any layoffs. Insofar as we interpret this language to mean a demand for information and notification prior to implementation of a managerial decision to lay off this requirement would not abridge a public employer's right to curtail or eliminate a service and would be a mandatory subject of bargaining. Under Section 1173-4.3b, the employer may unilaterally decide to relieve employees, but a Union demand for notice and discussion of imminent layoffs prior to their implementation relates directly to the Union's statutory right to negotiate on questions of the impact of managerial decisions on employees working conditions.

Our decision herein coincides with a determination reached by PERB in City of Albany v. Albany Police Officers Union, local

2841, AFSCME, AFl-CIO. In that case, PERB considered the negotiability of union demands relating to job security and re-employment rights. . A union demand that layoffs be accomplished by laying off temporary employees first, provisional second, probationary third, and finally permanent employees, all in inverse order of seniority, was determined to be a non-mandatory subject. PERB's rationale was that "layoff on the basis of seniority and service with preference for retention of veterans is ... covered by Civil Law." Another union demand giving laid off employees preference in transferring to other vacant City jobs and providing necessary training to any laid-off employee transferred into a mew job was also hold to be non-mandatory. Relying on New Rochelle, PERB reiterated that a decision to curtail a service is not a mandatory bargaining subject:

> "Accordingly, any proposal to limit a public employers exercise of this power is not a mandatory subject of negotiations. The thrust of the union's proposal herein would be to preclude or inhibit the exercise of such powers. Therefore, to that extent, it is not a mandatory subject of negotiation."

With respect, however, to union demands relating to layoff procedures and requiring reasonable notice prior to implementation of a managerial decision to lay off, PERB held that there was neither conflict with the Civil Service Law nor undue interference with a public employer's right to eliminate or curtail a service.

According to PERB, a provision for notice is not unreasonably related to the requirement that a public employer negotiate over the impact of its decision to eliminate a service or lay off employees.

In the instant case and with particular regard to the management prerogative to effect layoffs for lack of work, we find and herein decide that practical impact on those laid off or to be laid off is implicit in any exercise of that prerogative; and that wherever the employer exercises this particular power, a practical impact will be deemed to have occurred and to have been established.

Because practical impact is held herein to be implicit in any exercise by management of its prerogative to lay off, we further hold and enunciate as a rule in this Decision, that the Union need not wait until employees are, in fact, laid off before it exercises its right to negotiate the impact of management's decision. With respect to those issues over which the employer has discretion to act, and which relate to the practical impact of a managerial decision to lay off employees, the City is obligated to bargain immediately.

That aspect of the Union's Job Security demand which seeks to achieve re-employment rights falls within the area governed by Sections 80 and 81 of the Civil Service Law; it, therefore, is not a mandatory subject of bargaining to the extent that it would conflict with the cited sections of the Civil Service Law. Those issues, however, which fall within the practical impact of a managerial decision to lay off employees and which do not infringe

Civil Service Law or §1173-4.3b of the NYCCBL are mandatory subjects of bargaining. Notice and prior discussion of an intent to lay off employees is such an issue.

We do not hold herein that a per se practical impact flows from every exercise of a managerial prerogative. In certain-situations, the impact of a management decision on working conditions, specifically, job security, may be only slight or Indirect and may involve questions of fact requiring hearings or other procedures to establish the facts. In the latter circumstance and in other circumstances, such as that underlying our Decision B-9-68, management's action may be so directly related to the mission of the agency that even if practical impact is alleged and subsequently determined by this Board to exist, management should first have the opportunity to act unilaterally to alleviate the impact.

In the instant decision, we determine only that a management decision to lay off employees will result per se in a practical impact and that this impact is immediately bargainable. Therefore a union demand in collective negotiations for a contract prov that provides for impact-related procedures, such as notice a discussion, in the event the employer decides to relieve employees is a mandatory subject.

Having decided this case differently than Decision B-9-68 with respect to practical impact, the Board thereby makes known its intention to determine other scope of bargaining disputes involving alleged practical impact on a case-by-case basis.

Article XIII, Section 2 (d) - Sick Leave

> "A verifying statement from the Licensed Officer's doctor shall not be required by the employer for sick claims of two (2) days or loss. For claims of more than two (2) working days, the Licensed Officer must secure a verifying statement from his doctor to support his claim. This statement should be sent in as soon as possible after the period of absence is over."

The City alleges that the Employer's ability to verify proper use of sick leave is a management right covered under Section 1173-4.3 b of the NYCCBL.

The Union asserts that this provision was the subject of a determination by an Impasse Panel whose report and recommendations resulted in the parties' contract covering the period of July 1, 1970 through August 31, 1973. The City did not contest the bargainability of this item before that Impasse Panel, and the Panel's report and recommendations, which included Article XIII, Section 2 (d) was accepted by the City. The Union, therefore, urges that the City be deemed to have waived any claim of non-bargainability of this contract provision.

Ordinarily, time and leave benefits, including sick leave, has been held to be a mandatory subject of bargaining but a matter bargainable only at the City-wide level (B-11-68, B-4-69). However, employees in this unit are not covered by City-wide bargaining. There appears to be nothing about this particular demand that would render it inappropriate for bargaining. At the City-wide level, the NYCCBL authorizes bargaining on time and leave rules and the current City-wide agreement contains a comprehensive treatment

of Sick leave benefits and their administration. The obligation to negotiate an sick leave, which is clearly a mandatory Subject encompasses the duty to negotiate on the regulations and procedures governing its proper use.

Article XIV, Section 3 - New Vessels

> "In the event that the Employer introduces newly designed Vessels to the ferry service, the Employer agrees to negotiate with the union
> a manning scale, wages, working conditions and any other job problem that may arise with respect to such newly designed vessels. The foregoing is not to be construed as a reopening of this agreement in any respect covering licensed ferry officers employed on existing vessels."

The City argues that manning is specifically designated as a management right in §1173-4.3 b and that the utilization of new equipment cannot affect whether an item is a mandatory or permissive bargaining subject. With respect to mandatory subjects, such as wages, the City contends that it has no duty to renegotiate a contract provision when it introduced new equipment within its managerial discretion. It is contended that the NYCCBL provides the only recourse available to the Union, which is to raise a question of practical impact at the appropriate time.

The Union asserts that Article XIV, Section 3 is identical to a provision contained In the Agreement between the City and Local 333, United Marine Division, National Maritime Union, covering unlicenced ferry workers employed in the same department. It alleges that the City's attempt to have this item declared non-mandatory is based on discriminatory motivation.

The Union further argues that the introduction of new equipment can affect whether an item is mandatory or permissive since it is obvious that utilization of new equipment will have a practical impact on work load." MEBA request the Board to rule on the practical impact be the New Vessels contract provision for in futuro application to the parties.

The management rights clause of Section 1173-4.3b reserves to the City the rights to "maintain the efficiency of governmental operations...determine the methods, means and personnel by which government operations are to be conducted...exercise complete control and discretion over...the technology of performing its work." Clearly, the introduction of new equipment falls within Section 1173-4.3b, and MEBA's demand appears to recognize the City's unilateral right to put new vessels into service.

However, the introduction of newly designed vessels could indeed substantially alter the working conditions or job
content of employees. MEBA's demand is directed to this foreseeable, although not specifically definable, occurrence. We hold that the demand is a mandatory subject of bargaining, but only to the extant that it would obligate the City to bargain on the wages and working conditions of personnel whose job duties have been changed substantial as a result of their assignment to newly introduced equipment of new design.

Our conclusion is also supported by Section 1173-7.0(3) of the NYCCBL which states:

> "Nothing herein shall authorize or require collective bargaining between parties to a coll-
> ective agreement during the term thereof, except
> that such parties may engage in collective bargaining where... (b) there shall have arisen
> a significant change in circumstances with respect
> to such matter, which could not reasonable been anticipated by both parties at the time of the execution of such agreement."

If the parties are authorized to negotiate during the life of the contract ever unanticipated and newly arisen problems, we see no reason to hold as non-mandatory a demand for a contract provision that deals with problems which the parties can reasonable anticipate. It nay be that the union would have the right under law to re-open bargaining on a mandatory subject where unforeseen circumstances affected a mandatory subject of bargaining. What the union seeks in its New Vessels demand is to provide by contract for rights which that interpretation of the law would accord it. We have often stated that it is our policy to favor agreement and execution of contracts to define the rights of the parties and to diminish the necessity of resorting to legal remedies. The instant New Vessels demand would simply affirm by contract a right during the term of the agreement to re-open negotiations on mandatory subjects which nay subsequently be affected by management's introduction of radically different vessels.

We want to emphasize that we are not imposing upon the City a duty to bargain every tire it makes a minor change or updates equipment an a ferry boar. Rather, we are concerned only

with substantial changes in employees' job content which may result from the introduction of "newly designed" and technologically different vessels.

We also want to make explicit that the Union's right to bargain does not impair management's right to make those changes within its prerogative. Moreover, the mandatory nature of the demand does not encompass the phrase any other job problem that may arise," for the requirement established by that language is too vague and may infringe upon the employer's reserved rights. Additionally, the demand is non-mandatory to the extent that it would require the employer to negotiate a "manning scale" upon the introduction of newly designed vessels. Until the existence of a practical impact has been established in a given case and until whatever procedures prescribed therein by the Board have been completed, there can be no obligation on the part of the employer to bargain. The new Vessels demand is mandatory, therefore, only insofar as it entitles the Union to re-open negotiations during the life of the agreement in order to bargain on mandatory subjects that have been substantially affected by the introduction of new or different equipment.

Article XIV, Section 4 - Job Bidding

> "Per annum Licensed Officers shall have the right to bid for jobs on the basis of seniority. Such bid will be permanent for one year. Changes may be made before the expiration of the year by mutual consent of the Licensed Officers subject to prior approval by the Employer. Such approval shall not be unreasonably withheld."

The City refers to this contract provision as assignment of employees which, it alleges, is a management right under Section 1173-4.3 b. The only aspect of this Article that may be mandatorily bargainable, according to the City, is "a definition of seniority."

The Union argues that although this job bidding provision is not formalized in a contract between the City and Local 333 NMU, "the concept of job bidding has been embodied as a practice under the parties' collective bargaining relationship for at least 20 years." MEBA alleges that the City's attempt to have this provision declared a permissive subject is based an discriminatory motivation.

In the private sector, seniority is unquestionably a mandatory subject of bargaining. But in the public sector, and particularly in New York City, the issue must be considered in light of Section 1173-4.3b of the NYCCBL and Article V of the state Constitution, which mandates a civil service structure in which appointment and promotion must be based on merit and fitness.

Section 1173-4.3b affects and limits the uses of seniority in that the statute gives the City the rights to direct its employees; to maintain the efficiency of governmental operations; to determine the methods and personnel by which government operations are to be conducted; and to exercise complete control and discretion over the technology of performing its work. We have held in prior decisions that the direction of employees and to a higher title is a management right under

Section 1173-4.3b (See B-7-69, City of New York and Uniformed Firefighters Assoc. and B-2-73, NYS Nurses Assoc. and NYC Health and Hospitals Corporation).

In Decision No. B-4-71, (Assoc. of Building Inspectors and Housing and Development Administration), the Board considered the negotiability of seniority and stated:

> Seniority is not and end in itself. It is a criterion the significance of which lies in the purpose of which it is used. The propriety of its use therefore turns on the nature of these purposes and necessitates consideration in the context of the applicable provisions of the Civil Service Law and the Management rights reserved by the City.

The Board noted in that decision that the Civil Service Law deals with seniority in several sections. Section 52.2 provides that in promotional examinations, "due weight" is to be given to seniority. Moreover, Rule 5.3.23. of the Rules and Regulations of the New York City Civil Service Commission specifies that "tests and the relative weights thereof in any competitive promotion examination shall be fixed prior to each such examination by the director and the commission except that seniority shall be given a weight of 15" (on a scale of 100). The Civil Service also provides that layoffs of competitive employees are to be made in inverse order of seniority to be determined on a departmental basis unless the Civil Service Commission fixes a smaller unit (Section 80.3). Section 81 calls for reinstatement of laid off employees from "preferred lists" in order of seniority. Section 70 provides that on a transfer of function employees must be transferred in order of seniority, with preferred

lists for junior employees for whom no positions are available.

We concluded in B-4-71 that the union's strict seniority demand for a pick-and bid system for the rotation of assignments conflicted with applicable provisions of the Civil Service Law as well as §1173-4.3b of the NYCCBL. The union's demand interfered with the employer's ability to carry out its mission insofar as geographical rotation of assignments was a method used by the City to deal with alleged improper employee conduct. We noted in our decision that the City's authority to rotate assignments, and the propriety and validity of its reasons for doing so, were upheld in Quinn v. Marcu 28 A.D. 2d. 370.

Our conclusion in the Building Inspectors case did not determine, however, the negotiability of seniority as a criterion for other purposes not limited by law or management's reserved rights. To the extent that the instant Job Bidding demand contemplate the use of seniority in the making of assignments within a job title, we hold it to be a mandatory subject of bargaining. The thrust of the demand is not compel management to disregard the constitutional provision mandating that appointments and promotions be based on merit and fitness. Nor does it limit the City's authority or ability to rotate assignments or create new ones, particularly where the mission of the agency or effective delivery of services are involved. The demand assumes that all employees bidding for a job are licenced and qualified; and where employees' qualifications are equal, it would introduce seniority as a criterion for assignment. The job bidding pertains to assignments and not

promotions which require different considerations.

In our view,, this Job Bidding demand infringes neither the Civil Service Law nor §1173-4.3b of the NYCCBL. Rather it is a term and condition of employment, subject to mandatory collective bargaining. Although the Civil Service Law deals with seniority in several sections, under the Huntington, holding,[2] a public employer must bargain on all terms and condition of employment unless explicitly and definitively prohibited from doing so by a constitutional or statutory provision.

The provisions of the Civil Service Law that deal with seniority provide "due weight" shall be given to seniority with respect to promotional examinations, layoff, re-employment, and transfers. There is no statutory provision prohibiting management, provided, of course, the senior applicant meets all of the statutory requirements for the job.

The PERB, in Albany v. Albany Permanent Professional Firefighters, held as a mandatory subject of negotiations a union seniority demand allowing employees to request jobs on the basis of seniority and obligating the employer to keep and post up-to-date seniority lists from which job assignments could be made.

[2] Board of Education of U.B.S.D. No.3, Town of Huntington v. Associated Teachers of Huntington, 331 N.Y.S. 2d 17, 79 LRRM 2881 (1972)

In PERB's view, the benefits sought by the Union's demand "do not involve the decision of a government with respect to the carrying out of its mission or the manner and means by which its services ought to be rendered to its constituency." Likewise, the instant Job Bidding demand does not infringe the City's reserved rights, as specified in §1173-4.3b. The demand merely provides for a specific element to be given weight by management in the-assignment of employees to jobs for which they must be qualified. Additionally, the demand herein does not extend to bidding from, one job title to another. We do not interpret this Job Bidding demand to prevent the employer from taking unilateral action in making job assignments without seniority preference in special circumstances. Such circumstances could include alleged improper employee conduct or effective performance of employees assigned to inspection and law enforcement responsibilities.

Article XVI, Section 3 - union Representative

> "Time spent by Union officials and representatives in the conduct of labor relations shall be governed by provisions of the Mayor's Executive Order No.38 dated May 16 1957. No Licensed Officers shall otherwise engage in Union activities during the time he [sic] is assigned Lo his regular duties."

The City challenges this provision on the ground that assignment of employees, even for labor relations matters, is a management right under the NYCCBL. The fact that if this provision is not continued in a new agreement, the Union may still be entitled to certain benefits under the Mayo's Executive Order 75, covering time spent by employees for labor relations matters, is, in the City's view, "irrelevant to the question of whether assignment to Union activities are permissive bargaining subjects."

The Union disagrees with the City's position that this provision deals essentially with employee assignment. The Union asserts that Article XVI, Section 3 relates to rules and procedures regarding time spent by Union officials in the conduct of labor relations.

We find merit in the Union's argument that Article XVI, Section 3 pertains to time spent by employees in labor-management relations matters and not to assignment of employees. Therefore, bargaining or this subject would not infringe the City's management prerogatives, defined in Section 1173-4.b of the NYCCBL.

The use of working time by employees for the conduct of labor management relations can be considered a fundamental subject and an essential part of the right to bargain collectively. We equate this subject with the grievance procedure which, through manifestly and undisputedly a mandatory bargaining topic, was at one time the subject of mayoral executive order. The investigation and processing of grievances by union representatives and other participation in labor-management meeting and in the negotiation of collective agreements are part and parcel of the collective bargaining framework by the New York City Collective Bargaining Law; as such, they can be considered terms and conditions of employment. We do not pass judgement on the merits of Article XVI, Section 3, but we see no reason the City should not be obligated to negotiate this provision with the Union.[3]

[3] Our determination in regard to this demand comports with that reached by PERB in Albany v. Albany Police Officers Union. In finding that a demand for payed time off for Union Activities was a mandatory subject of bargaining, PERB stated:

> "The ability of an employee organization to provide effective representation to its constituency is predicted upon having employee leaders of that organization available to devote time to the work of the organization. The question of whether or not such employee leaders are to be compensated, and if so, how much, are mandatory subjects of negotiations.

The Union, in its Answer, concedes that Executive Order No. 38 "has been superseded by Mayor's Executive Order No. 75 which has the force of law." We understand the Union to acknowledge, therefore, that Article XVI, Section 3, as presently written, is inaccurate. When the parties entered into their most recently expired agreement, Executive Order No. 38 was still in effect, however. Naturally, Article XVI, Section 3 incorporated reference to that Order and not executive Order No. 75. For purposes of this decision, however, we assume the demand refers to executive Order No. 75, which is now the applicable mayoral order on the issue of release time. We interpret the demand as simply a contractual codification of an Executive Order currently in effect with respect to all unions representing City employees.

The Office of Labor Relations, in a letter dated January 9, 1975, expresses concern that the Union's demand would require the City to bargain on paid time off for labor relations and union activities. The City argues that paid release time is a permissive subject inasmuch as it represents "an assignment of an employee during paid working hours to perform functions in the employer's, behalf." The City concedes, however, that "to the extent that release without pay of an employee during working hours to perform any of the described.

activities is demanded, that plainly would be a legitimate subject for mandatory Collective bargaining."

The Union in a letter dated January 14, 1975, responded to the City's letter and I charged that the questions posed by City

> "have absolutely no application in the captioned matter since MEBA does not now and will not in these negotiations demand the opportunity to have its representatives (1) perform functions related to union representation without loss of pay of City time, or (2) engage in union activities during working hours without pay. MEBA's representative is paid full time for his endeavors by MEBA."

The Union's letter renders unnecessary any determination by this Board on that aspect of its demand which might have require the City to bargain on paid time off for representation activities. In other words, we now regard as moot any request for a decision by this Board as to the bargainability of paid release time because we interpret the Union's letter to mean the demand does not encompass paid release time. Thus we hold that the Union Representative demand is a mandatory subject of bargaining only insofar as it deals with the basic issue of release time for labor relations and union activities.

In light of ORL's letter, however, we believe that the matter of paid release time is specially appropriate for discussion between the Municipal Labor Committee and the City. The Union's letter of January 9, 1975 clarifies that its Union Representative

provision does not include a demand for paid time off. However, the issue of paid release tire is relevant to all municipal -unions and is currently governed by Executive Order No. 75, which applies equally to all City employees. We have determined herein that the issue of release time for labor relations and union activities is a mandatory subject. We believe that the corollary issue of payment for such activities should be discussed by the City and the MLC because it affects all municipal unions and requires consistent treatment. Moreover, we take note that the issue of release time and its broader implications have already been the subject of discussions between the MLC and the Office of Labor Relations.[4]

[4] The topic of release time, specifically Executive Order No. 75, was the subject of discussions between the MLC Steering Committee and the OLR, at meetings held on October 15, 1)73, and September 4, 1974.

Union Demands on Provisional and Temporary Appointments: Article XIV Sections 7 and 8

On January 28, 1975, during the meeting of this Board at which final consideration of the instant case was in progress, a hand-delivered letter from Mr. Anthony DiMaggio, MEBA's Inland and Harbor Representative, dated January 28, 1975, was received by the Board. The letter stated that with regard to Article XIV, Section 7 (Provisional Appointments) and Article XIV, Section 8 (Temporary Appointments), the union affirmatively relinquished all interest; the union requested that all controversy as to the said articles be deemed moot and that the articles be withdrawn form consideration by the Board. Thereafter and by letter dated February 4, 1975, the New York City Office of Labor Relations has made known to the Board its objection to any such treatment of the said two items as is requested by the union. In view of the timing of the Union's request, the fact that it was the petition of the OLR which initiated Board consideration of the bargainability

of these items, and in response to the OLR's objections to the union's request, we will not decide the issue now but will retain jurisdiction of these items in order to afford the parties the opportunity to express their respective position in the matter more fully and to enable the Board to give due consideration to the submissions of the parties at its next meeting. We issue our determination as to all other items at this time in order to make possible the further processing, without delay, of issues as to which the parties are at impasse.

The issue thus left before us no longer has any bearing upon the impasse procedures now in progress and our further consideration of these issues need occasion no delay in the issuance of the panel's report and recommendations.

ORDER AND DETERMINATION

For the reasons set forth above and pursuant to the powers vested in the Board of Collective Bargaining, it is

DETERMINED, that the following provision is within the mandatory scope of collective bargaining and may be submitted to the impasse panel:

Article XIII, Section 2(d) -
Sick Leave,

and it is further

DETERMINED, that the following provisions collective bargaining the above are within the mandatory scope of collective bargaining under the conditions set forth decision and may be submitted to the impasse panel:

Article II - Job Security
Article XIV, Section 3 - New Vessels
Article XIV, Section 4 - Job Bidding
Article XVI, Section 3 -
Union Representative,

and it is further

ORDERED, that the parties submit to the Board within ten days briefs addressed to the question whether withdrawal of Article XIV, Section 7 (Provisional Appointments)

and Article XIV, Section 8 (Temporary Appointment) from further consideration by the Board should be permitted.

DATED: New York, New York
February 6, 1975.

ARVID ANDERSON
Chairmann
WALTER L. EISENBERG
M e m b e r

ERIC J. SCHMERTZ
M e m b e r

EDWARD F. GRAY
M e m b e r

JOSEPH J. SOLAR
M e m b e r

THOMAS J.HERLIHY
Member

City Member Silver did not participate in the consideration of this case.

The Labor Members concur in the result of this decision but do not agree with all of the supporting rationale for our determinations herein.

Alternate City Member Herlihy concurs in the result of this decision with respect to Article XIV, Section 3; Article XIV, Section 4; Article XVI, Section 3: but does not agree with all of the supporting rationale for our determinations herein.

Alternate City Member Herlihy also has submitted an opinion, attached hereto setting forth his views on Article XIV, Section 4.

Mr. Herlihy dissents from the finding on Article II.

**Concurring Opinion of Mr. Herlihy,
on Article XIV, Section 4**

While-the job bidding demand in the specific occupational title appears to be bargainable, I believe that the rationale applied herein in arriving at that decision could not be extended to titles, the duties of which are far broader, without impairing the ability of the employer to make the most effective use of staff in accomplishing the mission of tho agency.

In the case before us, the principal skill required is a knowledge of marine propulsion machinery, or a knowledge of navigation within New York harbor, and an application of that knowledge in operating a ferry boat between two fixed points. The officers have a responsibility for supervising deck and engine room personnel in the performance of narrow and specific duties in accordance with the requirements of a Coast Guard license or rating.

There are many other titles in City classifications where the duties and responsibilities are far broader, as reflected in the typical tasks section

of the job specification sheet. An example of this would be in the title of Administrative Assistant where the employee may be assigned as a budget technician with minimal supervisory responsibilities or public contact, while others might have supervision over twenty or thirty persons with an implied requirement for a temperament and shill in supervision very dissimilar to that of the budget technician. Yet another in this title could be used in interpretation agency policy and programs to the public. In making an assignment within a category of this type, the skilled personnel officer can use the knowledge of individual skills possessed by the employee as evidenced by the agency's records, since this title is generally reached by promotion from within.

The discussion leading to the decision on this point recognizes that there may be job assignments without seniority preference even within this tightly circumscribed occupational group directly affected by this decision.

My purpose in setting forth these comments on the rationale is to point out that what may be applicable to the titles in this decision may not be applicable to other titles where a broad range of specialized abilities, skills and personal traits must be considered by the employer in making the assignment based on record and judgement.

To the extent that a seniority pick system for work assignments falling within a title impairs the ability of the employer to consider individual qualities in making a particular assignment, it impinges on the managerial right to
properly conduct public business.

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