City v.COBA, 27 OCB 16 (BCB 1981) [Decision No. B-16-81]

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

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In the Matter of

THE CITY OF NEW YORK,

DECISION NO. B-16-81

Petitioner,

DOCKET NO. BCB-481-81

-and- (I-160-81)

THE CORRECTION OFFICER'S BENEVOLENT ASSOCIATION,

Respondent.

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DECISION AND ORDER

On February 25, 1981 the City of New York, appearing by its Office of Municipal Labor Relations (OMLR), filed a petition seeking a determination on whether a number of matters which have been raised in negotiations between the City and the Corrections Officers' Benevolent Association (COBA) are mandatory subjects of bargaining within the meaning of section 1173-4.3 of the New York City Collective Bargaining Law (NYCCBL). The City challenges the bargainability of twenty-three numbered demands, many of which contain a number of subdivisions, that have not been resolved in negotiations between the parties for a successor agreement to their 1978-1980 unit contract. Several other unresolved bargaining demands, including Union demands whose bargainability is not challenged by the City#, have been submitted to an impasse panel for resolution pursuant to a-request for the appointment of a panel filed by the City on February 25, 1981.

Pursuant to the request of the Office of municipal Labor Relations,, a mediator was appointed on November 18, 1980, to assist the parties in their negotiation ns. The mediator held ten sessions with the parties. On April Of, 1981 the Board, acting on the City's request and after an extensive investigation of the negotiations and consultation with the mediator, found that an impasse exists in the negotiations between the parties. A one-man impasse panel-was appointed on April 28, 1981.

In its petition before the Board, the City seeks a determination that sixty-one demands are not mandatory subjects of bargaining and therefore,, are not appropriate for consideration by the impasse panel unless submitted to the panel by agreement of the parties. COSA filed on March 27, 1981 an answer to the City's petition. OMLR filed on April 8, 1981 a reply memorandum of law. on April 21, 1981 and May 12, 1981 letters and an affidavit concerning several of the matters addressed in the Union's memorandum. On May 14, 1981, the parties jointly submitted a letter specifying the demands that are and are not before the Board in this proceeding.

RELEVANT STATUTORY PROVISION

NYCCBL, section 1173-4.3, provides:

> Scope of collective bargaining; management
>
> a. Subject to the provisions of subdivision b of this section and subdivision c of section 1173-4.0 of this chapter, public employers and certified or designated

employee organizations shall have the duty to bargaining good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits) and working conditions, except that:

(1) with respect to those employees whose wages are determined under section two hundred twenty of the labor law, there shall be no duty to bargain concerning those matters determination of which is provided for in said section;

(2) matters which must be unform for all employees subject to the career and salary plant such as overtime and time and leave rulest shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty percent of all such employees, but nothing contained herein shall be construed to deny to a public employer or certified employee organization the right to bargain for a variation or a particular application of any city-wide policy or any term of any agreement executed pursuant to this paragraph where considerations special and unique to a particular department, class of employees, or collective bargaining imit are involved;

(3) matters which must be uniform for all employees in a particular department shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as being the certified representative or representatives of bargaining units which include more than fifty per cent of all employees in the department;

(4) all matters, including but not limited to pensions, overtime and time and leave rules

which affect employees in the uniformed police, fire, sanitation and correction services, shall be negotiated with the certified employee organizations representing the employees involved;

(5) matters involving pensions for employees other than those in the uniformed forces referred to in paragraph four hereof, shall be negotiated only with a certified employee organization, council or group of certified employee organizations designated by the board of certification as representing bargaining units which include more than fifty per cent of all employees included in the pension system involved.

b. It is the right of the city, or any other public employer,, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, but, notwithstanding the above, questions concerning the practical impact that decisions an the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

PRELIMINARY ISSUES

In their pleadings, the parties raise several issues that the Board wishes to discuss before examination of the bargainability of particular demands.

In its challenge to the bargainability of several demands, the City asserts that the demands deal with managerial prerogatives including the assignment of personnel and efficiency of governmental operations, and therefore are not mandatorily bargainable pursuant to the management rights cluse set forth in NYCCBL section 1173-4.3b. The Union argues that, with regard to Demands 3, 16 and 24, "the practical impact of these demands brings them within the mandatory scope of collective bargaining," citing to Board Decision No. B-9-68. In reply, the City asserts that the NYCCBL provides for bargaining "to alleviate the thrust of a managerial decision which has already been made and which the employer has failed to relieve unilaterally." In addition, the City argues that before there is a duty to bargain on alleged impact, there must be a determination by the Board that practical impact has occurred.

The Board has consistently followed the policy, since 1968, of requiring a determination by it that a management action has resulted in an."unduly burdensome or unreasonably excessive workload as a regular-condition of employment" before

there is a duty to alleviate or bargain on the impact of the actions except in cases of impacts on laid-off employees and safety impacts.[1] The Union's claim of practical impact do not rely on any specific affirmative management action as the cause of the practical impact. Rather, the Union implies that the practical impact results from management exercising its rights not to act on Union demands relating to working conditions. The claims of practical impact are not supported by allegations specifying the details of impact. Therefore, the Union's claims of practical impact made in support of Demands 3, 18 and 24 will be dismissed for lack of sufficient pleading on which a decision can be based, but without prejudice to a filing by the Union of a petition, "questing a Board finding of practical impact resulting from management actions, which is supported by evidence of practical impact on employees resulting from a specific, identified management action.

A second major issue raised by the parties is that the Board should not consider the economic aspect of several demands challenged in the petition. This issue &rose when the Union, in its memorandum of law, argued that am* demands are bargainable.

[1]See Board Decision No. B-41-80 pp. 7-9.

because they relate to employee compensation or wages. The City, in its April 27th and May 12th letters, asserted that the economic aspects of bargaining demands are not appropriate for consideration by the Board in this proceeding because the parties have agreed, in the Uniformed Coalition Economic Agreement (UCEA), not to bargain, and this Union has waived, in a letter dated October 10, 1980 signed by COBA's president, its right to bargain, cost-related demands in negotiations for a separate unit agreement successor to the 1978-1980 unit agreement. In the joint letter dated May 14, 19811 the Union stated that "its arguments which rest on the economic nature of items still in dispute should not be considered by the Board." In its May 12th letter, the City argued that disputes on the right in this negotiation to bargain, and go to impasse, on subjects claimed to be economic is a matter for the Dispute Resolution Panel established in the UCEA.

In this proceeding, the Board has jurisdiction to decide the bargainability under the NYCCBL of demands placed in issue before the Board. The mandatory nature under the law of a demand, whether in the area of wages, hours or working conditions, is not changed by contractual agreement. If the parties have agreed in the UCEA not to bargain on certain subjects, or aspects of subjects,

at the unit level, the agreement may be enforced by, and a dispute over performance of the terms and conditions of the agreement decided by, an arbitration panel consisting of the three impartial members of the BCB, as provided in section 11 of the UCEA, Interpretation and application of the terms of the UCEA are not within the Board's jurisdiction in this matter; interpretation and application of the statutory provisions requiring bargaining on wages, hours and working conditions are matters that the Board has authority to decide. Thus, when the City and the Union place the bargainability of a demand in issue before the Board, even though the parties have decided not to support their position by arguing a particular aspect of a demand, the Board has an obligation under the NYCCBL to decide whether a demand relates to wages, hours or working conditions, and is, therefore, a mandatory subject of bargaining under the law and, absent agreement of the parties, in submissible to the impasse panel for determination. A Board determination on bargainability will not prejudice a party's contractual right to petition for a determination by the UCEA Dispute Resolution Panel that a matter is cost-related and by agreement of the parties is not before the impasse panel.

A third area of preliminary concern generally relating to all the demands at issue herein is the City's argument that

each demand should be addressed an written and that the Board should follow the PERB rule[2] that, if any section of a demand is deemed non-mandatory, the entire demand is found not mandatory. in cases where a demand has a dual character, the Board has followed the practice of advising the parties of the elements of a demand that are mandatory subjects and of the elements that are non-mandatory subject of bargaining. The Board has also followed a practice of explaining its scope of bargaining decisions by pointing out matters that are bargainable under a particular subject and matters that are not mandatory in the same area. However, our holdings in this came are limited to the express terms of the demands that are placed in issues before the Board.

The Board has stated in several decisions its views on voluntary bargaining on non-mandatory, permissive subjects. Generally# full and free discussion and airing of problems are the keystones of good labor relations. With regard to negotiations on permissive subjects, the Board has said:

[2]The City cites Town of Haverstraw, 11 PERB ¶3109 (1978).

> The fact that collective bargaining on wages hours and working conditions is mandatory does not preclude discussion of other lawful subjects. The parties may discuss, and reach agreement on, any lawful subject. However, since there is no legal duty or obligation to discuss voluntary subjects, they may be discussed only on mutual consent, and submitted to an impasse panel only on mutual consent. Moreover, as distinguished from mandatory subjects, neither party may insist that agreement be reached, on a voluntary subject an a condition precedent to collective bargaining on mandatory subjects, or to entering into a collective agreement.[3] [Citations omitted]

We will discuss seriatim the demands that were challenged by the City in its petition the positions of the parties and a decision of the bargainability of the demand. We wish to repeat that a finding that a matter is bargainable does not constitute a decision on the merits of the demand. Such a decision rests solely with the designated impasse panel.[4]

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[3]Decision No. B-11-68.

[4] This policy has been followed in all cases involving determination of the bargainability of subject matters and has been expressly stated in Decisions Nos. B-2-73; B-1-74; B-10-75; B-17-75.

Demand No. 1. ASSIGNMENTS:

> "A. (By Seniority) - When openings occur for various posts, seniority shall be the determining factor in filling such positions.
>
> B. (Bidding) - Each member of a particular command or division shall be permitted to submit a bid for all posted jobs.
>
> C. (Posting) - Each opening that becomes available shall be posted on the institutional bulletin board of each command through the Department for a period of thirty (30) days.
>
> D. (Removal from Steady Post) - No officer will be removed from a steady post without a hearing. (Such removal shall be subject to the grievance procedure)."

City Position

The City argues that this demand infringes on management's statutory rights to "direct its workforce" and "determine the personnel by which governmental operations are to be conducted." OMLR claims that the demand seeks to reduce the Agency's role in the operation of institutions to a ministerial function of posting notices and computing seniority dates and is not only beyond the scope of bargaining but also would violate Chapter 25 of the City

Charter. The City maintains that the Board has hold that assignment of personnel[5] and movement of personnel through transfer[6] are managerial rights. The City further argues that a demand for a "seniority only" assignment system has been held not bargainable.[7]

COBA Position

The Union argues that a demand for use of seniority as a factor for filling vacant positions has been declared by PERB mandatorily bargainable as a term and condition of employment despite a claim that the demand inhibits management flexibility.[8] COBA argues that a job bidding demand (1B) and a demand for posting of open assignments (1C) are mandatory subjects which do not infringe on the statutory requirements for a particular job, do not involve promotion nor conflict with Civil Service Law. The Union asserts that the BCB has held a posting demand and a job bidding demand are mandatory subjects of bargaining.[9] With regard to Demand ID, the Union contends that this demand seeks bargaining on a grievance procedures, which is mandatory.

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[5] Decision No. B-4-71.

[6] Decision No. B-8-81.

[7] Decision No. B-4-71.

[8] The Union cites Matter of Albany Firefighters, 7 PERB ¶3144, and Matter of White Plains PBA, 9 PERB ¶3007.

[9] The Union cites Decision No. B-3-75.

Discussion

The 1978-60 unit contract Article XV provides that:

> The Department recognizes the importance of seniority in filling vacancies within a command and shall make every effort to adhere to this policy, providing the senior applicant has the ability and qualifications to perform the work involved. While consultation on such matter is permissable the final decision of the Department shall not be subject to the grievance procedure.

In Decision No. B-4-71, the Board held non mandatory a demand for a job security proposal, i.e., that no permanent employee be laid off, denoted or lose his rank and title as a result of reorganization of any City department and that present employees be given first priority for assignment to new positions through promotion, transfer or change in title. The Board found that the demand infringed an managerial rights and on matters, such as lay off and transfer, governed by Civil Service Law. In the same decision, the Board also found non-mandatory a demand for a "pick-and-bid seniority system to replace the City's geographic rotation of assignments system in the selection of employees for assignment within a job title. The Board found that rotation of assignments in a managerial prerogative and that the demand sought a seniority-only system. The Board stated that it was not making any determination on the negotiability of a demand for the use of seniority

as a criterion for other purposes not limited by law or the management rights clause. In Decision No. B-3-75, the Board found that a job bidding demand which provides that seniority be given weight in assignment of qualified employees to jobs within a job title and which would not infringe on any constitutional provision, Civil Service Law or the NYCCBL, is a mandatory subject of bargaining insofar as the demand relates to assignment and not to Promotion. The Board stated that there is no statutory provision prohibiting an agreement to make seniority the basis for a job assignment within a job title, provided the senior applicant meets all training requirements for the job.

In Decision No. B-2-73, the Board held that a demand for posting of work assignments is a mandatory subject because it relates to working conditions and does not infringe on management rights.

PERB has held a mandatory subject of bargaining a demand for development of a seniority list, postings of permanent job openings,, transfers or details, and use of seniority order in filling overtime needs and job openings. PERB found that the benefits sought by the demands are manifestly terms and conditions of employment and do not

involve a decision of government with respect to the carrying out of its mission or the manner and means by which services will be delivered.[10] PERB has also found that a demand for the assignment of jobs within a job title by seniority order in a mandatory subject but further stated that its decision does not imply any restrictions on. the prerogative of the City to establish criteria for the filling of particular jobs.

PERB has consistently followed an early holding that the public employer alone must determine the number of employees that are required to be on duty at any given time.[11] Thus, PERB has found not bargainable a demand that Patrol officers to pick [a shift] preference in October and remain in effect until the following December 31st." PERB held that the demand would interfere with the rights of the public employer to change the schedule of police officers so as to alter the number of officers who are on duty at a particular time or to replace absent police officers in order to maintain a desired complement of employees.[12] A PERB Hearing officer has found that a proposal that would entitle unit members to the same Job assignment from year-to-year and that would require vacancies to be filled by the most senior qualified applicant or volunteer in not a

[10] Albany Firefighters, note 4. supra.

[11] Matter of White Plains, 5 PERB 3008 (1972).

[12] Matter of Amherst Police Club, 12 PERB ¶3071 (1979), see also, Matter of Corning Police Department Chapter CSEA, 9 PERB ¶3086 (1976).

mandatory subject because the demand would restrict reductions in a staff size or determine the method of assigning personnel.[13]

In view of the management rights provision of the NYCCBL, Demand 1A is not a mandatory subject in our opinion because it seeks the use of seniority as the sole criterion in filling vacant posts. Under section 1173- 4.3b of the law, to the extent that a demand seeks the use of seniority an one factor among others in filling vacant posts, it would be bargainable. Demand 1B, which seeks to allow employees to bid for open assignments, and Demand 1C, which seeks posting of notices of open assignments, are mandatorily bargainable. Demand 1D, which seeks to grant an employed tenure in a steady post and procedural rights prior to reassignment from the post, is not mandatorily bargainable because it interferes with management's right to assign and lay off employees.

[13] Matter of New Paltz United Teachers, 13 PERB ¶4503 (1980).

Demand No. 2. CHEMICAL TESTS:

> "The City shall not make use of chemical tests an members when investigating their activities. A member may not be ordered,, requested or offered the opportunity to take such tests."

City Position

OMLR alleges that correction officers are hold to a high standard of compliance with law and that the City has a managerial right to require correction officers to submit to chemical tests. The City claims that the language of this demand duplicates the language of a demand considered by PERB in Buffalo Patrolmen's Benevolent Association[14] wherein it held that a demand seeking elimination of the use of breathalizer and blood tests is not a mandatory subject of bargaining. In the Buffalo PBA case, PERB reasoned that the procedures at issue are normally used to investigate parsons whereas suspected of having violated the law and that law enforcement personnel may be hold to a higher standard of compliance with law than are other persons. The City maintains that correction officers like police officers, are required to meet such higher standards.

[14] 9 PERB ¶3024 (1976).

CORA Position

The Union contends that the demand is restricted to the prohibition of chemical tests during investigations, which involve disciplinary procedures and therefore must be negotiated.[15] Te Union argues that the Assistant Secretary of Labor, in a ruling under Executive Order 11491, has hold that federal Agencies are obligated to negotiate inspection procedures and that the NLRB has hold that the use of polygraph testing is a mandatory subject of bargaining.[16] COB contends that the instant demand is disinguishable from the demand at issue in the Buffalo PBA case because the latter demand was not limited to investiations and included a demand for prohibition against the use of line-ups. COBA adds that the employees in the instant case are correction officers who do not have the affirmative enforcement powers possessed by the police employees in the PERB case.

Discussion

In Buffalo PBA v. Helsby,[17] the Supreme Court, Erie County, reversed a PERB decision that a demand that

[15] The Union cites to Matter of Albany Police, 7 PERB 3078 (1974).

[16] The Union cites to Medi Center Mid South Hospital, 221 NLRB 105 (1975).

[17] 9 PERB 7020 (1976).

"Police Officers shall not be required to submit to polygraph tests during investigations of departmental misconduct" is not mandatory. The court found that the demand is bargainable because it is directed to departmental misconduct and does not include any alleged violation of law. The court stated that the argument that police officers are subject to a higher standard of law and that investigations concerning their actions are not matters for bargaining did not apply in the case of investigations of departmental misconduct which do not necessarily include violations of law.

After the Buffalo PEA court decision, PERB held in is three cases[18] that demands addressed to the use of polygraph testing, blood tests, breathalizer tests and psychological stress tests during investigation, of employee activities are not mandatory subjects of bargaining because the demands seek to bargain with a governmental entity on the use of investigatory tools in cases which may include investigation of conduct outside the employment relationship or of conduct involving violation of law. In a case involving firefighters,[19] PERB found that a demand

[18] Troy Uniformed Firefighters Association, 10 PERB ¶3015 (1977); Patrolmen's Benevolent Association of Hempstead, 11 PERB ¶3072 (1973); Patrolmen's Benevolent Association City of White Plains, 12 PERB ¶3046 (1979).

[19] Troy UFA, id.

that would prohibit the government-employer from using a polygraph test, blood test or breathalizer test for any reason encompassed matters beyond the employment relationship and therefore beyond the scope of negotiations. In a case involving a demand worded about the same as the demand herein, PERB held that because the demand was not limited to investigation of departmental misconduct and may infringe on the normal police responsibilities of the government employer, it is not a mandatory subject of bargaining.[20]

Thus, the PERB holdings on this issue are not limited to the nature of an employee's job duties as a law enforcement official, but are based on the scope of the demand and whether the demand may include investigation of activity outside the employment relationship. Both in the phrasing of Demand 2 and in its papers submitted in this case, the Union seeks to prohibit "The City" from using chemical tests on employees, "when investigating their activities." Clearly, this demand falls under the PERB holdings on the non-bargainability of demands addressed to matters outside the scope of

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[20] PBA, Hempstead, note 18, supra. The demand read:

> The Village shall not make use of polygraph and/or chemical tests on employees when investigating their activities. An employee may not be ordered or requested to take any of the aforementioned tests.

employment. Because the Union has offered no persuasive reason, nor has any reason been found, to depart from the PERB holdings, we find Demand 2 a non-mandatory subject of bargaining.

Demand No. 3. CIVILIAN PERSONNEL:

> "(Restricted Use) - No civilian personnel will replace any of the Correction officers in their security or emergency response posts."

City Position

OMLR challenges this demand on the grounds that assignment and direction of personnel are management rights and that use of civilians by management is not an appropriate subject of a bargaining demand by the Union. The City argues that the demand seeks to interfere with the Department's right to deploy its workforce to meet the needs of the service. OMLR also contends that the Board has held that "the implementation of [a] civilianization program is a management prerogative, and ... is not within the scope of collective bargaining. .."[21]

The City also argues that because there has been no showing or determination of any practical impact, including safety impact, an employees resulting from the civilianization of any specific post, the demand cannot be considered bargainable in the context of practical impact. The City contends that a procedure outside the bargaining process exists for redress of safety concerns

[21] Decision No. B-26-80. The City also relies on Decisions Nos. B-14-80 and B-27-80.

arising from a specific civilianized poste but that the instant demand is too vague in made before any allegation or finding of safety impact, and may not be referred to the impasse panel.

COBA Position

The Union answers that the demand seeks to protect Job security by restricting the use of civilian personnel and, therefore, is a mandatory subject of bargaining and not a matter of management right. In its memorandum, the Union argues that the demands addressed to the safety of unit members and does not relate to civilianization. CORA contends that the placing of "untrained and inexperienced civilians" in security or emergency response posts will create "grave dangers and risk" for correction officers, place an unreasonable burden on members, and is, therefore, a term and condition of employment. The Union maintain or that PERB has held, the possible subjection of employees to unsafe conditions and acts of violence is a bargainable term and condition of employment.[22] COBA also relies on a BCB decision that according to the Union, hazards affecting unit employees is a mandatory subject of negotiations."[23]

[22] The Union cites to Somers Faculty Association, 9 PERB ¶3014 (1976).

[23] Decision No. B-11-68.

Discussion

In several recent cases, the BCB has hold a non-mandatory subject of bargaining the replacement of police officers by civilian personnel in the performance of traffic enforcement and tow-away duties clerical, record keeping, time keeping, roll call, payroll, communications, statistical analytical and mechanical repair duties, supervisory functions, and jobs in the Police Department's Management Information Systems Division.[24] Of particular relevance to the instant matter is a Board Decision finding that the City's use of volunteer, auxiliary police officers to perform patrol duties is a non-mandatory subject of bargaining.[25] All the civilianization decisions were based on the provision in the statutory management's rights clause that the City is free to decide unilaterally "the methods, mans and personnel" by which government services are to be rendered. The Board also relied on the absence of any limitation, by contractual agreement or otherwise, on the City's freedom to act unilaterally in this area. In addition, there was no showing in any of the cases of any practical impact on employees resulting from the assignment of civilians to perform certain duties that had been performed by police officers. The Board's decisions in two of the civilianization cases were recently upheld by Supreme

[24] Decisions Nos. B-8-80, B-33-80, B-26-80, B-27-80 and B-14-80.

[25] Decision No. B-5-80.

Court, New York County.[26]

In deciding the civilianization issued the Board has also relied on two PERB cases. In Matter of County of Suffolk,[27] PERB held that the transfer of police officers from the Teletype section, the Firearms section and the Central Records section of the Department's Headquarters Division to other units within the County Police Department and the replacement of police officers in those sections with civilian employees to perform the officer's previous duties was within the County's management rights to determine qualifications for a position and assignment of employees. In a second case, PERB found that the City of Albany's unilateral decision to transfer police officers "from work involving communications, towing and issuance of parking tickets to other assignments" and the hiring of civilians to replace the police officers in performing those duties was not a mandatory subject of negotiation.[28]

The BCB has suggested that contractual agreement on the maintenance and protection of the integrity of bargaining unit work, whether through union security clauses

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[26] Matter of Patrolmen's Benevolent Association, NYLJ, January 30, 1981, p.6 (N.Y. Cty, Greenfield, J.), affirming Decision No. B-33-80; Matter of Patrolmen's Benevolent Association, NYLJ, April 21, 1981, p.7 (N.Y. City, Stecher, J.), affirming Decision No. B-8-80.

[27] 12 PERB ¶3123 (1979).

[28] Matter of City of Albany, 13 PERB ¶3011 (1980).

or grievance-arbitration provisions or both, is favored by the law and by the Board.[29] The case involved a request for arbitration of an alleged wrongful assignment of unit work to non-unit employees which the Board found not arbitrable because of the absence of a contractual job security clause. In a second case, the Board found arbitrable a claimed wrongful assignment of unit work to non-unit employees based on the inclusion in the collective bargaining agreement of the job description of the unit employees.[30] The Board noted that job descriptions an not usually made part of labor contracts involving City employees. PERB has held mandatorily bargainable the issue of subcontracting unit work to non-unit employees where employees of the contractor will perform the same work under circumstances similar to the performance of the work by unit members.[31]

A third group of cases applicable to a determination of the bargainablity of Demand 3 are the BCB decisions finding that direction of employees and assignment of personnel are management rights under the NYCCBL.[32]

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[29] Decision No. B-12-77.

[30] Decision No. B-17-79.

[31] Saratoga Springs School District, 11 PERB ¶3037 (1978).

[32] Board Decisions Nos. B-7-69, B-2-73, B-16-74, B-18-74, B-3-75 and B-5-75.

In addition, the Board has found that the contents of a job classification is a management right.[33] In several cases, PERB found that demands addressed to the work to be performed or not to be performed by non-bargaining unit employees are not mandatory subjects of bargaining.[34] In Amherst Police Club, PERB found a demand that "Auxiliary Police are not to be used for functions ordinarily performed by Police Officers such as patrol functions, etc." is not a mandatory subject of bargaining because the Union has no authority to negotiate restrictions upon the work of auxiliary police who are not unit employees.[35]

The wording of Demand 3 brings it squarely under the Board and PERB holdings on the non-bargainability of demands addressed to assignment of (civilian) employees and restrictions on work performed by non-bargaining unit employees. Demand 3 is not a mandatory subject of bargaining. The issue of practical impact is discussed in the preliminary issues section of this decision.

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[33] Decisions Nos. B-3-69, B-7-69 and B-24-72.

[34] Somers Faculty Association, supra note 2; Fairview Professional Firefighters Association, 12 PERB ¶3083 (1979); Amherst Police Club, 12 PERB ¶3071 (1979).

[35] Id.

Demand No. 4. COMPENSATORY TIME:

> "B. (Time Limit) - All members must be granted compensatory time within thirty (30) days unless waived."

City Position

OMLR claims that a demand addressed to scheduling of compensatory time infringes on the City's ability to direct its workforce and is, therefore, beyond the scope of bargaining. The City argues that the demand would permit any officer, upon request and without restriction, to alter his assigned schedule, which would hinder the Department in its efforts to schedule employees to meet the needs of the service. The City maintains that, under the NYCCBL, management has a unilateral right to schedule employees[36] and that this demand would subject the Department to an unrestricted right of an officer to be excused from duty.

COBA Position

The Union in the May 14, 1981 joint letter withdrew from Board consideration Demand 4A on the grounds that the Union had withdrawn the demand from bargaining. However, in its papers, the

[36] The City cites to Decision No. B-4-75.

Union treated Demands A and B together. We will attempt to limit this presentation of the Union's Position to its contentions regarding Demand 1B.

COBA claims that the granting of compensatory time in a term and condition of employment and, therefore, in a mandatory subject of bargaining. The Union maintains that the Board has held demands addressed to time and leave benefits, such as Demand 4, including negotiation on the regulation and procedure governing their proper use, are mandatory subjects of bargaining.[37]

Discussion

The 1978-80 unit contract between the parties contains the following provisions that are related to the subject matter of Demand 4B.

Article III, Section 3:

> Overtime shall be computed on a monthly basis and the Department shall make every reasonable effort to pay such overtime within six (6) weeks following the submission of the monthly report.

Article XI, Section 2:

> Vacations shall be scheduled in accordance with existing procedures.

Article XI, Section 3:

> The Department agrees to allow Correction Officers to use their accrued vacation days in the vacation year in which they are earned subject to the exigencies of the Department.

[37] The Union cites to Decision No. B-3-75.

In Decision No. B-3-75, the Board stated that time and leave benefits are mandatory subjects of bargaining at the City-wide level. The Board hold that in the case of employees who are not covered by the City-wide contract time and leave provisions, including a demand setting forth Procedures for the granting of sick leave, are mandatory subjects of bargaining. The Board stated, “The obligation to negotiate on sick leave, which is clearly a mandatory subject, encompasses the duty to negotiate on the regulations and procedures governing its proper use.”

In Decision No. B-10-81, the Board held that a Union has the right to bargain on the maximum hours of work per day, per week and per year, an the number of appearances per year and on time-off for vacations, sick leaves or other contractually-guaranteed time off. The Board further held "[O]nce agreement is reached on these provisions it in the City's management prerogative to determine the level of staffing to be provided by means of work schedules, within the limitations of the agreement an hours and leave benefits." The Board explained that it is within managerial rights to reschedule shifts, provided that such rescheduling does not violate contractual provisions relating to number of days of leave or maximum hours of work.

PERB has consistently followed its holding in a 1972 decision that:

> It in the City alone which must determine the number of firemen it must have on duty at any given time. It cannot be compelled to negotiate with respect to this matter. However, there are many ways in which the schedules of individuals and groups of firemen may be manipulated in order to satisfy the City's requirement for fire protection. It is this manipulation of the schedules of individuals and groups of firemen which is involved in the Fire Fighters' demand. Within the framework which the City may impose unilaterally that a specified number of Fire Fighters must be on duty at special times, the City is obligated to negotiate over the tours of duty of the Fire Fighters within its employ.[38]

PERB has also hold non-mandatory a demand that would restrict the scheduling or extent of services provided at a given time.[39]

In our opinion, Demand 4B is clearly mandatory to the extent that it seeks compensatory time-off for employees who have worked overtime. However, determination of the bargainability issue rests on the proviso that the time off be granted within thirty days unless waived. To the extent that the demand in addressed to procedures for scheduling compensatory time-off for individual employees, it is a mandatory subject of bargaining under holdings in B-3-75 and PERB's City of White Plains decision. To the

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[38] Matter of City of White Plains, 5 PERB ¶3008 (1972), followed in Village of Malone, 8 PERB ¶3024 (1976), Corning Police Department, 9 PERB ¶3086 (1976).

[39] Orange County Community College, 9 PERB ¶3068 (1976), Rochester Firefighters, 12 PERB ¶3047 (1979).

extent that the demand infringes on the City's ability to establish through work schedules the level of manpower needed to operate the corrections department, it is not a mandatory subject of bargaining under the holdings in B-10-81 and City of White Plains. If the demand were drafted to seek use of compensatory time within a period of time in a manner that recognized the exigencies of the department, it would be bargainable. However, because the demand seeks an inflexible, absolute right to time off within a defined period of time, without any recognition of the exigencies of the department, we find that Demand 4B infringes on management's right to establish manpower levels and schedule employees and in, therefore, a non-mandatory subject of bargaining.

Demand No. 7. DISCIPLINARY RECORDS:

> "When a member has been charged with a departmental violation and the final disposition of the charge is other than guilty , the record of the case will be expunged immediately upon such final disposition. If the final disposition of the charge is guilty the record of the came will be expunged one (1) year after such final disposition."

City Position

The City withdrew its challenge to the bargainability of a related demand (No.6) which seeks grievance-arbitration of disciplinary actions and procedures to govern the investigation of employees and hearings into employee conduct. OMLR continues to maintain that Demand 7 is not bargainable because the recording of guilty charges developed at a departmental hearing is an internal matter within the department's control and for which the department has developed an efficient operating procedure. The City states, "The employee in not stigmatized by the contents of the folder and further compliance with Civil service due process standards in not an issue." The City argues that the demand would eliminate meaningful review of employee job performance. In addition, the City asserts, "Material in personnel files is unrelated to the concept of alternative

disciplinary procedures regardless of the union title attached to the demand."

COBA Position

The Union states that the demand seeks procedures for the handling of disciplinary records. COBA argues that as a disciplinary procedure demand, the matter is bargainable for the same reasons that the Union stated Demand No. 6 is bargainable. Without elaborating on the Union's arguments concerning Demand 6, which the City is no longer challenging, COBA relied on BCB Decision B-2-73 and the Court of Appeals decision in Auburn Police v. Helsby.[40]

Discussion

This demand does not seek employee access to and review of information contained in a personnel file. The demand does not seek to limit employer access to information contained in a personnel file.[41] The demand is not addressed to the use of information contained in a personnel file, such as for purposes of progressive discipline or for evaluation of an employee. Rather, the demand seeks to limit the information that may be placed in a personnel file. Part of the demands is related to review of employer disciplinary actions. After an employee is charged with a

[40] 46 N.Y. 2d 1034 (1979).

[41] Such a demand would be a non-mandatory subject of Bargaining. Bd. of Education v. Areman, 41 N.Y. 2d 527, 10 PERB ¶7512 (1977).

departmental violation is disciplined and the employee seeks to review the charge and a disposition other than guilty is rendered, the record of the incident is a matter to be addressed as relief in the final disposition of the charge. The matter of entries into personnel files of alleged violations for which the employee is not found guilty is appropriately considered as part of the disciplinary procedure and, in this case, should be addressed by the parties and the impasse panel in fashioning the scope of the disciplinary procedure and the authority of the review body sought by the Union in Demand No. 6.

However, the part of this demand which seeks to limit the time period that the employer may maintain a record of a disciplinary action, in our opinion, infringes on the employer's right to keep files concerning employees. The demand may conflict with an employer obligation under federal or state law to maintain records for a prescribed period of time of actions taken, against employees. This demand is not addressed to the use of disciplinary records in future proceedings, a matter which may be bargainable.

We find that the part of Demand 7 calling for the expunging of a disciplinary action is not mandatory and that the part of Demand 7 which seeks to limit the substance of a personnel file entry resulting fa a disciplinary charge is referred to the parties and the impasse panel for consideration as part of Demand No. 6.

Demand No. 9. IDENTIFICATION CARDS FOR RETIRED MEMBERS:

> "COBA and the Department shall develop a procedure whereby a retiring member will be provided with an identification card which shall also serve as a gun permit."

City Position

In its petition, the City contends that it has no duty to negotiate benefits for persons no longer employed at the time of negotiations.[42] The City claims that this demand is not addressed to a term and condition of employment and, therefore, is not a subject of collective bargaining. Moreover, the City argues, since a demand for a pistol permit during employment is not bargainable referring to its argument under Demand 19, a demand for a pistol permit for retired employees is not a mandatory subject.

COBA Position

The Union answers that the demand contemplates the provision of a benefit to active members of the bargaining unit to be received when they retire. The Union argues that PERB has held mandatorily bargainable a demand that employees receive identification cards, parking stickers, and the first opportunity to teach part-time

[42] The City cites to Troy UFA, 10 PERB ¶3015 (1977); City of New Rochelle, 10 PERB ¶3042; BCB Decision No. B-21-72.

courses when they retire. COBA claims that PERB held that this type of retirement benefit is a mandatory subject and that negotiation on it in not barred by section 201.4 of the Taylor Law.[43] CORA alleges that the demand for identification cards "is a form of extra compensation for members in the event they retire during the period of the contract" and thus is a mandatory subject of negotiation. However, since this latter point appears to advance an economic argument, it may no longer be espoused by the Union pursuant to the May 14, 1981 letter signed by both parties.

Discussion

Both the BCB[44] and PERB[45] have held that a demand for a retirement benefit for employees, who are employed at the time of negotiations, in a mandatory subject of bargaining to the extent that the demand in not otherwise prohibited by law.[46] PERB has held that a demand that, upon retirement, members of a bargaining unit be given identification cards is a mandatory subject of bargaining.[47] PERB has

[43] The Union cites to Orange County Community College, 10 PERB ¶3080.

[44] Decision No. B-21-72.

[45] City of Now Rochelle, 10 PERB ¶3042 (1977).

[46] See, Board Decision B-6-74.

[47] Orange County Community College Faculty Association, 10 PERB ¶3080 (1977).

also held however, that a demand that employees be permeritted pistol permits for reasons not connected with their official duties, such as after they retire, ... is not a term or condition of employment.[48]

A demand that seeks a post-employment benefit for present employees in bargainable. COBA argues that it is seeking an extra retirement benefit for unit members in the form of "an identification card which shall also serve as A gun permit." In our opinion, this demand is addressed matters outside the scope of employment or of retirement compensation and in not a mandatory subject of collective bargaining.

[48] City of Albany, 7 PERB ¶3078 (1974).

Demand No. 11. MEAL:

> "A. (Food Handling) - Any inmate, who is assigned to kitchen duty or any duty which involves the handling of food, which is eventually served to Correction Officers, shall be provided with proper training for such work and shall be examined medically prior and during such assignments.
> B. (Inmate Utensils) - All members shall be provided with utensils which are to be kept separate and apart from the utensils which are used by the inmates.
> C. (Utensils) - No members will be required to use plastic utensils."

City Position

In its petition, the City contends that this demand interferes with its management right to maintain the efficiency of government operations and, accordingly, it has no obligation to bargain over the method of selection of persons who prepare meals or how the meals are served. OMLR also claims, in its memorandum, that the demand interferes with the exclusive powers of the commissioner of the department, under section 623(6) of the City Charter,

to formulate and implement rehabilitation and training policies for inmates in City institutions.[49]

COBA Position

The Union answers that the provision of meals is a benefit for the members of the bargaining unit and that the method by which the meals are provided is a mandatory subject of bargaining. The Union claims that the absence of the demanded procedures "would subject members to hepatitis food poisoning and bacterial infection." The Union further argues that proper food handling and clean utensils are terms and conditions of employment, especially where employees are required to take meals on the job. COBA also contends that the risks on employees occasioned by preparation and service of food under unsanitary condition makes the demands a mandatory subject of bargaining, citing Decisions Nos. B-18-75 and B-11-68.

Discussion

There is no dispute between the parties that this demand relates to a term and condition of employment. To

[49] City Charter, section 623)6) provides:

> The commissioner shall have:
>
> (6) General supervision and responsibility for the planning and implementation of re-training, counseling and rehabilitative programs for felons, misdemeanors and violators of local laws who have been sentenced and are held in institutions under his charge.

our knowledge, there has been no decision by the BCB or PERB on the bargainability of demands addressed to the conditions under which in-plant food service is made available to employees. In the private sectors the Supreme Court held in a 1979 case[50] that in-plant food prices and services are mandatory subjects of bargaining. The Court stated:

> [T]he availability of food during working hours and the conditions under which it is to be consumed are matters of deep concern to workers, and.... among those 'conditions' of employment that should be subject to the mutual duty to bargain. By the same token, where the employer has chosen apparently in his own interest, to make available a system of in-plant feeding facilities for his employees, the prices at which food is offered and other aspects of this service may reasonably be considered among those subjects about which management and union must bargain. The terms and conditions under which food in available on the job are plainly germane to the 'working environment.' ... Furthermore,, the company is not in the business of selling food to its employee and the establishment of in-plant food prices is not among those managerial decisional, which lie at the core of entrepreneurial controls' The Board is in no sense attempting to permit the Union to usurp managerial decision-making; nor is it seeking to regulate an area from which Congress intended to exclude it. [Citations omitted].

[50] Ford Motor Co. v. NLRB, 441 U.S. 488, 101 LRRM, 2222 (1979).

The issue before the BCB is whether Demand 11 seeks to interfere with managerial rights protected by NYCCBL section 1173-4.3b. The City contends that the demand interferes with its right to "maintain the efficiency of government operations" and infringes, in certain respects, on the Charter powers of the correction commissioner. With regard to sections B and C of Demand ll, the City in no way explains how bargaining on the demands will interfere with its ability to provide correction department services efficiently. The demands concern conditions under which in-plant food service will be provided and do not, in our opinion, involve the manner er in which the correction department will operate. Therefore, Demands 11 B and C are mandatory subjects of bargaining and are not subject to the management rights clause.

Demand 11 A concerns the training of inmate-kitchen help and a requirement that they be medically examined. The City claims that the demand interferes with the powers of the commissioner, under the Charter, to supervise and implement re-training, counseling and rehabilitative programs for inmates. This is a close question. To the extent that the demand is addressed to sanitary conditions for the provision of in-plant food service it in a mandatory subject of bargaining; to the extent that the demand is addressed to training of inmates, it is a non-mandatory subject of bargaining.

Demand No. 12. MUTUALS:

> "Any member requesting changes in his tours of duty, vacation or a transfer from one institution to another shall have the right to arrange to a mutual swap with another Correction Officer."

City Position

OMLR argues that this demand would have the City play no role in assignment of personnel. The City alleges that management must assess individual characteristics in assigning correction officers to perform highly sensitive duties in a correction institution. The City contends that this demand infringes on its statutory right to direct and assign the municipal workforce, which has been recognized in several Board decisions.[51]

COBA Position

The Union claims that this demand seeks to define clearly the rights of the parties by a written agreement, which is a policy favored by the Board and the NYCCBL.[52] The Union argues that the demand in no way affects managerial prerogatives and that all correction officers must perform their job duties in a satisfactory manner. The Union asserts that the demand does not interfere with the number of correction officers assigned, but deals with

[51] The City cites Board Decisions B-7-69; B-2-73; B-16-74; B-18-74; B-3-75 and B-5-75.

[52] The Union cites Board Decision No. B-3-75.

manipulation of individual schedules# a matter found bargainable by PERB in City of White Plains.[53] COBA concludes that the City in required to negotiate over the tours of duty of individual correction officers.

Discussion

In City of New York and Committee of Interns and Residents,[54] the Board ruled on the bargainability of a demand which sought to restrict the City's ability to reschedule won call duty" to require an employee to make-p such duty not taken when the employee exercised a conractual right to take time off for vacation, sick leave and other contractually recognized occasions. The Board held that "it is within the right of management to reschedule shifts ... provided that such rescheduling does not violate contractual provisions relating to the number of days of leave, or maximum hours of work." [Emphasis in original] The instant demand seeks the converse -- it employees be free to reschedule work time or time off -- and the right to arrange place of work. Clearly, the instant demand goes to the heart of the statutory managerial rights to schedule employees to direct the

[53] 5 PERB ¶3013 (1972). The quotation from the decision on which the Union relies in set forth in the discussion of Demand 4B, supra.

[54] Decision No. B-10-81.

workforce and to assign personnel.[55] The Board finds this demand is not a mandatory subject of bargaining.

[55] Supra note l, B-10-61.

Demand No. 13. OFFICERS OF ASSOCIATION:

> "A. (Accessible Phone) - All Delegates and Officers of the Association must be assigned to a central area where they are readily accessible for communication with the members.
> B. (Notification) - The President of the COBA or his designee in to be immediately notified of all assaults on Correction Officers and all other unusuals involving Correction Officers.
> C. (Transfers) - Delegates and Officers of the Association shall not be transferred from their command assignments while holding such office without their consent."

City Position

The City claims that assignment of union officers to particular types of jobs would infringe on the City's management rights to assign and direct its workforce. OMLR also argues that PERB has held non-mandatory a demand which "requires that certain employees (union officials) be transferred so as to be given specific job assignments and/or that they not be transferred from these assignments."[56] The City further contends that it has no duty to notify CORA of "unusuals" and that the demand is beyond the purview

[56] The City cites City of Buffalo 9 PERB ¶3024 (1976).

of collective bargaining, not being related to a term and condition of employment. OMLR maintains that the information within the Department's possession to which the Union in entitled must relate to the bargaining process an provided in the NYCCBL.

COBA Position

The Union answers that the provision of benefits for Association officers in the nature of assignments is a necessary benefit for the Union to function properly and is, therefore, a mandatory subject of bargaining. The Union argues that both PERB and New York courts have held that procedures, rules and means of providing effective representation are mandatory subjects of bargaining.[57] COBA maintains that work rules necessary for the effective representation of members do not constitute gifts of public monies for private purposes[58] but are mandatory subjects of bargaining necessary for effective representation of the bargaining unit.

Discussion

Article XVII of the 1978-80 unit contract covers union activity and provides an follows:

[57] The Union cites to City of Albany, 7 PERB ¶3079 (1979), Matter of Albany Police, 55 A.D. 2d 346, 390 N.Y.S. 2d 475 (Third Dept. 1977); City of Albany v. Helsby, 48 A.D. 2d 998 aff'd., 38 N.Y. 2d 778, 381 N.Y.S. 2d 866.

[58] Citing to Matter of Albany Police, supra note 57.

Section 1

Time spent by Union officials and representatives in the conduct of labor relations shall be governed by the provisions of Mayor's Executive order No. 75, as amended dated March 220 1973, or any other applicable Executive Order or local law, or as otherwise provided in this Agreement. No employee shall otherwise engage in Union activities during the time the employee is assigned to the employee's regular duties.

Section 2

C.O.B.A. officers and delegates shall be recognized as representatives of the C.O.B.A. within their respective commands. For the purpose of attending the regularly scheduled monthly meetings, C.O.B.A. delegates shall be excused from duty if the meeting coincides with the delegate's scheduled tour, provided that the command has received at least seventy-two (72) hours advance notice of such request for excusal.

Section 3

The Department of Correction will issue a memorandum to all heads of institutions instructing them to discuss labor/management problems with alternate Union delegates when a regular delegate is not available, and such alternate will be released for the regularly scheduled monthly meeting when the regular delegate in unable to attend said monthly delegate meeting because of illness which requires remaining at home or hospitalization, or absence from the New York metropolitan area on leave or by assignment, or required court appearance.

Executive order No. 75 provides for and governs the use of working time in the conduct of labor-management activities and of union activities.

In Decision No. B-21-79,[59] the Board considered an improper practice charge filed by the Patrolmen's Benevolent Association claiming that the transfer and reassignment of police officers who are also PBA delegates violated the NYCCBL because it produced "a chilling effect upon the activities of delegates and constitutes unwarranted interference and coercion of union official by the employer."[60] The Board found that the employer's actions in the case did not constitute violation of law and the Board indicated that, if the delegates were afforded protection against transfer or reassignment because of their union status, the employer or the Union or both may be guilty of an improper practice. The Board based this latter observation on the provisions in the NYCCBL prohibiting both public employers and public employee organizations from interfering with the rights of public employees to "Join or assist" unions and to "refrain" from union activity (section 1173-4.1), on the section prohibiting a public employer from discriminating "for the purpose of encouraging or discouraging membership in, or participation in the activities of, any public employee organization" (section 1173-4.2a(3)), and on the clause making it an improper practice for a union "to cause, or attempt to cause, a public employer" to

[59] PBA v. McGuire.

[60] The Union also claimed a violation of contract, a matter that is not relevant to the issue before the Board.

interfere, restrain or coerce public employees in the exercise of their rights (section 1173-4.2b(l)). The Board stated:

> Read together, these subsections prohibit any actions by management or labor which discriminate in such a way as to encourage participation in the affairs of a public employee organization, including the granting of benefits to employees in return for their activities on behalf of the union. It is clear that a provision, such as is sought by PBA herein, which would have the effect of insulating elected PBA delegates from transfer to temporary details might be viewed by many Police officers as an encouragement of active participation in internal PBA activities.

In making its determination, the Board discussed several private sector cases concerning the legality of benefits for union delegates whose presence on the job is necessary for effective representation of employees and protection of their interests. In Dairylea Cooperative Inc.,[61] the NLRB found that a superseniority clause for union shop stewards, which on its face was not limited to layoff and recall, is presumptively invalid under section 8a of the National Labor Relations Act when it affords shop stewards special economic or other on-the-job benefits solely because of their union positions. The NLRB based its decision on the fact that the clause at issue gave union stewards a wide range of on-the-job preference benefits including first choice of vacant lucrative route

[61] 89 LRRM 1737 (1975).

assignments over other employees who would otherwise be fully entitled to such an assignment solely because of the steward's union position. The Board reasoned that an agreement by the employer and union to give a wide range of job benefits to a union steward has the effect of encouraging other employees to become members and participate in the activities of the union and has a deleterious effect on other employees who choose not to join or participate in a union. The Board further stated that if the union could show legitimate and substantial business justification for a super seniority clause, it may be found valid. Thus, the Board found that a clause which affords a shop steward super seniority in the areas of layoff and recall in valid, despite the effect of an on-the-job benefit resulting from union status because such a clause promotes effective administration of bargaining agreements in the work place by encouraging the continued presence of the steward on the job which rebounds to the benefit of all unit employees. The NLRB decision was affirmed by the Second Circuit Court of Appeals.[62]

Since the Dairylea decision, the NLRB and the courts have generally followed the rule that where it is in established that a super seniority for shop stewards clause has the effect of furthering effective administration of the collective bargaining agreement and of furthering the

[62] NLRB v. Teamsters, Local 338, 91 LRRM 2929 (CA Second Circuit 1976).

collective bargaining relationship,[63] the clause is valid but where a super seniority clause gives a shop steward on-the-job benefits such as preference in job assignments, based on union status, the clause is invalid absent a Showing of legitimate and substantial justification for, the provision.[64] In a District of Columbia Circuit Court decision, a union's claim that a super seniority clause that granted a shop steward preference on selection-of route assignment was necessary because it had the effect of increasing the time spent by the steward at the terminal, and thus facilitated the handling of grievances was re-jected by the NLRB and the court because the evidence indicated that the employee was able to perform adequately as steward prior to the preferential grant of the route assignment at issue.[65]

The BCB, PERB and the courts have held that a demand for release time for union representatives is a mandatory subject of bargaining.[66] The BCB and PERB based their decisions on the statutory duty of the employee organization to represent employees and the concomitant need to have representatives available to devote time to the work of the

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[63] W.R. Grace & Co., 95 LRRM 1441 (1977).

[64] Perma-Line v. Painters Local 230, 106 LRRM 2483 (CA Second Circuit 1981).

[65] Teamsters Local 20 v. NLRB, 102 LRRM 3080 (CA D.C. Circuit 1979).

[66] Decisions Nos. B-3-75 and B-22-75; City of Albany, 7 PERB ¶3079 and cases cited at note 2, supra.

organization. In a more recent case, PERB held mandatorily bargainable a demand for a reduced workload for the president of a faculty association.[67] PERB has hold, however, that a demand for the assignment of union officers to specific jobs is a non-mandatory subject of bargaining.[68]

Applying the case law to Demand 13C, it appears that the demand is a prohibited subject of bargaining because it seeks to confer on-the-job benefits to employees because of their union status without any indication of how the requested command-position tenure will enable the union officials to perform better, or more effectively, the work of representing the members of the bargaining unit. Clearly, affording union delegates and officers such distinct tenure rights without any business-reason justification would constitute a violation of NYCCBL sections 1173-4.2a(3) and b(2) if agreed to by the parties.

Demand 13A presents a narrower and more difficult issue. The demand states that assignment of delegates and officers to a central location will allow better communication with bargaining unit members and, impliedly, more effective representation of employees by the Union. However, a demand seeking particular assignments for employees is directly counter to the management rights clause and PERB's holding in City of Buffalo that a demand for assignment

[67] Orange County Community College, 10 PERB ¶3080 (1977).

[68] City of Buffalo, 9 PERB ¶3024 (1976).

of union officers to a particular Job is not mandatory. This demand is not addressed to reduced workload to conduct union business, but to assignment to a particular work location. In addition, the Union has not presented any evidence that Union officers and delegates in their present work locations are not able to perform adequately their duties concerning representation of employees. We are guided by the decision of the NLRB, affirmed by the D.C. Circuit, in the Teamsters Local 20 case[69] that where there is evidence that union officials have been able to perform adequately their employee representative duties in their old work location, preferential reassignment to a new work location, which may be desired by other employees, is illegal even though the new position may be advantegous in terms of conducting union representative duties. We find Demand 13A is not a mandatory subject of bargaining.

With regard to the bargainability of Demand 13B, we note that the NYCCBL, section 1173-4.2c(4) requires parties, as part of their duty to bargain in good faith, to furnish to each other, upon request, "data normally maintained in the regular course of business reasonably available and necessary for full and proper discussion, understanding and negotiation of subjects within the

[69] Note 65, supra.

scope of collective bargaining." Demand 13B does not request information to be used in the context of collective bargaining. However, the demand that the Union president be notified of assaults on Correction Officers relates to information pertaining to the working conditions of bargaining unit members. Moreover, providing notice of assault to the Union president would aid the Union in representing employees and would promote the collective bargaining relationship by keeping the Union informed of serious incidents concerning employees. For these reasons, we find mandatorily bargainable the part of Demand 13B seeking notification to COBA's president of assaults on Correction Officers. The Union has not defined in its papers the term “unusuals.” The part of Demand 13B seeking notification to COBA's president of “unusuals involving Correction Officers” is to vague to require bargaining thereon. Therefore, we find this latter part of Demand 13B a non-mandatory subject.

Demand No. 14. OVERTIME:

> "A. (Choice of Assignments) - When a member volunteers or in forced to work overtime, said member shall have first choice of any assignment outside the housing areas, unless his assignment in already manned by a Correction officer on a steady basis.
> B. (Limitations) - No member shall work more than seventeen (17) hours and ten (10) minutes during a twenty-four (24) hour period."

City Position

The City challenges the bargainability of this demand on the grounds that it "would strip the City of its right to assign its workforce in accordance with the needs of the service." The City argues that the demand would give a Correction Officer an unfettered right of choice of assignment" and for this reason is beyond the scope of bargaining. The City also claims that the demand would interfere with its management right to schedule overtime pursuant to its statutory right to determine "the standards of service to be offered."[70] This right in particularly important, the City maintains in the area of correctional services which is fraught with emergencies and special circumstances. In addition, the City alleges that the City

[70] The City cites Decision No. B-6-74.

Charter (Chapter 25) and the New York City Administrative Code (section 623(4)-5.1) governs certain aspects of the demand and that, to the extent the demand conflicts with the law, it in not bargainable.

COBA Position

The Union answers that "the method of allocation of overtime is a term and condition of employment" and, therefore, is a mandatory subject of bargaining. COBA claims that under PERB's holding in Buffalo PBA[71] it is a management prerogative to determine how many policemen will be on duty at a particular times, but that the employer "must negotiate the manner that will provide the City with the number of police that it requires." The Union argues that Demand 14A in addressed to "the manner that will provide the City with the number of correction officers required" and therefore in mandatorily bargainable.

Demand 14B, the Union contends, seeks to limit the total number of hours to be worked during a 24-hour period and in mandatorily bargainable under the BCD decisions finding that the City must bargain on the total number of hours in a work day and the total number of hours in a work week.[72]

[71] 9 PERB ¶3024 (1976).

[72] The Union cites Board Decisions Nos. B-5-75, B-10-75, B-23-75, B-24-75 and B-7-77.

Discussion

Chapter 25 of the City Charter provides for a department of correction and sets forth the powers of the commissioner of the department. Section 623(4)-5.1 of the Administrative Code provides, in relevant part, as follows:

> b. The commissioner or other officer or officers having the management control or direction of the department of correction shall divide all the custodial officers in each employee classification into three platoons at each institution. No one of such platoons nor any member thereof shall be assigned to more than one tour of duty, to consist of not more than ten consecutive hours in each consecutive twenty-four hours, excepting only that in the event of riots, prison breaks or other similar emergencies, so many of said platoons or of the members thereof as may be necessary, may be continued on duty for such hours as may be necessary. For the purpose of changing tours of duty and for the necessary time consumed therein, said platoons or members thereof shall be continued on duty until relieved.

This section of the Administrative Code also provides for the starting and finishing times of normal tours of duty, for the assignment of custodial officers, which includes correction officers to the same number of each of the normal tours of duty within a working cycle, for a monthly rotation of certain tours of duty, for at least one calendar day of rest after every six tours, and for exceptions to these provisions based on the size of an

institution or membership in a special duty squad. Section 623(4)-5.1 further provides for a vacation period for custodial officers, in accordance with leave regulations Promulgated by the Mayor, for the withholding of a vacation period during periods of emergency and for compensation to employees for withheld vacations days.

As indicated in the discussions of Demands 1, 3 and 12, the Board has recognized in several decisions the management rights, set forth in the NYCCBL, to assign and direct the workforce. The Union has offered no grounds to deny these managerial rights when employees are working overtime. Because Demand 14A seeks to give employees, on overtime, the "first choice of any assignment outside the housing area," we find that it is not a mandatory subject of bargaining.

Demand 14B seeks to limit the maximum number of hours an employee may be required to work during a 24-hour period. The Board has hold in a number of decisions that the City must bargain on the total number of hours in a work day and the total number of hours in a work week.[73] Two of the prior Board decisions concerned demands by the union which represents police officers to bargain on the

[73] Decisions Nos. B-5-75; B-10-75; B-23-75; B-24-75; B-2-77; B-7-77.

number of hours worked by officers in a day and week[74] The City argued that the demands were not bargainable because the subject of hours of work of police officers in New York City is governed by section 971 of the Unconsolidated Laws. In relevant part, this section provided that:

> In the City of New York, the police commissioner shall promulgate duty charts for members of the police force which distribute the available Police force according to the relative need for its services. This need shall be measured by the incidence of police hazard and criminal activity or other similar factor or factors. No member of the force shall be assigned to perform a tour of duty in excess or eight consecutive hours excepting only that in the event of strikes, riots, conflagrations or occasions when large crowds shall assemble or other emergency or on a day on which an election authorized by law shall be held, for the purpose of changing tours of duty so many members may be continued on duty for such hours as may be necessary. No member shall be assigned to an average of more than forty hours of duty during any seven consecutive day period except in an emergency or as permitted in this subdivision or for the purpose of changing tours of duty or as otherwise provided by law. [Emphasis added][75]

The underscored provisions Of section 971 are similar to the provisions of section 623(4)-5.1 of the Administrative Code in that both empower the commissioner of the department

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[74] Decisions Nos. B-5-75 and B-24-75.

[75] The statute was amended in 1980 to provide that the quoted provisions also apply to police officers employed by the City of Syracuse. L.1980, c.794.

to require members of the force to work as long as necessary in cases of emergencies and special circumstances. In the earlier Board cases, the issue was the bargainability of demands for work days of eight hours or longer than eight hours with combinations of number of required appearances per year. The Board held that the City was required to bargain on the number of hours worked per day or per week, but that:

> [The parties may not bargain over hours in such a way as to reach agreement contrary to the duty expressly reserved to the Police Commissioner by law. Any PBA or City demand which would require a contravention of law is therefore a prohibited subject of bargaining. [Citations omitted.]

The Board also stated, in making its decision, that, under the state law and the NYCCBL, the department has the duty to determine the level of service to be provided and that "it alone may determine the level of manpower required and the number of Patrolman who must be an duty at a certain time."

Demand 14B seeks to place a limit on the number of hours a correction officer may be required to work in a 24-hour period. This demand appears to have the potential of interfering with the department's right to determine the level of manpower needed to maintain order in correction facilities and to infringe on the commissioner's statutory

authority to continue the workforce on duty "for such hours an may be necessary." However the management right and statutory authority factors which circumscribe the bargainability of an hours demand, were present in the PBA chart cases. In those cases, the Board found that the parties are required to bargain on the total number of hours to be worked per day, per week and per year, but that they may not reach an agreement that would interfere with the department's right to determine the manpower needed to deliver the level of service required. Therefore we find Demand 14B mandatorily bargainable to the extent that it does not seek an agreement that would interfere with the department's managerial right to decide manpower levels and the commissioner's statutory rights under the Administrative Code.

Demand No. 15. PARKING FACILITIES:

> "The Department of Correction and the City shall provide locations adjacent to, near or part of correctional facilities, as parking facilities for the personal use of the Correction Officers with no more than a five (5) minute walk to the designated location."

City Position

OMLR challenges the bargainability of this demand on the grounds that it would interfere with the City's right under NYCCBL section 1173-4.3b to allocate its resources in accordance with its obligation to deliver municipal services. The City recognizes that a demand for parking facilities seeks an employee benefits which is a term and condition of employment, and the City contends that it does provide parking facilities, for employees in the correction force. The City alleges, however, that this demand would require parking facilities within a five minute walk of designated work locations, which would necessitate alteration of security measures for Rikers Island, a matter clearly within the area of managerial rights.

COBA Position

The Union argues that PERB has hold that the provision of free parking facilities is a term and condition

of employment.[76] COBA states, "[P]arking in New York City, one of the world's most congested cities, is a valuable benefit, directly related to the ability of a member to perform his work properly by being on times, and not having to worry about loss or damage to his vehicle." The Union asserts that parking conditions in the City and the PERB decision "obligate the City to negotiate" on Demand 15. The Union also presents an argument that parking facilities are a form of compensation which, as noted above, it has withdrawn.

Discussion

In the State of New York case cited by the Union, PERB considered the bargainability of the imposition of a charge for parking at locations where free parking for employees had been made available. PERB stated that several factors determine whether free parking is a term and condition of employment. They are: the nature of the benefit; the proportion of the work force at a given location and on the whole receiving the benefits the availability of alternatives to employees receiving the benefit; and the extent to which the decision to continue or not to continue to provide free parking is an essential part of the employer's mission as an enterprise so as to require that the decision be made only by management. Applying the criteria to the

[76] The Union cites Matter of State of New York, 6 PERB ¶3005 (1973).

case before it, PERB found that the State was required to bargain on parking fees for locations where free parking had existed.

PERB's decision was based on a change in past practice that the Board found to be a term and condition of employment. Demand 15 seeks bargaining not on a change in the employer's policy in providing parking facilities, but to bargain on the Union's demand that parking facilities be located at places convenient for correction officers. Certainly, this demand is different than the issue considered by PERB in the State of New York case. Demand 15 does not seek only the provision of parking facilities, which the City claims, and the Union does not deny, already exist, but seeks alteration of the physical layout of the department's facilities. Clearly, this demand goes beyond bargaining for a benefit and infringes upon the City's rights and obligations with regard to incarceration of people convicted or accused of committing a crime.

We find that Demand 15 is not a mandatory subject of bargaining.

Demand No. 16. PHONE:

> "(Personal) - Any member shall be permitted to receive and place a reasonable number of personal phone calls."

City Position

OMLR claims that this demand is not bargainable because the placing and receipt of personal telephone calls does not bear on the employment relationship and is not a term and condition of employment. The City maintains that PERB has held that employee use of school telephones and photocopying equipment is not a mandatory subject of bargaining.[77] The personal use of phones at work locations, according to the City, is only a permissive subject.

COBA Position

The Union contends that the placing of phone calls while a member is on duty is a benefit and a working condition, and therefore mandatorily bargain In its memorandum of law, COBA argues that the use of a phone is a matter of compensation# but# an discussed above, the Union later withdrew this argument.

Discussion

The PERB case cited by OMLR is a decision by a hearing officer on an improper practice charge concerning a

[77] The City cites Addison Central School District, 12 PERB ¶4604 (1979).

change in the employer's policy regarding use of photo-copying equipment and telephones by union officials. The hearing officer found that the use of the equipment was not a matter on which the employer had a duty to cooperate to facilitate representation of public employees was not a past practice, was not discriminatorily denied by the em-ployer, and was not a term and condition of employment but a matter of equipment usage which management has the right to determine in deciding the most effective method of utilizing school resources.

The issue before the BCB is not an improper prac-tice charge on a change in practice Nit a demand for the use of a personal phone. A demand for the use of personal phone for any purpose may interfere with the functioning of the department. However, a demand for the use of a phone to place and receive calls concerning personal emergencies, and as an injury to or the death of a family member, in a term and condition of employment. Therefore, to the extent that the demand seeks usage of a telephone for emergency situations it is a mandatory subject of bargaining.

Demand No. 18. PROTECTION Op EMPLOYEE BENEFITS:

> "(Conditions of Employment) - Proposed now rules or modifications of existing rules governing working conditions shall be negotiated with the COBA before they are established."

City Position

OMLR claims that, under the statutory management rights clause, the City has an absolute right to establish unilaterally reasonable rules and regulations dealing with maintenance and delivery of government services. The City contends that the wording of the demand would require negotiation on all existing policies and rules governing working conditions. The City claims that PERB ruled on a demand requiring prior notification, discussion, and written consent by a union before the institution of "new policies or customs affecting working conditions." PERB held according to the City, that because this demand would restrict alteration of policies and practices that are management prerogatives, it is not mandatory even though there may be some effect on working conditions.[78] The City asserts that this demand would restrict the exercise of recognized managerial rights and, therefore, is not a mandatory subject of bargaining.

[78] The City cites Orange County Community College Faculty Association, 10 PERB ¶3080 (1977) and the City of Rochester, 12 PERB ¶3010 (1979).

COBA Position

The Union contends that protection of employee benefits is a term and condition of employment and a mandatory subject of bargaining. In its memorandum of law, COBA argues that the demand is restricted, by its terms, to rules governing working conditions. The Union relies on the PERB decision in Albany Police[79] which, the Union states, found that rules and regulations restricted to working conditions are mandatory subjects of bargaining. The Union also relies on the statement in the Appellate Division's affirmance of PERB's decision that, "[The general subject of 'work rules' ... involves a condition of employment and consequently is mandatorily negotiable...."

COBA adds that the demand is bargainable because it relates only to subjects that are bargainable as working conditions and does not infringe on management rights. Demand 18 in negotiable because of the practical impact, according to the Unions, caused by the introduction of changes in working conditions. COBA claims that PERB has hold zipper clauses are mandatory subjects of bargaining. In conclusion, the Union maintains that Demand 18 only deals with modification or changes in terms and conditions of employment and, for this reason, is mandatory.

[79] 7 PERB ¶3078 (1974), aff'd. 38 N.Y. 2d 778 (1975).

Discussion

In two 1980 decisions, PERB adopted the rationale of the District of Columbia Circuit Court of Appeals in ruling on the bargainability of demands concerning work rules. In County of Rensselear,[80] PERB stated that the determination of whether a work rule which affects terms and conditions of employment is bargainable requires a balancing of "an employer's freedom to manage its affairs and the right of employees to negotiate their terms and conditions of employment." PERB mentioned that a factor to be considered in determining the extent to which the rule affects terms and conditions of employment in whether the work rule is enforceable by disciplinary penalties.[81] PERB held that a rule requiring inspection of parcels belonging to employees, which was designed to discourage employees from bringing personal property to work, to protect the employer's property and which subjected employees to searches and discipline, is a mandatory subject of bargaining. In the second case,[82] PERB stated:

> As a general proposition, an administrative work rule constitutes a mandatory subject of negotiation unless it has but a slight impact upon terms

[80] 13 PERB ¶3080 (1980).

[81] PERB relied on the decision in Newspaper Guild of Greater Philadelphia v. NLRB, 105 LRRM 2001 (CA DC 1980).

[82] Police Association of New Rochelle and City of New Rochelle, 13 PERB ¶3082 (1980).

> and conditions of employment or if it has a major impact upon managerial responsibilities that, by law or public policy may not be shared.

PERB held that a demand that would permit employees who are working in the field to sign in and out by telephone is a mandatory subject because it has a clear and direct major impact on terms and conditions of employment.

In a 1979 decision, PERB held non-mandatory a demand that all rules, regulations and general orders of the Police Department be the subject of negotiation between the parties and that, once agreement is reached, no new orders may be issued or changes made in existing orders without negotiation with the Union. PERB found the demand not mandatory because it was not limited to orders establishing terms and conditions of employment.[83] In a 1977 decision, PERB found a demand that "No new policies or customs effecting working conditions shall be instituted without prior notification, discussion, and written consent of the Association" is not mandatory because it would restrict the alteration of policies and practices that are management prerogatives even though they may have some effect upon working conditions.[84] PERB noted in particular that demand would give the Union an opportunity to veto proposed changes in policies or practices affecting working conditions.

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[83] City of Rochester and Rochester Police Locust Club, 12 PERB ¶3010 (1979).

[84] Orangetown Community College Faculty Association, 10 PERB ¶3080 (1977).

In an early decision, rendered in 1974 and later affirmed by the Appellate Division and the court of Appeals,[85] PERB considered the bargainability of a demand that work rules and regulations of the Police Department be subject to review by a joint committee, consisting of employer - employee representatives. PERB hold that, to the extent that the demand is concerned with and restricted to work rules, the demand is bargainable. PERB noted that the Union, in its brief, agreed to restrict the demand to work rules concerning terms and conditions of employment in its presentation to an interest arbitration panel appointed to resolve a bargaining impasse between the parties. In affirming PERB's decision, the courts noted that the determination limited bargaining to work rules concerning terms and conditions of employment and that there was ho determination of the bargainability of any specific work rule.

Demand 18 made by COBA in the instant matter seeks bargaining, prior to implementation, on "Proposed now rules or modification of existing rules governing working conditions...." The Union does not, in its papers, define the term "working conditions" or give examples of the subject of the rules that it seeks to bargain on. Thus, we have no indication of whether the rules that the Union has

[85] City of Albany, 7 PERB ¶3078 (1974), aff'd., City of Albany v. Helsby, 9 PERB ¶7005 (NY 1976).

in mind involve disciplinary measures to promote enforcement, are directly related to terms and conditions of employment, or are more or less directly related to the employer's ability to manage its affairs. We do know that the NYCCBL contains a strong management rights clause which has been interpreted to provide managerial freedom to act unilaterally on a wide range of matters that fall under the broad heading of "working conditions." The law provides, as the Union recognizes in its memorandum of law, that employee representatives may bargain on the practical impact of managerial decisions in matters concerning working conditions made pursuant to the management rights clause. The procedures associated with practical impact bargaining are discussed in the preliminary issues of this decision. Management does not have an absolute right, under the NYCCBL, to implement or modify work rules unilaterally. The substance of many work rules, such as disciplinary procedures, is bargainable. Modification of work rules contained in a collective bargaining agreement is bargainable. Moreover, a demand seeking notification of a change in work rules, which is not addressed to the substance of a rule, is bargainable.

However, because Demand 18 does not identify the subjects of the work rules on which it seeks to bargain, it must be read to cover all work rules, including management prerogatives. Therefore, we find Demand 18 a non-mandatory subject of bargaining.

Demand No. 20. RELIEF:

> "(Post) - If any post requires a member to stand, he may not be assigned there for more than a four (4) hour period."

City Position

OMLR argues that this demand infringes on the managerial right, under the NYCCBL, to assign employees. The City also claims that the demand seeks to give employees standing in the process of deciding the types of work that will be performed during a tour of duty. The City maintains that the Board has found that the determination of how much of scheduled work time should be devoted to a particular activity is a matter of management rights.[86]

COBA Position

The Union claims that it is "clearly overly burdensome" to require an employee to stand eight hours and, that the physical punishment resulting from eight hours of standing Odepreciates a member's ability to perform his duties...." The Union argues that relief from said punishment is a mandatory subject and that matters of personal protection have been hold by PERB to be bargainable.[87]

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[86] The City cites Decision No. B-10-75.

[87] The Union cites Matter of Somers, 9 PERB ¶3014.

Discussion

Assignment and direction of employees and the determination, of the duties that an employee will perform during work time have long been recognized as management rights by the Board.[88] The PERB case cited by the Union concerned the bargainability of a demand for personal protection for teachers from student acts. The union does not present any evidence of a practical impact on employees resulting from an assignment that requires an employee to stand for more than four hours. We find Demand 20 not mandatorily bargainable.

[88] See Decisions Nos. B-7-69; B-2-73; B-16-74; B-18-74; B-3-75; B-5-75; B-10-75.

Demand No. 19. RANGE AND TRAINING:

> "A. (Absentee Members) - Members, who are unable to qualify and,, therefore, would ordinarily have their weapons confiscated, shall be permitted to retain their weapons for promise use only.
> B. (Firefighting) -
> a. The Department shall give at least one hundred (100) hours of firefighting training to each member.
> b. The Department may not order a member, who has not been given sufficient training in Firefighting procedures, to respond to any type of fire or take any action in relation thereto.
>
> D. (Maintenance) - All Firefighters [sic] and other emergency equipment shall be checked and/or maintained on a monthly basis, an necessary,
> E. (Notification) - The Department shall notify each mom er sixty (60) days prior to the expiration of his firearms qualifying period."

City Position

The City claims that subsection A of this demand seeks to allow a disqualified employee to retain possession of a firearm for on-promise use only. OMLR contends that

a public employer is "not in the business of regulating off-duty uses of a firearm which has not been confiscated." The City further argues that firearm privileges for an on-duty employee directly bear on the mission of the employer and are outside the scope of bargaining.[89] OMLR also maintains that Demand 19A and D are not bargainable because they seek bargaining on equipment, a matter which the BCB has found not mandatory absent a showing of practical impact.[90]

The City alleges that Demands 19B(a) and (b) are not mandatory subjects because the establishment of training procedures is a management right.[91]

COBA Position

The Union claims that the department mandates the carrying of weapons, that the procedure necessary for their proper use affects employee safety and that, therefore, procedures concerning weapons are a term and condition of employment.

The Union argues that the BCB has hold that, to the extent training requirements affect the total number of hours worked, it is a mandatory subject[92] and that the

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[89] The City cites City of Albany, 7 PERB ¶3078 (1974).

[90] OMLR cites Decision No. B-3-73.

[91] The City cites Decisions Nos. B-4-72; B-2-73; B-16-74; B-23-75; B-7-77.

[92] The Union cites Board Decisions B-2-77 and B-23-75.

practical impact of training in bargainable. In addition, COBA alleges that a decision to reduce training to less than 100 hours would place an unreasonable burden on employees by endangering their health and lives. For these reasons, the Union asserts that Demands 19B(a) and (b) are bargainable.

The Union alleges, with regard to Demand 19D, that procedures relating to maintenance and safety of equipment are a term and condition of employment and a matter of job content which PERB has declared a mandatory subject of bargaining.[93]

Finally, the Union contends that notification of the expiration of the firearms qualifying period impacts on the hours required for training and is, therefore, a mandatory subject under Board Decision No. B-18-75.

Discussion

In City of Albany and Albany Police Officers Union,[94] PERB considered a demand that, "All employees will be permitted to obtain individual pistol permits upon request." PERB held that, to the extent the demand raises questions concerning performance of official police duties, it relates to the mission of the Police Department and in not negotiable. PERB also stated that to the extent the demand seeks pistol

[93] The Union cites Matter of Scarsdale, 7 PERB ¶3078.

[94] Note 1, supra.

permits for reasons not connected with performance of official duties, it is not a term and condition and is not a mandatory subject of bargaining. In a 1977 decision, PERB found non-mandatory a demand that employees be furnished by the employer with a certain type of revolver because the selection of weapons and their tactical deployment involves the manner and means by which government serves its constituency and, hence, in a management prerogative.[95] According to the Union, Demand 19A seeks to give employees "the right to retain weapons for premise use only." Clearly, if this demand seeks possession of weapons to aid in performance of job duties, it is an infringement on management's prerogatives to determine the mission of the agency and the equipment necessary to accomplish that purpose.[96] If the demand is seeking a right to possess weapons off-duty, then it is not related to terms and conditions of employment and for that reason, is not a mandatory subject.

Demand 19B(a) is addressed to training, a subject that the Board has hold in a management right under the NYCCBL.[97] The Board decisions to which the Union refers dealt with the bargainability of an hour demand when the employer requires attendance in a training programs, which is not the

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[95] Matter of Now Rochelle Police, 10 PERB ¶3042 (1977).

[96] The Board has held demands for equipment non-mandatory subjects in several cases. Decisions Non. B-3-73; B-16-74; B-3-75.

[97] Board Decision No. B-10-81 and decisions cited at note 88, supra.

subject of Demand 19B(a). Demand 19B(b) concerns training and assignment of personnel both of which have been held matters of management prerogative under the NYCCBL.[98] The Union offers no evidence to support its claim that the demands are addressed to practical impact and therefore we dismiss this claim.

Demand 19D is identical to Demand 22G and falls under the board category of maintenance of equipment and safety. We will refer this demand to the impasse panel for the reasons stated in the discussion of Demand 22G.

The City does not raise any specific objection to the bargainability of Demand 19E. it must be assumed# therefore, that the matter in bargainable and appropriate for considera-tion by the impasse panel.

[98] The permissive nature of an as assignment demand is discussed under Demands No. 1, 3, 12 and 14.

Demand No. 22. SAFETY AND SECURITY:

"A. (Department Vehicles) - All Department vehicle are to be in proper working order with headlights, sirens brakes, and radio communication systems, and all other mechanical parts functionable. Said vehicles are to be inspected in accordance with State requirements. Any vehicle which has not been so inspected and/or does not comply with State requirements shall not be driven by members. This provision shall apply both on and off Riker's Island.

B. (Establishment) - The parties hereby agree to establish a Health and Safety Committee with jurisdiction over all matters of health and safety of all Correction Officers of the Correction Department. Such jurisdiction of this Committee shall includes, but not be limited, by the following: Correction Department vehicles, protective equipment, weapons procedures numbers of personnel required to accomplish specific tasks Departmental facilities and other related, matters.

Said Committee shall be comprised of two (2) employer representatives and two (2) Union representatives. A majority vote of the Committee members on a specific subject shall be conclusive.

Demand No. 22. Cont'd

However, said result will be immediately subject to the arbitration provisions grievance procedure in the event of a deadlock. Said Committee shall meet not less than once every two (2) months at a mutually convenient time and place or at the request of either side. Any person may submit suggestions to the Committee either orally or in writing.

C. (Emergency Plan) - The Department will develop and provide the COBA with a copy of its emergency firefighting safety and other major disturbance plans of action.

D. (Escorts) -

a. There shall be no civilians escorting inmates.

b. No inmate movement shall be accomplished with [out] a Correction Officer escort.

E. (History) - Any inmate,, who has a history for violence or assaultive behavior, will not be removed from his coll unless he is handcuffed or shackled and is escorted by at least two (2) Correction Officers armed with batons.

F. (Inmate Van) - No member is to ride in the inmate compartment of a security enclosed van.

G. (Maintenance) - All Firefighters [sic] and other emergency equipment shall be chocked and/or main-

Demand No. 22. Cont'd

tained on a monthly basis, if necessary.
H. (Medical Backup) - The Department shall provide proper medical backup during riots disturbances, etc.
I. (Medical History) - No member with a medical or physical problem shall be used for emergency response situations including but not limited to fires, situations requiring tear gas, etc.
J. (Searches) - Every institution shall be thoroughly searched once a month.
K. (Segregation) -Department of Correction will segregate and prosecute any inmate who attempts to or does in fact assault a Correction Officer.
L. (Stationary Alarms) - Stationary alarms shall be placed in all inmate housing work and program areas,
M. (Training) - Every member shall be trained and qualified in the use of tear gas, respirators, and first aid."

City Position

OMLR challenges the bargainability of Demands Nos. 22A and 22C to 22M. The City claims that the condition and operation of equipment is not a subject of bargaining. The City contends that training of employees is non-bargainable.

The City further alleges that the demands on emergency plans, responses or staffing, inmate escorts and movements, and the security and integrity of City facilities are beyond the scope of bargaining because the method by which the City conducts its operation and delivers services is a management right. OMLR contends that Demands 22D, F and H infringe an the Department's statutory rights to assign and direct its employees, to determine the methods, means and personnel by which government operations are to be conducted, and "to take all necessary actions to carry out its mission in emergencies."

COBA Position

The Union argues that, with regard to Demand 22A, PERB has held bargainable a demand that "unit employees not be required to ride in unsafe vehicles."[99] COBA claims that employee safety depends on vehicles being in proper working order and that, since the department requires employees to use vehicles, the subject of their operating condition is mandatorily bargainable.

The Union maintains that Demands 22C to 22M deal strictly with employee safety and are mandatory subjects under several PERB holdings.[100] COBA also alleges that Demand 22Z, which seeks to provide protection of members

[99] The Union cites Matter of Scarsdale, 8 PERB ¶3075.

[100] The Union cites to City of Albany, 7 PERB ¶3078 (1974); White Plains, 9 PERB ¶3007, and New Rochelle, 11 PERB ¶7002.

from violent inmates, is bargainable under the PERB holding in Matter of Somers[101] that a procedure for protection from acts of violence in a mandatory subject.

Discussion

We note that Demand 22B, concerning establishment of a Health and Safety Committee, is, by agreement of the parties, before the impasse panel.
In a series of cases beginning with Matter of White Plains PBA,[102] PERB has hold that the safety aspects of employee working conditions are a mandatory subject of bargaining and that a demand for a joint labor-management safety committee to consider issues of safety that may relate to management prerogatives is a mandatory subject of bargaining. PERB also suggested that the safety demand may include a provision that the decisions of the committee be made subject to the contractual grievance-arbitration procedures. Thus, PERB has hold mandatorily bargainable a demand for the creation of a general Health and Safety Committee to consider, among other issues, safety questions concerning the total number of firefighters reporting to a fire and the minimum number of employees to be assigned to fire fighting apparatus and that issues not resolved by the

[101] 9 PERB ¶3014.

[102] 9 PERB ¶3007 (1976).

committee shall be submitted to binding arbitration.[103] In several cases, courts have confirmed the PERB decision, noting the balance that PERB has established in permitting negotiations on the establishment of a committee "to consider individual and specific factual situations that encompass safety considerations" while at the same time, not forcing "management to negotiate general questions of manpower deployment under the guise of safety, and ... safeguarding management's prerogatives in such situations."[104]

The Board of Collective Bargaining has ruled that the question of threats to employee safety resulting from particular exercise of management prerogative constitutes sufficient basis for a finding that a practical impact may attach to the exercise of the management prerogative. The Board has required bargaining on the safety impact at the time when implementation of the managerial decision is proposed and has provided that unresolved safety issues are to be decided by an impasse panel.[105]

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[103] City of New Rochelle, 10 PERB ¶3078 (1977), see also, City of Newburgh, 10 PERB ¶3001 (1977); Troy Uniformed Firefighters Assoc., 10 PERB ¶3105 (1977); City of Mount Vernon, 11 PERB ¶3049 (1978); City of Newburgh, 11 PERB ¶3087 (1978); City of White Plains, 11 PERB ¶3089 (1978).

[104] City of New Rochelle v. Crowley, 61 A.D. 2d 1031 (2nd Dept. 1978); see also, International Assn. of Fire-Fighters [Newburgh] v. Helsby, 59 A.D. 2d 342 (3rd Dept. 1977); City of White Plains v. Newman, 12 PERB ¶7019 (2nd Dept. 1979); mo. for lv to app dem, 13 PERB ¶7001 (1980).

[105] Board Decisions Non. B-5-75 and B-6-79.

In light of the parties' agreement to submit to the impasse panel both the issue of establishment of a joint Health and Safety Committee with deadlocked issues to be subject to the grievance-arbitration procedures and the issue of the committee's jurisdiction, we will refer unresolved safety issues to the impasse panel for consideration in deciding the safety committee issue. We believe that this approach is consistent with PERB's decisions on the bargainability of joint Committee consideration of safety issues that touch upon management prerogatives and the Board's past decisions on the bargainability of safety impacts resulting from the exercise of management rights. We take this action to allow the parties to negotiate, and if necessary the impasse panel to decide the potential jurisdiction of a joint safety committee to consider safety issues arising from existing conditions that the Union seeks to change in its bargaining demands herein. The Board will continue to have jurisdiction over future questions of safety practical impacts resulting from the exercise of management rights and jurisdiction ever questions of arbitrability under the parties' contract, which may include unresolved safety allegations.

Demand 22A presents a classic example of safety issues intertwined with management rights. In the demand, the Union seeks to ensure that department vehicles are in proper working order and comply with State inspection requirements. The Union also seeks a provision that would allow employees to refuse to drive vehicles that have not been inspected or do not meet State requirements. The former part of the demand falls generally under the category of equipment safety, while the latter provision would give employees rights concerning the equipment that they may be required to use. In Scarsdale Police Benevolent Association,[106] PERB held a demand that reported mechanical or safety defects in patrol vehicles shall be corrected within two days or removed from service until the mechanical or safety defect is corrected is mandatory to the extent that it seeks that unit employees not be required to ride in unsafe vehicles. in the same case, the PERB considered a demand that "No Superior officer shall assign, direct, or order a member to operate a municipal vehicle which is mechanically deficient or does not satisfy the safety requirements of the Now York State Vehicle Inspection Law." PERB found that the demand is a mandatory subject to the extent that it involves safety. In Troy Uniformed Firefighter's Association,[107] PERB found non-mandatory a demand

[106] Supra, note 99.

[107] 10 PERB ¶3015 (1977).

that would permit a safety committee# consisting entirely of union representatives, to inspect fire equipment and to have equipment identified by the committee removed from service until corrected or replaced. PERB ruled that the demand was more than a safety demand, that it would give the employee organization veto power over equipment selected by the City and would usurp the right of the City to determine the manner and means by which it will serve its constituency. In a 1979 decision,[108] PERB considered the bargainability of the following demand:

> No police officer shall be ordered to operate vehicles or equipment which is defective, and as such may cause physical harm to the officer or other person(s) or damage to the vehicle or other vehicles. A police officer shall not be penalized, re-assigned or disciplined for refusing to operate unsafe vehicle(s) or equipment.

PERB held the demand a mandatory subject of bargaining because it in part of a general safety clause and contains a provision that employees shall not be penalized for refusing to operate unsafe equipment. PERB also noted that application of the safety clause to particular circumstances would be subject to the contractual grievance-arbitration procedure. PERB considered the demand to be substantially similar to the demand approved by it and the Appellate Division in the City of New Rochelle case discussed above.

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[108] City of White Plains, 12 PERB ¶3046 (1979).

In our opinion, Demand 22A may raise issues of equipment safety and the procedures for resolution of such issues is appropriate for consideration by the impasse panel. Unlike the demand in Troy Uniformed Firefighter's Association, Demand 22A does not seek to usurp the City's right to equip the workforce as it deems necessary for purposes of providing correctional services. The demand is not addressed to assignment of employees to particular work locations. We will refer Demand 22A to the impasse panel for purposes of consideration in making its report and recommendation on Demand 22B.

Demand 22C seeks development of a plan of action that will be used-for firefighting and during other major disturbances, with a copy of the plan to be provided to COBA. Under the NYCCBL, the City has the right to "take all necessary actions to carry out its mission in emergencies."[109] In our opinion, the development of a plan of action is covered by the statutory provision. The furnishing of copies of emergency plans of action to employees would appear to be a matter of safety in the workplace but the furnishing of a copy of the plan to the Union is a different matter and, an its face, not related to safety in the workplace. We find Demand 22C A non-mandatory subject of bargaining.

[109] Section 1173-4.3b.

Demand 22D(a) is addressed to assignment of non-unit civilian employees, a matter previously explained under Demand 3 to be non-mandatory. Demand 22D(b) is not comprehensible an stated. it either seeks to infringe on management's rights regarding the carrying out of the mission of the agency or on the right to assign and direct the workforce. Neither area in a mandatory subject of bargaining. There has been no explanation by the Union of the safety aspects of Demand 22D(a) or (b). Therefore, because the demand on its face in addressed entirely to matters of management prerogative, we find Demand 22D a non-mandatory subject of bargaining.

Demand 22B also appears addressed entirely to matters of management prerogative, such as determination of the standards of services to be, offered-by the agency, determination of the methods, means and personnel by which government operations are to be conducted, and the exercise of complete control and discretion over its organization and the technology of performing its work. COBA argues that this demand is addressed to matters of personal protection of employees# a subject that has been hold bargainable by PERB. in Matter of Somers Faculty Association,[110] cited by the Union, PERB considered a demand that teachers have the right to remove disruptive students from the classroom and also setting forth procedures for the return of such students to the classroom. PERB held that teachers may negotiate to insulate themselves from acts of violence from their

[110] Note 101, supra.

students. The State Board indicated that negotiations for procedure by which disruptive students are temporarily removed from the classroom and sent to higher authority are mandatory as are procedures that would require teacher-administration conferences before such students are returned to the classroom. PERB stated, however, that a demand that might preclude the student's return to the classroom is not mandatory because of the school board's responsibilities for the education of the student. The school board must decide the availability and reasonableness of alternatives for the education of the student.

Demand 22E is directly addressed to the department's methods and means of incarceration of people, the number of correction officers who will be assigned to particular assignments, and the equipment that they will use. These are matters of management prerogative. CO RA does indicate, in its memorandum of law, that the demand concerns protection of employee safety. In the safety committee cases decided by PERB discussed above, the demands at issue expressly included as subjects for review by the safety committee, questions concerning the total number of firefighters reporting to a fire and the minimum number of employees to be assigned to fire-fighting apparatus.[111] Therefore, we find that Demand 222 is not mandatory but that the question of manpower and employee safety raised by the

[111] See, for example, City of New Rochelle and cases cited at note 103, supra. The New Rochelle case was confirmed by the Appellate Division, note 104, supra.

Union is a matter appropriate for consideration by the impasse panel as part of its report and recommendation on Demand 22B.

Demand 22F deals with assignment and direction of employees. The Union has not in any way indicated how this demand relates to employee safety. Therefore, we find that Demand 22F is not a mandatory subject of bargaining.

Demand 22G concerns maintenance of firefighting and emergency equipment and is identical to Demand 19D. As discussed under Demand 22A, the maintenance of equipment in proper working order may raise issues of employee safety. Formulation of procedures to resolve issues of equipment and employee safety in appropriate for consideration by the impasse panel in its report and recommendation on Demand 22B.

Demand 22H appears to concern manpower, but not the number of employees in this bargaining unit who are to be assigned during emergency conditions. The demand is addressed to "medical backups" during certain occasions. The Union has not in any way related this demand to employee safety. To the extent that the demand concerns assignment of non-unit or unit personnel, it is non-mandatory.

Demand 22I deals with assignment of employees with medical or physical problems to emergency situations. Management has a right to expect that all employees are medically and physically able to perform all the duties of

the position to which they were appointed. And, direction and assignment of employees is a management right. However, employees, do suffer medical and physical problems over the course of time which may hinder their performance during certain physically taxing activities. Such individual limitations may raise safety issues both for the person involved and for other employees whose safety may depend on the performance of other employees during emergency situations. Therefore, we find that Demand 22I in not A mandatory subject but that a procedure to resolve safety issues raised by individual medical or physical limitations is an appropriate matter for consideration by the impasse panel in its report and recommendation on Demand 22B.

Demand 22J, calling for monthly searches of institutions, is entirely concerned with the manner in which the correction department will maintain order in its institutions. This is a government function and not appropriate for collective bargaining negotiations. The Union has made no argument explaining how the demand relates to employee safety other than to conclude that it does. Therefore we find Demand 22J a non-mandatory subject of bargaining.

Similarly Demand 22K deals with the government functions of arrest and incarceration of people accused

of a crime. There is no connection made with employee safety other than a conclusory statement that it is a safety demand. We find the demand a non-mandatory subject of bargaining.

Demand 22L seeks placement of equipment which, as the Union alleges, may be a matter of employee safety or may be a matter of management rights, as argued by the City. To the extent that the demand raises issues of employees safety, a procedure to resolve such issues is appropriate for consideration by the impasse panel in its report and recommendation on the safety committee demand (22B). However, Demand 22L speaks only of equipment placement, a management prerogative and a non-mandatory subject of bargaining.

Demand 22M seeks training of employees in the use of certain equipment and in first aid. No relationship to employee safety is offered by the Union other than the conclusion that this is a matter of employee safety. However, the proper use of tear gas and respirators and training in first aid are generally recognized to involve safety and protection of individuals. Thus, while Demand 22M is non-mandatory because it infringes on the managerial right to determine training for the workforce,[112] the safety issues suggested by the demand may be subject to procedures to resolve safety issues will be considered by the impasse

[112] See discussion under Demand 19, supra.

panel in its report and recommendation on Demand 22B.

Demand No. 23. SICK LEAVE:

"A. (Chronic Sick) - The Department shall eliminate any and all references to chronic sick or chronic absenteeism. There shall be no discrimination against any member for his use of sick time.
B. (Doctor's Note) - A member shall have two (2) weeks after his return from sick leave to submit a required doctor's note.
C. (family) - Any sickness in a member's family may be deducted from his annual leave or compensatory time, at the option of the member.
D. (Lack of Confinement and Checking During) - A members, who is on sick leave which shall include off duty illnesses and on duty injuries, may leave his residence or place of confinement at any time, and the Department may not check, in person or by any other means, his whereabouts.
E. (No Discrimination) - There shall be no restriction upon the allocation of overtime because of sickness or absences.
F. (Release) - No member will be denied a release from duty if he complains of any illness or injury."

Demand No. 27. UNSUPERVISED SICK LEAVE:

> "Members, who are on sick leaver shall no longer be subject to visitations by the Department. Only sick leave abusers may be subject to visitation."

City Position

The City argues that to maintain operating procedures, the employer must retain control of regulation of sick leave abuse. The City maintains that the procedures used to ensure that sick leave is actually taken for legitimate health-related reasons are not mandatory subjects of bargaining. OMLR contends that PERB has hold non-mandatory a demand which in effect would have permitted police officers on sick leave to leave their homes. The City states that PERB's rationale was that the demand infringed on management's right to control sick leave abuse.[113] OMLR alleges that Demand 23F would preclude the department from determining the number of employees required to be on duty at a particular time and infringe on management's right to assign employees.

The City asserts that Demand 27 would require the impossible task of determining which employees are sick leave abusers, and subject to visitation, while barring visitations, to ferret out abusers, in the first place. The City claims that this demand would be contrary to the

[113] The City cites City of Rochester, 12 PERB ¶3010 (1979).

holding in Town of Blooming Grove[114] that a demand requiring an employer to relinquish all administrative control over the taking of nick leave is non-mandatory.

COBA Position

The Union states that Demand 23 deals with procedures for total hours of work and sick leave, and is mandatory under the PERB holding in Town of Haverstraw.[115] COBA claims that Demand 23C in identical to the demand for an increase in the amount of sick leave in the event of an illness in the family found bargainable by PERE in Haverstraw.

The Union maintains that Demand 27 seeks that only sick leave abusers be subject to visitation and is bargainable because procedures governing sick leave pertain to terms and conditions of employment.

Discussion

Article X, section 2 of the 1978-1979 unit contact provides as follows:

> Each Correction Officer shall be entitled to leave with pay for the full period of any incapacity due to illness, injury or mental or physical defect, whether or not service-connected in accordance with existing procedures.

Section 3 of Article X provides for leave in the event of a death in the family of a correction officer upon applica-

[114] 13 PERB ¶4550 (1980).

[115] 11 PERB ¶3109.

tion to and approval by a commanding officer or supervisory head.

Demand 23A mentions the subjects of sick leave and absenteeism but, in our opinion, the demand in more closely related to discipline of employees for use of sick leave or chronic absenteeism. New York courts,[116] PERB,[117] and the BCB[118] have hold a demand for procedures to review and appeal disciplinary actions, including submission to arbitration of disciplinary rulings, in a mandatory subject of bargaining. In Binghamton Civil Service Forum. v. City of Binghamton,[119] the Court of Appeals stated:

> It is well settled ... that disputes relating to whether the necessary predicate exists for taking disciplinary action against a public employee and the proper penalty to be imposed if that predicate exists are terms and conditions of employment under the Taylor Law .(Civil Service Law, §204, subd. 1), and an such may be agreed by a public employer and employee to be resolved by arbitration .... [Citation omitted].

The City has withdrawal its objection to consideration by the impasse panel of Demand No. 6 which concerns disciplinary procedures and review of disciplinary actions through the

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[116] Binghamton Civil Service Forum v. City of Binghamton, N.Y. 2d, 11 PERB ¶7508 (l980).

[117] City of New Rochelle, 13 PERB ¶3082 (1980).

[118] Decisions Nos. B-3-73; B-1-80.

[119] Supra, note 116.

contractual grievance-arbitration procedure. The NYCCBL provides that management has the right to institute disciplinary actions against employees. Demand 22A is addressed to managerial actions against employees taken an the basis of use of sick leave or for chronic absenteeism and does not soak procedures to review and appeal such actions. We believe that Demand 22A is not a mandatory subject of bargaining because it seeks to limit management's right to take disciplinary action without a procedure that would allow the employer to seek to impose the disciplinary action it believes is necessary or that would permit an employee to appeal such action.

In Decision No. B-3-75, the Board considered the bargainability of a demand for an amendment of sick leave procedures to require a verifying statement from an employee's doctor only in the case of absences of more than two working days. The City claimed that the employer's ability to verify proper use of sick leave is a management right under the NYCCBL. The Board rejected the City's argument and hold, “The obligation to negotiate on sick leave, which is clearly a mandatory subject, encompasses the duty to negotiate on the regulations and procedures governing its proper use.”

PERB has held that sick leave is a mandatory subject of bargaining and has found that a demand to increase the

number of sick leave days in the event of illness in an employee's family in mandatory.[120] However, PERB has hold non-mandatory a demand that, in effect, would relinquish all employer control over the use of sick leave. In City of Rochester,[121] PERB found that a proposal that would permit police officers on sick leave to leave their homes infringes on management's right to control sick leave abuse.

Applying the BCB and PERB case law to Demand 23, we find that sections B and C are mandatory subjects because they deal with regulations and procedures concerning the use of sick leave and seek min increase In the amount of sick leave available to an employee. Demand 23D, Demand 23F and Demand 27 are not mandatory subjects of bargaining because they seek to displace entirely management's right to-control the proper use of sick leave. The proposals set forth in Demands 23D and 27 are very similar to the demand found non-mandatory by PERB in City of Rochester. We find that Demand 23E is non-mandatory for the same reasons that we find Demand 23A is non-mandatory. The demand seeks to limit the disciplinary actions management might take against employees for the use of sick leave or for absences without a procedure to review discipline.

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[120] Town of Haverstraw, 11 PERB ¶3109 (1978), aff'd. 75 A.D. 2d 874 (2nd Dept. 1980).

[121] 12 PERB ¶3010.

Demand No. 24. SUPPORT:

> "(Arrest on Duty) - Support will be given to all members who are assaulted or threatened by inmates. Such support shall not only permit members to make arrests while on duty,, but shall facilitate all aspects of said arrest procedures."

City Position

The City argues that~ arrest procedures are an integral part of the methods by which the City must maintain the efficiency of its operation. OMLR claims that the demand seeks to interfere with the responsibility of the Board of Correction under the City Charter to establish "minimum standards for the care, custody, correction, treatment, supervision, and discipline of all persons held or confined under the jurisdiction of the department...."[122] The City asserts that because the demand would interfere with the statutory obligation of the department, it is not mandatory.

COBA Position

The Union contends that this demand is mandatory because it seeks procedures to protect employees against acts of violence a subject found bargainable by PERB in Matter of Somers.[123] COBA also alleges that support for

[122] The City cites to section 626 of the New York City Charter.

[123] 9 PERB ¶3014.

arrest procedures impacts on terms and conditions of employment and therefore, is mandatory.

Discussion

This demand bears directly upon the responsibility of government to maintain order in society and, in particular, to maintain order in institutions designed to serve the needs of society. The laws of the State of New York and the City Charter vest the City government with authority to take certain actions for the purpose of enforcement of law. The City Charter expressly provides that the Board of Correction shall set standards for the maintenance of order in correction institutions.[124] The Administrative Code declares that it is the right of the City "to determine the standards of services to be offered by its agencies" and to "determine the methods, means and personnel by which government operations are to be conducted."[125] Demand 24, in seeking to direct that the government will support employees in confrontations with inmates, no matter what the circumstances of such incidents, and to delegate in a collective bargaining agreement authority to make arrests to employees, infringes upon matters of government authority and management rights. The Somers case, cited by the Union, is dismissed, under Demand No. 22. In the case, PERB recognized that while teachers may bargain on procedures to remove

[124] City Charter section 626 (e).

[125] NYCCBL section 1173-4.3b.

violent and disruptive students from the classroom, the scope of bargaining is circumscribed by the school board's responsibility for the education of students. Because Demand 24 seeks to bargain not on procedure for employee protection but on the areas of government authority over and responsibility for incarcerated persons, we find that the demand in a non-mandatory subject of bargaining.

Demand No. 25. SUPPORT LEGISLATION:

> "A. The City of New York shall agree to support legislation on behalf of Correction Officers to include them in the present Heart Bill Legislation which applies to Police officers and Firefighters.
> B. (Legislation) - The City shall support all legislation to provide proper disability coverage for all Correction officers as found in the Tier One section of the Pension Law, and the City will also support legislation to provide proper pension coverage an is provided in Tier One."

City Position

OMLR claims that this demand is not bargainable on three grounds. The City states that the demand seeks modification of the disability and retirement law which must be enacted, if at all, by the legislature. OMLR argues that a demand which would require action by a party not subject to the jurisdiction of an impasse panel in not appropriate for consideration by the panel as provided in NYCCBL section 1173-7.0c(3)(c).[126] The City alleges that the subject of the demand is not mandatary. Finally, the City contends that PERB has held that demands for legislative support are outside the employment relationship.[127]

[126] The City also cites to Board Decisions Nos. B-1-74 and B-6-74.

[127] The City cites to 12 PERB ¶3047.

COBA Position

The Union argues that Demand 25 "is required for the safety, health and well-being of members." COBA contends that the demands have a direct impact on the terms and conditions of employment and in particular, a demand for disability benefits is mandatory.[128] The Union also claims that Demand 25 seeks to "create a labor management committee to discuss and promote matters which are in themselves subjects." COBA maintains that such labor management committees have been found by PERB to be mandatory subjects of negotiation.[129]

Discussion

In Decision No. B-1-74, the Board held that NYCCBL section 1173-7.0c(3)(c) "prohibits a direction by an impasse panel that the City support a recommendation which must be addressed to a third party 'body, agency or official.'" In City of Rochester, PERB found that a demand requiring the enactment of legislation in not a mandatory subject because the content of legislation in not within the scope of negotiations unless the proposed legislation in required to implement the terms of a negotiated contract. Demands 25A and B seek that the City support legislation

[128] The Union cites to Local 456, IBT v. Town of Cortland, 68 Misc. 645, 4 PERB ¶8012.

[129] The Union cites to Albany PFFA, 7 PERB ¶3079 (1974).

but not in connection with implementation of an agreement. Under the cited decisions, they are not Mandatory subjects.

Demand No. 26. UNIFORM:

> "A. All members shall have the opportunity of wearing short sleeve shirts all year round.
> B. No tie shall be required on inside posts."

City Position

OMLR argues that while a demand for a uniform allowance is bargainable, the design of employee's uniform is a management right under the NYCCBL. In addition, the City quotes section 623(4)-5.2 of the Administrative Code to provide an follows:

> (c) The uniforms to be worn by the members of the force shall be prescribed by the commissioner.

COBA Position

COBA alleges that to the extent a uniform affects employee comfort and safety, it in a term and condition of employment and a demand concerning the type of uniform to be worn is a mandatory a subject. In its memorandum of law, the Union contends that Demand 26 does not seek to infringe upon management rights concerning uniform requirements, but that the demand is restricted, by its terms, "to formulation of procedures to determine the applicability of wearing the prescribed uniform during difficult situations." The Union argues that in certain circumstances a tie should not be worn on the job and that Demand 26 seeks

procedures to establish the appropriateness of uniform requirements, matters which are mandatory subjects.[130]

Discussion

Article VII of the 1978-80 unit contract provides:

> Uniform Allowances
>
> In each of the fiscal years, 1976-1979 and 1979-1980, the City shall pay to each employee a uniform allowance of $265.00 in accord with the existing standard procedures.

The Board has stated that "while a uniform allowance is a mandatory subject of bargaining, the determination and prescription of authorized uniforms is a management prerogative."[131] The Board based this statement on the employer's rights, under the NYCCBL, to determine the methods, means and personnel by which governmental functions are to be performed and to exercise control and discretion over the technology of performing its work. PERB has not considered the bargainability of uniform requirements and design, except to find that a demand addressed to the cost of cleaning and repairing uniforms is mandatory.[132] A PERB Hearing Officer found that a demand to bargain on the style of deputy sheriff's badges was not mandatorily bargainable because it reasonably concerned the manner and means of

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[130] The Union cites to Town of Haverstraw, 11 PERB ¶3109.

[131] Decision No. B-22-80.

[132] Town of Haverstraw, 11 PERB ¶3109 (1979).

sheriffs' delivery of service more than it concerned dress codes and grooming regulations.[133] PERB has held that the determination of whether to use a piece of equipment and to select a particular type of equipment from a number of options is a matter of management prerogative.[134]

Demands 26A and B, are clearly not mandatory subjects under BCB and PERB decisions. Moreover, the demands would usurp powers vested in the commissioner of the department of correction by the Administrative Code.[135] The Union's memorandum of law indicates an amendment to the demands to seek procedures for review of uniform requirements. In our opinion whether the demand seeks direct changes in uniform requirements, as proposed in Demand 26, or procedures for review of the uniform, the demand is addressed to matters of management prerogative. Therefore, we find that Demand 26 is a non-mandatory subject of bargaining.

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[133] County of Onondaga and County of Onondaga Deputy Sheriff, 14 PERB ¶4503 (H.O. 1931).

[134] City of Albany, 7 PERB ¶3078 (1974); City of White Plains, 9 PERB ¶3007 (1976).

[135] Section 623(4)-5.2(b), quoted on page 114, supra.

Demand No. 28. VACATION:

> "A. (Accrual) - A member shall have the right to accrue unused annual vacation time with no maximum limitation.
> B. (Lateness) - No member shall lose vacation time for lateness if he has compensatory time on the books.
> C. (No Limit) - A member shall have the guaranteed right to take his vacation consistent with his selection by seniority and not hampered by any Department limit or exigency.
> D. (option) - A member shall have the right of annually splitting his vacation up two (2) or more periods.
> E. (Period) - The Department shall schedule vacations so as to begin and end at the beginning or the end of a member's work week."

City Position

OMLR maintains that by this demand, the Union seeks to obtain control over all aspects of vacation scheduling. The City asserts that the demand would preclude management from exercising the flexibility needed in emergencies.[136] The City further argues that the accrual of vacation time

[136] The City cites to City of Scarsdale, 8 PERB ¶3075.

and the scheduling of vacation periods are matters related to direction and assignment of personnel, which are outside the scope of bargaining.

COBA Position

The Union asserts that, under the holdings in two PERB cases, vacation scheduling in clearly a mandatory subject. COBA claims that in City of Yonkers[137] and Fairview Fire District[138] PERB found that it in within management's right to determine the number of employees who must be an duty at a particular time, but that the manner in which "available vacation time may be enjoyed by individuals" and the manner in which vacation time is to be allocated are mandatory subjects. The Union alleges that since all sections of Demand 28 are addressed to use of vacation time, the demand is bargainable. in addition, the Union argues that Demand 28A is a time and leave demand which is mandatory under BCB Decision No. B-3-75 finding that the City must negotiate procedures concerning time and leave benefits.

Discussion

Article XI of the 1976-80 unit contract provides for and governs the use of vacation time. Section l sets forth the amount of vacation time that May be earned depending upon years of service. Section 2 states, "Vaca-

[137] 10 PERB ¶3056 (1977).

[138] 12 PERB ¶3118 (1979).

tions shall be scheduled in accordance with existing procedures." Section 3 provides, "The Department agrees to allow Correction Officers to use their accrued vacation days in the vacation year in which they are earned subject to the exigencies bf the Department."

An discussed under Demand 4B, supra, the Board has held time and leave benefits mandatory subjects of bargaining, and includes a duty to negotiate on the regulation and procedure governing the proper use of leave.[139] The Board has also held that a union may bargain for time-off for vacations, but that, once agreement is reached on a leave provision, "[I]t is the City's management prerogative to determine the level of staffing to be provided, by means of work schedules within the limitations of the agreement on hours and leave benefits."[140]

PERB has found that to the extent a work schedule demand for posting, prohibiting changes without notice to the employees and additional compensation if notice in given less than 90 days before the change in schedule so, might prevent the employer from calling in employees in the event of an emergency, it is not mandatory.[141]

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[139] Decision No. B-3-75.

[140] Decision No. B-10-81.

[141] Village of Scarsdale, 8 PERB ¶3075 (1975).

PERB has also held that a demand for paid leave for personal reasons is mandatory.[142] In natters of scheduling PERB has followed its holding in an early case that it in the employer's right to determine the number of employees that it must have on duty at any given time, but that it in required to negotiate the work schedules of individual employees within the framework of the total number of employees needed.[143] In City of Yonkers,[144] PERB stated that the employer can determine the total number of unit employees that must be an hand during vacation periods and that the City must bargain on the order in which individual vacation preferences may be granted. In Fairview Professional Firefighters Association,[145] PERB held mandatorily bargainable, a demand to change the method by which rank and file employees and supervisors bid for available vacation time. PERB found that the demand did not interfere with management's right to determine the number of employees that must be on duty at any given time. PERB stated, "Subject to its staffing requirements ... a public employer is required to negotiate an to the manner in which available vacation time may be enjoyed by individuals... ."

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[142] City of Albany, 7 PERB ¶3078, aff'd. 38 N.Y. 2d 778 (1976).

[143] City of White Plains, 5 PERB ¶3008 (1972).

[144] 10 PERB ¶3056 (1977).

[145] 12 PERB ¶3118 (1979).

Applying the BCB and PERB decision s to the sections of Demand 28, we find that Demand 28A is mandatory because it seeks to negotiate an the use of earned vacation time and does not limit in any way management's right to determine the necessary complement of employees. Similarly, Demands 28D and 28E are mandatorily bargainable because they are addressed to the scheduling of individual employee use of leave time without seeking to interfere with management's right to determine the number of employees needed at a given time.

The delineation between the mandatory and non-mandatory nature of a vacation schedule demand in clearly illustrated by Demand 28C. Therein, the Union seeks a procedure to govern preferences in the use of vacation time (seniority) which is bargainable, but also seeks a guaranteed right to take a vacation "not hampered by any Department limit or exigency." This latter provision would interfere with management's right to establish and maintain the number of employees needed to deliver the governmental service. Therefore, we find that Demand 28C in a non-mandatory subject of bargaining.

Demand 28B concerns the use of earned leave time as a set off for lateness. The demand is not addressed to the employer's decision to deduct leave time for lateness. Rather, the demand seeks a degree of employee control over how his or her earned time off will be used without infringing on any management prerogatives. Therefore, we find that Demand 28B is a mandatory subject of bargaining.

Demand No. 29. WORKING CONDITIONS:

> "A. (Chairs) - A chair must be available so that each member may be able to sit during his tour of duty.
> B. (Excused Lateness) - Lateness accrued because of transportation breakdowns, severe weather conditions, documented traffic conditions, personal emergencies, etc., shall be considered excused lateness.
> C. (Forced Time Due) - The Department cannot force any member to use time due.
> D. (Freedom of Expression) - No member shall be barred from speaking to the media.
> G. (Punishment Posts) - No post shall be used as a punishment.

City Position

OMLR claims that certain aspects of this demand infringe on the City's right to direct the workforce and are, therefore not mandatory subjects. OMLR contends that Demand 29C would strip the department of its right to assign personnel to attain efficient and effective delivery of municipal services. The City argues that

Demand 29G would prohibit the department "from making certain kinds of assignments." OMLR asserts that both demands are overly broad and vague.

The City alleges that the other sections of Demand 29 that are in issue are not mandatory because they contradict the statutory right of the employer to determine the method of its operation. OMLR also contends that the demand relates to the physical properties and maintenance of detention facilities, matters that are within the commissioner's authority under section 624 of the City Charter.[146] The City maintains that budget appropriations for furniture and fixtures are beyond the scope of bargaining despite any claim of relationship to employee comfort. Moreover, the City argues that there is no claim of safety impact made in support of Demand 29. The City concludes that it has no duty to bargain on these items under the holding in BCB Decision No. B-5-75.

COBA Position

The Union claims that work rules have been hold mandatory subjects[147] and that therefore, Demands 29A, B, C, D and G are mandatory since they do not involve the mission of the agency. COBA alleges that Demand 29B seeks

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[146] The City quotes section 624 of the City Charter to provide that:

> The commissioner shall maintain and operate buildings and structures under his jurisdiction.

[147] The Union cites to Matter of Albany Police, 7 PERB ¶3078, aff'd, 38 N.Y. 2d 778 (9 PERB ¶7005).

"payment of late time due to certain circumstances" and as an hours demand is mandatorily bargainable under several Board decisions.[148]

Discussion

The City does not present any specific challenge to the bargainability of Demands 29B and 29D. Demand 29B deals with rules concerning lateness and the imposition of a penalty for lateness. The BCB has not ruled on the bargainability of a demand concerning work rules governing lateness. As discussed under Demand 18, PERB has employed a balancing test in determining the bargainability of a work rules demand. In Matter of Albany Police,[149] PERB held that a lateness policy is a term and condition of employment and mandatorily bargainable since it involved discipline and work rules. We find that Demand 29B is a mandatory subject of bargaining.

Demand 29D is broadly stated and seeks to prevent the department from imposing any restrictions on matters that correction officers may discuss with persons outside the department. This would include no restriction on discussions concerning the security of institutions or

[148] The Union cites to Decisions Nos. B-5-75; B-10-75; B-7-77.

[149] Note 148, supra.

issues concerning particular inmates. The contractual prohibition would infringe on manag ntla ability to carry out the mission of the agency. Therefore we find that Demand 29D is a non-mandatory subject of bargaining.

Demand 29A, concerns assignment of employees and equipment to be used in performing work duties. The Union makes no argument, in support of this demand# of any impact on working conditions or on employee safety resulting from the absence of a chair. Therefore, because this demand directly concerns matters of management prerogative we find that Demand 29A is a non-mandatory subject of bargaining.

Demand 29C in directed to use of earned leave time. As discussed above, procedures concerning use of leave time are mandatory subjects of bargaining.[150] Therefore, we find that Demand 29C is a mandatory subject of bargaining.

Demand 29G concerns assignment of personnel and discipline of employees. We find that the demand infringes upon management's statutory fight to assign employees and is non-mandatory.

[150] Decision No. B-3-75.

DETERMINATION

NOW, THEREFORE, pursuant to the powers vented 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 following Union proposals are within the scope of mandatory collective bargaining between the parties herein: 1B, 1C, 7 (insofar as it deals with limitations on the substance of personnel file entries relating to disciplinary charges) 11A, 11D, 11C, 13B (insofar an it demands notification to the Union's President of assaults on Correction Officers), 14B, 16, 19E (in context of 22B), 22A (in context of 22B) 22B, 22G(in context of 22B), 23B, 23C, 28A, 28B, 28D, 28E, 29B, 29C; and it is further

DETERMINED, that the following Union proposals are not within the scope of mandatory collective bargaining between the parties herein: 1A. 1D, 2, 3, 4, 7 (insofar as it seeks to limit the time that the public employer may \maintain a record of a disciplinary action), 9, 12, 13A, 13B, (insofar as it seeks notification as to matters referred to by the undefined term "unusuals"), 14A, 15, 18, 19A, 19B, 20, 22C, 22D, 22E, 22F, 22H through 22M; 23A, 23D, 23E, 23F, 24, 25A, 25B, 26A, 26B, 27, 28C, 29A, 29D, 29G; and it is further

DETERMINED, that the following Union proposals not within the scope of mandatory collective bargaining between the parties herein but is a prohibited subject of bargaining: 13C.

DATED: Now York,, N.Y.
July 7, 1981

ARVID ANDERSON
CHAIRMAN

WALTER L. EISENBERG
MEMBER

DANIEL G. COLLINS
MEMBER

EDWARD SILVER
MEMBER

JOHN D. FEERICK
MEMBER

EDWARD F. GRAY
MEMBER

CAROLYN GENTILE
MEMBER