Patrolmen's Benevolent Ass'n, 19 OCB 3 (BCB 1977) [Decision No. B-3-77], aff'd, Higgins v. Anderson, 1997 WL 25251, 97 LRRN 2481 (Sup. Ct. N.Y. Co. Sept. 26, 1977).

BOARD OF COLLECTIVE BARGAINING
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In the Matter of

THE CITY OF NEW YORK,

Petitioner.

-and-

PATROLMEN'S BENEVOLENT ASSOCI-
ATION OF THE DISTRICT ATTORNEYS'
OFFICE, CITY OF NEW YORK, INC.

Respondent.
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DECISION NO. B-3-77

DOCKET NO. BCBI-13-77
(I-126-76)

DECISION AND ORDER

On February 18, 1977, the single man panel in the above captioned case issued its Report and Recommendations in the impasse between the City of New York and the certified repre-sentative of employees. in the Detective Investigators and Rackets Investigators series of titles in the District Attorneys' Offices.

The impasse had been reached in negotiations pursuant. to a wage reopener provision effective January 1, 1974, and for a success_ contract to the one which expired on Decem-ber 31, 1974.

The union had dcmanded, in substance, certain wage increases and other benefits in recognition of the increased duties and effectiveness of the employees in the bargaining unit, and on the basis of increases in the"cost of living, and of comparability with other City employees. The City's

position had been that guidelines of the Emergency Financial Control Board limited the increases that could be awarded by the panel, and that the facts did not justify a large increase.

The Report and Recommendations awarded certain wage increases to be implemented in stages commencing January 1, 1974, with the last increase to be effective January 1, 1978. In effect, a*pay plan was established for unit employees including minimum, and maximum rates of pay and automatic step increases based on "wage equality to comparable jobs in the City. The term 'of the recommended contract was January 1, 1975 through December 31, 1976.

The Union accepted the recommendations on March 3, 1977.

The City rejected the recommendations on March 7, 1977. It filed its Notice of Appeal and Petition for review on March 17, 1977, and a brief in support of the Petit-ion on March 22, 1977.

The Union f iled its Answer on March 31, 1977, and a supporting brief on April 5. 1977.

The Union requested oral argument and the City opposed the request. We determined not to hear oral argument.

The recommendations of the Panel may be summarized as follows:

I. Wage Reopener

Effective January 1, 1974, an 8% wage increase pursuant to EFCB guidelines.

II. New Minimum, and Maximum Rates, January 1, 1975

	Minimum	Maximum
County Detective	$10,000	$14,000
Detective Investigator Rackets Investigator Chief county Detective	13,500	17,500
Senior Detective Investigator Senior Rackets Investigator	15,000	19,000
Supervising Rackets Investigator	17,000	21.000

III. Automatic Adjustment System

During the three years, from January 1. .1975, to January 1, 1975, to January 1, 1978 employees shall automatically receive wage adjustments which will take them to the maximum at the end of the three year period.

IV. January 1, 1976 Cost-of-Living Increase

On January 1, 1976, unit employees shall receive "a 3% increase, deferred for one year, as recommended by the guidelines, and applied to both minimum and maximum rates, plus the standard cost-of-living adjustment, effective in the final year of the agreement as the guidelines recommend."

V. Terms of the Contract

The contract term "shall run from January 1, 1975, until December 31, 1976."

Position of the City of New York

The City's Petition, filed on March 17, 1977 alleges that the Panel's decision is erroneous, arbitrary and capricious and not supported by substanial evidence. The Petition alleges, in substance, that the pay plan and the series of pay increases awarded by the panel are not justified by the duties and skills of the unit employees, nor are they permissible under the financial plan and guidelines approved by the EFCB.

The Panel found that "although the basis cpurpose of the investigatiors' jobs has not changed... the manner in which they perform thes functions has undergone substantial change." (Pp. 20-21) the Panel concluded that changes had taken place in training and in duties performed, and that the employees were therfor entitled to a greatly improved salary schedule. The City's Petition contends that this conslusion of the Panel was erroneous because it is based on the performance of out-of-title work. The City asserts that two prior impasse panels have rejected the notion that the unit employees titles such as Fire Marshal, Patrolman, Triborough Bridge and Tunnel Authority officer, and Deputy Sheriff, and that on the basis of comparability the unit employees are entitled to substantially higher wages. Further, the City asserts that the job specifications for unit employees have not changed, and that any finding by the Panel that unit duties have changed would amount to an award of compensation for out-of-title work.

Concerning tHe actual amount of the wage increase award, the City alleges that the Panel awarded "a total wage increase of approximately 43.1% as part of a package whose total cost is . . . 58.%. Of this amount approximately 20.8% is effective January 1, 1975 to January 1, 1976. " The City alleges that the %..,age increase ignores the statutory criteria of NYCCBL §1173 .Oc(3)(6) concerning comparability, the rise in the c'ost of living, and the interest and welfare of*the public, and that it completely disregards the ability of the City to pay. . . " Citing the wage guidelines adopted by the EFCB, the City asserts that the claimed 20.8% increase effective January 1, 1975, exceeds the increase of 6% plus a cost-of-living adjustment permitted by the EFCB, the City also states that the award of a cost-of living adjustment effective January 1, 1976, exceeds the EFCB guidelines, which permit only a cost-of-living increase effective October 1, 1975, on condition that the Union adopts the Interim Memorandum of Understanding signed by most municipal employee unions on June 30, 1976. With respect to the system of automatic adjustments established by the Panel, the City contends that the establishment of such a system ignores the ability of the City to pay and the record testimony "that such provisions for automatic adjustments are not common among comparable City employees."

The City argues that the term of the contract fixed by the Panel is erroneous in that rather than awarding a contract to run from January 1, 1975 to December 31, 1976, the Panel should have provided a termination date of June 30, 1976, in common with other City contract-s. In this connection, the system of automatic adjustments awarded by the Panel is also erroneous, the City asserts, because the last two such adjustments take place on January 1, 1977 and January 1, 1978 and the Panel may not award salaries for a term beyond the contract expiration date.

Although the City rejected the Report and Recommendations of the Impasse Panel, the Petition states that only a rejection of "those portions. . . which are erroneous as a matter of law, arbitrary and capricious and not supported by substantial evidence" was intended. Therefore, it appears that the 8%, increase awarded as a result of the 1974 wage reopener is accepted by the City pursuant to EFCB guidelines.

The relief requested by the City is that the Board should modify the Report and Recommendations in the following manner:

a. The wage was increased effective January 1. 1975, should be reduced so as to represent an increase of no more than 6%.

b. The provisions for a system of automatic adjustments should be eliminated.

c. The cost-of-living adjustment should be made effective October 1, 1975, not January 1, 1976, with continuation subject to acceptance of the Memorandum of Interim Understanding signed June 30, 1976.

d. The term of the agreement should commence January 1, 197f5, and terminate June 30, 1976.

Position of the Union

The Union maintains that the report and recommendations should be affirmed in its entirety. The 'Union argues- that the report is supported by substantial evidence in, the record and that the impasse panel considered an d applied correctly the standards set forth in NYCCBL §1173-7.Oc (3)(b).

The Union contends that the Panel was correct in distinguishing Decision No. B-8-76 f--om the instant case in that the record evidence that 1--he employees in the titles at issue herein have experienced a change in the manner of performing their functions. Therefore, the Board's prior decision. imp6sing FrCB guidelines on impasse panel recommendation would not apply here.

Further, the Union contends* that "the terms of the Financial Emergency Act and the guidelines adopted pursuant thereto must be read in conjunction with the collective bargaining law," and that "the Financial Emergency Act. . . is not applicable as a matter of law to impasse panel awards.

Applicability of the Financial Emergency Act

The Financial Emergency Act (FEA)[1] was enacted by the Legislature in response to the-New York City fiscal crisis. it provides for the creation of the Emergency Financial Control Board (EFCB) to "review, control and supervise the financial management of the city".[2] Section 3.1 of the FEA provides that the city shall not "borrow or expend any monies ... except in compliance with the provisions of this act", while §3.3 declares that "nothing contained in this act shall be construed to impair the right of employees to organize or to bargain collectively." Pursuant to §7, the EFCB has the power to develop and implement a financial plan for the City;[3] §7.e provides that "all contracts entered into by the city must be consistent with the provisions of this act and must comply with the financial plan as approved by the [EFCB)."

[1] Laws of 1975, Chapter 868, as amended

[2] FEA, §l(i) Section 5

[3] Section 7.6 provides: "The [EFCB] shall issue ... such orders as it deems necessary to accomplish the purposes of this act including but not limited to timelv and satisfactory implementation of any approved financial plan”

Section 10 of the FEA imposes a wage freeze:

> "1. Increases in salary or wages of employees of the citV and employees of covered organizations which have taken effect since June thirtieth, nineteen hundred seventy-five or which will take effect after that. date Pursuant to collective bargaining agreements or other analogous contracts requiring such salary increases as of July first, nineteen hundred seventy-five or as of any date thereafter are hereby suspended. All increased payments for holiday and vacation differentials, shift difer-entials, salarv adjustments according to plan and sten-ups or increments for employees of the city and employees of covered organizations which have taken effect since June thirtieth, nineteen hundred seventy-five or which will take effect after that date pursuant to collective bargaining agreements or other analogous contracts requiring such increased payments as of July first, nineteen hundred seventy-five as of any date thereafter are hereby, in the same manner, suspended ....
> The suspensions provided herein shall be effective for the first pay period ending on or subsequent to September first, nineteen hundred seventy-five and shall continue until one year thereafter and, to the extent of any determination of the board that a continuation of such suspensions, to a date specified by the board, is necessary in order to achieve the objectives of the financial -plan, such suspensions shall be continued to the date specified by such board, which date shall in no event be later than the end of the emergency period.

> "2. This section shall no-E be applicable to employees of the city or employees of a covered organization covered by a collective bargaining agreement or an employee of the city or a covered organization not covered by a collective bargaining agreement where the collective bargaining representative or such unrepresented employee has agreed to a deferinent of salary or wag-_ increase, by an instrument in writing, which has been certified by the mayor on or before September first, nineteen hundred seventy-five, or certified by the board after September first, nineteen hundred seventy-five as being an acceptable and appropriate contribution toward alleviating the fiscal crisis of the city. The board may, if it finds that the fiscal crisis has been sufficiently alleviated or for any other appropriate reason, direct that the suspensions of salary or wage increases or suspensions of other increased payments shall, in whole or in part, be terminated."

Similar wage freeze provisions were incorporated into the NYCCBL as 51173-12.0 thereof by Local Laws of the City of New York, Nos. 43 and 44 of 1975.

The meaning and effect of the wage freeze provisions of FEA §10 have been the. subject of a decision by the Court of Appeals in PBA v. City of New York, 41 NY 2d 205 (1976). In that case, an impasse panel had awarded a wage increase for the contract term 1974 to 1976, including a 6% wage increase for the second year. The Court described the ensuing events asfollows:

"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 '%'--he 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 thLe 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 Cit-v'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 1975-1975 fiscal year and the increase ordered for the 1975-1976 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 held that FEA-510 did not apply to the 6% wage increase, and it affirmed the order of the Appellate Division for the payment of the increase. The Court said:

> "The statute under scrutiny in this case suspends wage increases "pursuant to collective agreements." In this case, the wage increase did not "take effect" by virtue of a collective bargaining agreement buy rather it tool effect as the result of a judicially mandated remedy embodied in a judgment. Even if it would be constitutionally permissible for a statute to suspend a judgment, nowhere is there language which would suggest this legislative intent; nor can it be said that the language employed permits an interpretation which would broaden the scope of the statute so as t encompass such increases (see New Amsterdam Casualty Co. V. Stecker, supra; Matter of Patrolmen's Benevolent Assn. Of Buffalo v. Buffalo, 50 AD2d 101). Hence, where as here the statute describes the particular situations in which it is to apply, "an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted. or excluded" (McKinney's Statutes, §240).
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> "Had the Legislature intended that the wage freeze also apply to situation involving judically mandated salary increases, they were free, assuming arguendo constitutional validity, to draft appropriately worded legislation (of. Bright Homes v. Wright 8 NY2d 157). We would but not that the statute in question was adopted some two months after the July 1st judgment requiring that the City pav the salary increase and we must assume the legislature was well aware of this fact when the statute was passed.

> "Nor is our view altered because the July lst judgnent was one confirming the award of the Impasse Panel. A judgment entered upon.the confirmation of an arbitrator's award hasthe same force and effect in all respects as... a judgment in an action..."'

The Union herein argues that following the Court's reasoning in the PBA case, and because there is no "express language" in FEA §10 applying the wage freeze to impasse panel awards, we should conclude that §10 does not apply to wage increases recommended by impasse panels. The Union contends that we should reverse our decision in Local No. 3, I.B.E.W v. City of New York, Dec. No. B-8-76 where we said;

> "It is the Board's vieur that all 'impasse panels are and have been bound by the emergency fiscal legislation since the inception of these laws in September, 1975. The passage by the St-ate Legislature of the FEA and the ensuing creation of the EFCBE were actions specifically addressed to the interest and welfare of the public and as such, applicable to the actions of impasse panels pursuant to the mandate of criterion No. 4 of Section 11730-70.0(c) (3)(b)-the interest and welfare of the public. It follows that in any statutory review proceeding before this Board, in accordance with Section 11-13-7.Oc (4)of the NYCCBL, the same is true."

We reaffirm our earlier decision that impasse panels is are bound by the emergency financial legislation. We believe that any other finding would be contrary to the public policy expressed in the NYCCBL and the PEA, that it would be contrary to the intent of the legislat:are in enacting FEA §10 and that a different holding is in no way required by the language of the Court of Appeals in the PBA case.

Both the NYCCBL and the FEA express a policy designed to preserve the collective bargaining process in public-employment.[4] The impasse procedures of the NYCCBL are but the culmination of a statutory procedure carefullv written to ioster collective bargaining and the voluntary resolution Of negotiating disputes with 'or without the aid of mediaticn. If FEA 910 were read to permit an impasse panel to override the wage freeze imposed by the legislature and implemented by the EFCB, it would be in the interest of public employee representatives to avoid reaching voluntary agreements with public employers in order to submit their disputes to impasse panel procedures. Such a result would frustrate the collective bargaining process and render it meaningless, contrary to the public policy

[4] NYCCBL §1173-2.0; PBA §3.3

expressed in both the State and local law. Moreover, such a result would encourage public employee-representatives to violate their duty to bargain in good faith.[5]

Further, FEA §10 applies the wage freeze to "collective bargaining agreements or other analagous contracts." An impasse panel report and recommendations, whether accepted by the parties or affirmed or modified by this Board, constitutes a binding recommendation as to what terms the parties shall include in their collect--ive bargaining agreement. The effect of voluntary acceptance or of a Board decision is to tell the parties %..,hat their contract shall be if they have not earlier reached mutual agreement. indeed if thAe parties engage in further negotiations and reach agreement, they may mutually agree to incorporate into their contract terms which vary from the impasse recommendations as accepted or as affirmed or modified by the Board. Ile believe, therefore, that a contract which contains wage provisions arrived at" through statutory impasse procedures is a "collective bargaining agreement" within the meaning of FEA 510. Our view is supported by the finding of the Court'. of Anneals in Caso v. Coffey, 41 NY2d 153 (1976), that "the essential function of these compulsory arbi tra-tion panels is to 'write collective bargaining agreements for the parties'."

[5] NYCC13L §1173-4.2c.

The Court of Appeals opinion in the PBA case clearly rests on the status to be accorded to a judgment. The opinion refers to-a "judicially mandated remedy embodied in a judgment" and "judicially mandated salary increases," and holds that the statute does not include such judgments within the ambit of the wage freeze. An impasse panel report and recommendation such as the one at issue herein is not a judgment; it becomes an award within the meaning of CPLR Article 75 only after acceptance by the parties or review by the Board[6], and the award becomes a judgment only after it is confirmed by a court.[7] The reasoning of the Appellate Division was the same as that of the Court of Appeals. It held that "where a judgment confirming an impasse Panel's award has been entered, the wage freeze legislation is inapplicable..." [8] Moreover, the Court at Special Term had discussed the instant issue at length. It. said:

> "While there can be no dispute that the arbitration award is subject to the wage freeze, as stemming from the collective

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[6] NYCCBL §1173-7.oc (4) (f)

[7] CPLR §7510.

[8] PBA v. City of New York, .52 AD2d 43(1976).

> bargaining process, the court must necessarily recognize the distinction between the award of an arbitration and the judgment confirming the award."[9] (emphasis in original)

Finally, we see no reason to vary our procedure in the instant case from that which we followed in Local No. 3,IBEW v.City of New York, supra. In that case, we hold that to the extent the panel's recommendations exceeded EFCB guidelines promulgated pursuant to the FEA. "The Board must in accordance with applicable law modify the wage recommendations to bring them into conformity with the dictates of the City's financial recovery plan."

Although it is well settled Board policy that we will not substitute our judgment for that of an impasse panel charged with issuing recommendations in a contract dispute,[10] clear violations of the mandates of law cannot be affirmed. Thus, where an impasse panel award clearly and demonstrablv exceeds permissible wage increases under the FEA and the guidelines promulgated pursuant thereto, we shall reduce the wage increase accordingly. If a case should arise, however, where

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[9] PBA v.-City of New York N.Y.L.J. 12/31/75, p.8. This holding was affirmed by the Appellate Division which modified only that portion of Special Term's order delaying payment of the Judgment.

[10] BCB Dec. Nos. B-23-72; B-4-73; B-14-75.

the EFCB guidelines are not clear or where their application to a particular circumstance would inv olve policy decisions best made by the EFCB itself, then we shall leave the interpretation of the fiscal guidelines to the EFCB-

The Charter Revisions adopted by the electorate in 1975 constitute another legal mandate which must be obeyed by the Board. Section 1176 of the City Charter requires that:

> "So far as practicable, each collective bargaining agreement covering city employees shall be executed prior to the commencement of the fiscal year during which its provisions shall first be in effect."

The New York City fiscal year begins every July 1, and it is thus apparent the aims of the City Charter will be served if we award a contract expiration date of June 30, 1976 in common with other City collective bargaining agreements.

In accordance with our conclusions, we shal1 reduce the wage increases provided by the panel so that they confirm, to the financial plan, we shall change the effective date of the cost of living adjustment so that it conforms to that offered to other city employees, we shall provide a contract expiration date. in common with other public employee contracts, and we shall disallow any wage increases beyond the term of the contract.

It is the Board's understanding that the following BFCB guidelines are applicable in the instant case:

I. 8% wage increase in 1974 (here, the January 1, 1974, wage reopener);

II. 6%.wage increase effective January 1, 1975, subject to deferral, if applicable, plus a cost of living adjustment effective October 1, 1975;

III. Cost of living adjustment effective January 1, 1976, subject to acceptance of "Hilton Agreement" of June 30, 1976, and, if applicable, 3% increase effective January 1, 1976, subject to deferral.

The EFCB has not yet ruled on the precise applicability of its guidelines to contracts, such as the instant one, which did not begin on July 1, 1974.

Thus, there may be a question whether those retroactive contrac:Ls whose te--m begins on January 1, 1975, as does the instant contract, are subject to deferral of the 6% wage increase of 1975, or, instead, are subject to deferral of a 3% increase effective January 1, 1976. The ultimate decision of this issue rests with the EFCB; and the implementation of these two items must therefore await an EFCB determination as to the rule which must apply in such cases. In the meantime, however, the parties, based on this decision, will have the opportunity to formulate a settlement and possibly to prepare tin application to the EFCB setting forth a joint position on the two open items.

In accord with our practice in Local No. 3, IBEW, supra, we shall afford the parties an opportunity to agree on a method for making the necessary adjustments [in a mutually determined manner] within the requirements of the FEA. Failing this Board will make the required changes, including reductions and adjustments in wage increases on a per capita basis.

ORDER

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

ORDERED, that the Panel's recommendation for an 8% increase effective January 1, 1974, be, and the same hereby is, affirmed; and it is further

ORDERED,that to the extent the Panel's recommendations exceed the permissible amounts under the FEA and the guideline promulgated pursuant thereto by the EFCB, they will be reduced to bring them into conformity with the guidelines set forth above; and it is further

ORDERED that to the extent the Panel's recommendations deviate from the contract expiration date required by §1176 of the City Charter, they will be modified to bring them into

compliance; and it is further

ORDERED, that if the parties fail within 10 days of receipt of this decision to report back to the Board with the details of an agreement on the method for accomplishing the mandated adjustments, the Board will make the adjustments and reduce the wage increases fcr each employee on a oer capita basis.

Dated: New York, N.Y.
April 20, 1977

ARVID ANDERSON

WALTER L. EISENBERG

EDWARD F. GRAY

VIRGIL B. DAY

FRANCES M. MORRIS