City v. L.721, SSEU, et. al, 43 OCB 59 (BCB 1989) [Decision No. B-59-89]

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

THE CITY OF NEW YORK, DECISION NO. B-59-89

Petitioner, DOCKET NO. BCB-1174-89

-and-

LICENSED PRACTICAL NURSES AND TECHNICIANS OF NEW YORK, INC., LOCAL 721, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

Respondent.
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DECISION AND ORDER

On June 7, 1989, the City of New York, appearing by its Office of Municipal Labor Relations ("the City"), filed a petition seeking a determination on whether a number of matters which have been raised in negotiations between the City and the Licensed Practical Nurses and Technicians of New York, Local 721, Service Employees International Union, AFL-CIO ("the Union"), are mandatory subjects of collective bargaining within the meaning of Section 12-307 of the New York City Collective Bargaining Law ("NYCCBL"). On July 7, 1989, the Union filed an answer to the City's petition. The City filed a reply on July 27, 1989.

The City challenges the bargainability, in whole or in part, of eighteen numbered demands that have not been resolved in negotiations between the parties for a successor agreement to

their 1984-87 Licensed Practical Nurses ("LPNs") Unit Contract.[1] 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 December 7, 1988. A one-man Impasse Panel was appointed on April 3, 1989 and several days of hearings have been held.[2] The parties agreed that the Impasse Panel's report and recommendations for settlement will be held in abeyance pending a ruling by the Board of Collective Bargaining ("Board") as to the bargainability of the instant matters and, hearings, if necessary on demands found to be within the scope of mandatory collective bargaining.

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[1] Inasmuch as the title, LPN, is subject to the Career and Salary Plan, negotiation of the Unit Contract is subject to the provisions, terms and conditions of the 1985-87 Citywide Agreement, which remains in effect while negotiations progress for an agreement to cover the period after July 1, 1987. Under NYCCBL Section 12-307a(2), matters which must be uniform for all employees subject to the Career and Salary Plan are embodied in the Citywide Agreement, which has been negotiated between the City and District Council 37, AFSCME, AFL-CIO, the union recognized as the exclusive bargaining representative on Citywide matters.

[2] Docket No. I-195-88. The panel began taking evidence on July 20, 1989.

RELEVANT STATUTORY PROVISION

Section 12-307 of the NYCCBL provides:

Scope of collective bargaining; management rights.
a. Subject to the provisions of subdivision b of this section and subdivision c of Section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in 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), working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of sums equal to the periodic dues uniformly required of its members by such certified or designated employee organization and for the payment of the sums so deducted to the certified or designated employee organization, subject to applicable state law, 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 uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, 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 unit 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 percent of all employees 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 on the above matters have on employees, such as questions of workload or manning, are within the scope of collective bargaining.

PRELIMINARY ISSUE

In its challenge to the bargainability of several of the matters herein, the City asserts that because the demands deal with managerial prerogative, they are not mandatorily bargainable under the management rights clause set forth in Section 12-307b of the NYCCBL. Specifically, Union Demand Nos. 4, 6(B), 11, 13 and 31, are found to concern areas reserved to the City's exclusive managerial control and, therefore, are not appropriate for consideration by the Impasse Panel.[3] In support of those demands, however, the Union argues that the exercise of management's discretion has an adverse effect on safety or other terms and conditions of employment of LPNs. Although the Union does not specifically allege "practical impact," the Union maintains that management's actions bring these demands within the scope of mandatory collective bargaining because, for example, the assignment complained of "puts the LPN's license in peril" or the proposal seeks "to protect ... the LPN."

In response to such arguments, the City asserts that those aspects of the Union's pleadings which would "arguably constitute allegations of practical impact are totally without foundation." The City maintains that this Board has found that conclusory

[3] See infra, at 18, 27, 40, 46, and 66 for a complete discussion on each of these demands, respectively.

allegations do not constitute claims of practical impact[4] and are not sufficient to demonstrate that any alleged safety impact is the result of management action, or inaction in the face of changed circumstances.[5] The City argues, therefore, that because the Union has failed to make an arguable prima facie claim of practical impact with respect to any of its demands, they must be dismissed.

Pursuant to Section 12-307b of the NYCCBL, "questions concerning the practical impact that decisions [of managerial prerogative] have on employees, such as questions of workload or manning, are within the scope of collective bargaining." However, the determination by this Board of the existence of a practical impact is a condition precedent to determining whether there are any bargainable issues arising from management's actions.[6] As a general rule, there is no duty to bargain over an alleged practical impact on workload, for example, until this Board has first, determined that a management action has resulted in an "unduly burdensome or unreasonably excessive workload as a regular condition of employment" and, second, finds that the employer has not expeditiously acted unilaterally to alleviate

[4] The City cites Decision Nos. B-35-82; B-26-80; B-5-80.

[5] The City cites Decision No. B-31-88.

[6] Decision Nos. B-43-86; B-36-86; B-2-76; B-16-74; B-1-74; B-9-68.

the impact.[7]

We have also recognized certain exceptional circumstances arising from the exercise of management prerogative, such as the impact of actions which result in imminent threats to employee safety, to constitute a basis for a finding of per se practical impact.[8] Such instances may warrant imposition of the duty to bargain before actual impact has occurred.[9] This does not mean, however, that a union need only allege a threat to safety in order to present a cognizable claim a practical impact; the union must first prove the existence of such a threat.[10] As we stated in Decision No. B-4-89:

> [T]he question of whether a management action has a practical impact on employees within the meaning of the YCCBL [Section 12-307b] is a question of fact which may require the holding of a hearing.[11] Nevertheless, conclusory allegations of practical impact do not warrant the holding of a hearing. The existence of a claimed practical impact cannot be determined when insufficient facts are provided by the Union.[12]

Applying these principles to our consideration of the Union's arguments in support of Demand Nos. 4, 6(B), 11, 13 and

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[7] E.g., Decision Nos. B-37-87; B-36-86.

[8] Decision Nos. B-6-79; B-5-75.

[9] See, Decision No. B-26-89.

[10] Decision No. B-37-87; B-37-82; B-5-75.

[11] Decision Nos. B-34-88; B-31-88; B-43-86; B-38-86; B-18-85; B-2-76; B-16-74

[12] Decision Nos. B-37-82; B-27-80; B-16-74.

31, we find that nowhere in relation to any of the cited demands does the Union supply the details of any alleged impact resulting from a management action, or inaction in the face of a change in circumstances. Rather, the Union relies on conclusory statements which do not give this Board sufficient information upon which to determine whether there is warrant even for a hearing. We will not, on the basis of bare allegations, direct a hearing to determine whether practical impact exists.

Accordingly, we must conclude that the Union has failed, at this point, to demonstrate the existence of any bargainable issues arising from the exercise of management's prerogative. However, to the extent that the Union alleges, in support of Demand Nos. 4, 6(B), 21, 13 and 31, that specific employer action has an adverse effect on a term and condition of employment,[13] or employee safety,[14] which may be subject to alleviation through collective bargaining, we dismiss these demands without prejudice to the right of the Union to file a petition which is supported by evidence of specific, identified practical impact resulting from management's action.[15] Upon such submission, we will then determine whether further action on each or any of the demands at issue is warranted within the context of practical impact and the

[13] See e.g., Decision No. B-56-88.

[14] See e.g., Decision No. B-5-75.

[15] See e.g., Decision No. B-6-87.

alleviation thereof.

We will now address seriatim each of the demands challenged by the city in its petition. We wish to emphasize that a finding that a matter is bargainable does not constitute an expression of any view on the merits of a demand.[16]

[16] Decision Nos. B-4-69; B-43-86; B-16-81; B-17-75; B-10-75; B-1-74; B-2-73.

SCOPE OF BARGAINING ISSUES IN DISPUTE

Demand No. 2 - Elimination of non-nursing functions.

The City argues that this demand is outside the scope of mandatory collective bargaining because it infringes on management's statutory right to schedule, direct and assign its workforce, 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.[17]

The Union contends that inasmuch as LPNs "are hired under a job description and license that defines and limits their scope of [employment, they] can properly seek language in a collective bargaining agreement to reflect their ... job description and professional title."

In its reply, the City contends that the Board has held the determination of job content to be an-express management right and, further, that "the City may not be required to include a job description in an agreement which would limit its right to unilaterally change the content of the classification or otherwise limit the exercise of management rights."[18] Moreover, in citing PERB as authority, the City maintains that because this

[17] NYCCBL Section 12-307b.

[18] The City cites Decision Nos. B-4-89; B-43-86.

demand could encompass the elimination of duties which are essential aspects of an LPN's job description, this demand is clearly a nonmandatory subject of bargaining.[19]

Discussion

This demand, on its face, seeks to prohibit the City from requiring that LPNs perform "non-nursing functions" that the Union claims are not within the scope of an LPN's "job description and [professional] license." The City argues that the right to direct and assign personnel is an express management prerogative, as is the content of a job classification.

At the outset, we note that the Union fails to indicate which duties it claims LPNs currently perform that are outside the scope of their job description. Moreover, we note that even though the Union's demand concerns the assignment of work alleged to be out-of-title for an LPN, it does not seek to bargain over the performance of this work which is an issue we have found to be within the scope of mandatory bargaining.[20] Rather, the

[19] The City cites Fairview Professional Firefighters Association, Inc., Local 1586. IAFF v. Fairview Fire District, 12 PERB ¶3083 (1979); Waverly Central School District v. Waverly Teachers Association, 10 PERB ¶3103 (1977).

[20] In Decision No. B-10-81, we stated that "the issue of performance of out-of-title work is covered by statute (Civil Service Law §61(2)), it is an issue involving working conditions, and agreement on a contractual prohibition of such work is not inconsistent with the statute, but rather is contemplated by the law (see Civil Service Law §100(d) ; NYCCBL §12-303 (0) (3))."

Union's expressed desire is to seek the removal of certain unspecified duties entirely from the job description of an LPN.

As the City correctly points out, the determination of the content of a job classification is an express management right,[21] subject only to a duty to bargain to alleviate any practical impact which night result from a substantial change in a job classification.[22] We have also held that a union's "attempt to define what [duties are] appropriate for a job title" is an infringement on the City's managerial prerogative in this area.[23]

In Decision No. B-10-81, we considered whether the Committee of Interns and Residents ("CIR") had the right to demand that "[n]o House Staff Officer be assigned to perform duties appropriate to other job titles," such as nurses, nurses aides, messengers, etc. There, we held:

> The CIR has a right to bargain concerning assignment to work outside the scope of the job specifications (established by the City) for employees in its bargaining unit. However, it does not have the right to bargain over a prohibition of work which might be "appropriate" for performance by other job titles. When the City establishes the job specifications for a title, it determines what work is "appropriate" for that title.

Clearly, a union may not demand language in a collective bargaining agreement which circumscribes the City's right to

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[21] Decision Nos. B-4-89; B-43-86; B-24-72; B-7-69; B-3-69.

[22] See e.g., Decision Nos. B-38-89; B-43-86.

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

unilaterally determine which functions are to be included in a particular job specification. Therefore, to the extent that the Union, in its answer, makes clear that it seeks language which will "reflect an [LPNs] title," it demonstrates an intent to negotiate over which functions are appropriate for inclusion within the job specification of an LPN.

Even assuming, arguendo, that the non-nursing functions the Union seeks to eliminate are actually beyond the scope of an LPN's current job specification, the City may not be compelled to bargain concerning the content of a job description. In Decision No. B-43-86 we noted that in contrast to rulings by the Public Employment Relations Board ("PERB"), where it has been held that the "job content of current employees is a mandatory subject of negotiations so long as the negotiations demand would not narrow the inherent nature of the employment involved,"[24] these decisions are not dispositive of a case arising under the NYCCBL.[25]

Accordingly, we find that Demand No. 2 is a nonmandatory subject of bargaining.

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[24] Scarsdale Police Benevolent Association v. Village of Scarsdale, 8 PERB ¶3075 (1975). See also, Fairview, 12 PERB ¶3083 (1979); Waverly, 10 PERB ¶3103 (1977).

[25] See also, Decision No. B-4-89.

Demand No. 3 - The union be given an office for union business in each corporation hospital and at Rikers island.

The City contends that it may not be required to provide "office space" for union business in its facilities. The City maintains that a union's use of the employer's property is not a term and condition of employment and relies on PERB as authority for the proposition that to grant the use of its property for this purpose would constitute improper employer assistance.[26]

The Union did not submit an answer to the City's challenge.

Discussion

The demand involves balancing the competing interests of the City's property rights against rights accruing to a union under Section 12-302 of the NYCCBL.[27] Our construction of this section, as it relates to an incumbent union's bargaining demand for access to the employer's facility, is one of first impression for this Board. However, in the context of an improper practice proceeding, we have held that it is within the City's managerial

[26] The City cites Charlotte Valley Central school District v. Charlotte Valley Teachers Association, NYSUT, AFT, Local 2556, 18 PERB ¶3010 (1985); Amherst Police Club, Inc. v. Town of Amherst, 12 PERB ¶3071 (1979).

[27] Section 12-302 of the NYCCBL declares it to be "the policy of the city to favor and encourage the right of municipal employees to organize and be represented...."

prerogative under Section 12-307b of the NYCCBL, to limit access as to time and place and to establish a procedure for the conduct of meetings between a union representative and unit employees on its premises.[28]

More pertinent to the instant matter, PERB applies a pragmatic test in considering whether a union has a right to negotiate for provisions related to the employee organization's access to the employer's facilities. In cases which raise the question whether a union's demand concerning the use of an employer's property is a mandatory subject, PERB construes Section 203 of the Taylor Law[29] to require that employee organizations have reasonable access under certain circumstances, e.g., when such accommodation would involve either minimal use of the employer's facilities or minimal interference with the employer's property rights. In Charlotte Valley Central School District, PERB held that employee organizations have a right to:

> [N]egotiate provisions relating to access to the employer's property to aid in gathering information necessary for its preparation for collective negotiations, in the investigation of grievances and in the

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[28] Decision No. B-30-82.

[29] Section 203 of the Taylor provides:

> **Right of representation.** Public employees shall have the right to be represented by employee organizations to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

proper administration of the bargaining agreement.[30]

However, in recognizing a union's right to negotiate access provisions, PERB does not accord to employee organizations the right to negotiate unlimited use of the employer's property. In such cases, PERB finds that "such access provisions must be reasonable in scope and limited to the furtherance of the employee organization's representation duties." Accordingly, PERB has held that a union's demand for use of a room on the employer's property for "regular union meetings"[31] or for "office space,"[32] was not a term and condition of employment. Although PERB has found that an employee organization's need for a meeting place on employer premises is "self-evident,[33] as the City points out, PERB has also held that "except for access related to and limited to its representation duties, a union's use of the employer's property is not a term and condition of employment."

In the instant matter, the City's unrebutted contention is that in accord with the PERB cases cited above, a demand for "office space" does not relate to a term and condition of employment. Because the Union does not attempt to challenge the City's argument, it does not enable us to weigh the relative

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[30] 18 PERB ¶3010 at 3024.

[31] Id.

[32] Amherst Police Club, Inc., 12 PERB ¶3071.

[33] Addison Central School District v. Addition Teachers Association, 13 PERB ¶4602 (1980).

needs of the organization as against the property rights of the city or to make any judgments as to the reasonableness of its demand.

Accordingly, we find that Demand No. 3 is outside the scope of mandatory collective bargaining.

Demand No. 4 - Elimination of covering more than one unit during a tour of duty.

The City argues that this demand infringes on its statutory managerial prerogative to determine the methods, means and personnel by which government operations are to be conducted and the level of manning in its agencies.[34]

The Union contends that "LPNs can properly seek contract language restricting [this practice since] it puts both their patients and license in jeopardy."

In response, the City submits that the Union's bare allegation with regard to this demand fails to state a prima facie claim of practical impact.

Discussion

There is no dispute that Section 12-307b of the NYCCBL confers on the City the right unilaterally to deploy its personnel and determine the level of services to be offered by its agencies. Unless governed by some contractual provision negotiated by the parties, management discretion over such matters is limited only by the constraints that a resultant practical impact might impose.[35]

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[34] NYCCBL Section 12-307b.

[35] Decision No. B-13-74.

In essence, the Union claims that the City's practice of assigning LPNs to cover more than one unit per shift has a practical impact on a term and condition of employment. Presumably, in arguing that this exercise of managerial discretion places "both their patients and license ... in jeopardy," the Union alleges that this practice creates an undue risk of professional negligence which, in turn, could result in the loss of the LPN's license to practice nursing. The City maintains that since this allegation is wholly unsubstantiated, the Union fails to state a claim of practical impact.

In Decision No. B-10-81, we considered, inter alia, several demands concerning "enforceable patient care (staffing) provisions." The CIR's contention was that inadequate levels of support staff renders house staff officers unable to adequately treat patients, thereby forcing them to violate routinely the standards of patient care mandated as a matter of professional ethics. In further support of its claim, the CIR argued that violation of these standards "can lead to discipline including loss of license to practice medicine." In that case, we found that inasmuch as this argument was both speculative and dependent upon action by an independent third party, it did not constitute a basis for finding the demands within the scope of bargaining.

Similarly, in the instant matter, the Union's bare assertion that LPNs assigned to cover more than one unit during a tour of duty are in jeopardy of losing their licenses to practice nursing

equally fails to provide a basis. upon which we may find this demand bargainable. As set forth supra, at 5-9, the allegation of mere conclusions in support of a practical impact claim is insufficient; the Union must specify the details thereof. Inasmuch as the Union has failed to supply sufficient information upon which to base a decision, we cannot make a determination if practical impact exists.

Accordingly, we find that Demand No. 4 concerns a nonmandatory subject of bargaining and shall not be submitted for consideration by the Impasse Panel. However, inasmuch as the Union alleges that the scheduling practice complained of has impact on a term and condition of employment, our determination is without prejudice to the right of the Union to file a petition which is supported by evidence of specific, identified practical impact resulting from management's action.

Demand No. 5 - An LPN will not be floated if an agency R.N. is assigned to the unit or if an R.N. is assigned to the unit to work overtime.

The City argues that any demand which would circumscribe management's right to assign its personnel and to determine levels of manning is outside the scope of mandatory collective bargaining.[36]

The Union submits that because "floating ... is so essential and critical to conditions of employment that it should be the subject of arbitration." In any event, the Union states, such a restriction "would not unreasonably limit or infringe" on management rights.

In response, the City adds that to the extent the Union attempts to demonstrate a basis for impact bargaining, its contentions fail to state a prima facie claim of practical impact.

Discussion

This demand, on its face, seeks that conditions be placed on the City's ability to reassign ("float") an LPN from one unit to another. The Union contends that because floating is an "essential and critical" aspect of an LPN's working conditions, it constitutes a mandatory subject of bargaining. The City submits that the Union has failed to cite any authority which

[36] The City cites Decision No. B-4-89; City of Kingston v. New York State Professional Firefighters Association, Inc., Local 461, 9 PERB ¶3069 (1976).

either supports the alleged mandatory nature of this demand or would arguably constitute allegations of practical impact.

We have long held that the assignment, including the reassignment, of personnel is a management right.[37] In Decision No. B-4-71, we stated that the rotation of assignments "manifestly is within the City's reserved rights to determine the method and means by which government operations are to be conducted and to maintain the efficiency of governmental operations." We have also held "that it is not the right to rotate assignments, per se, or as in this case, [the right to float LPNs] that is protected by Section 12-307b of the NYCCBL, but the right to take all kinds of actions appropriate and necessary to the proper, effective and efficient management of City government."[38] Accordingly, any demand which would circumscribe such rights is outside the scope of mandatory collective bargaining.

Furthermore, as the city asserts, the Union's argument is totally devoid of any legal or factual allegations which would warrant a conclusion that this demand may be subject to practical impact bargaining.

Accordingly, we find that Demand No. 5 is outside the scope of mandatory collective bargaining.

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[37] E.g., Decision Nos. B-52-89; B-8-81; B-4-71.

[38] Decision No. B-8-81 at 10.

Demand No. 6(A) - LPNs be provided a safe working site.

The City asks that this demand be deemed outside the scope of bargaining because it "is so vague that it cannot be determined whether it involves a mandatory or nonmandatory subject."[39] In the alternative, the City argues that since the demand "seems to address the health and safety of employees other than LPNs," it concerns a matter appropriately raised at Citywide negotiations, as an issue that should be uniform for all City employees subject to the Career and Salary Plan.[40]

The Union submits that a safe place to work is "a basic right" and requests that the Board allow it to present evidence to the Impasse Panel which will "clarify and particularize this demand."

In its reply, the City asserts that the Union's argument in support of this demand is "wholly insufficient." The assertion that a demand will be clarified before the Impasse Panel, the City argues, does not compensate for the fact that the demand is

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[39] The City cites Fairview Professional Firefighters Association, Inc., Local 1586, IAFF v. Fairview Fire District, 12 PERB ¶3083 (1979); Rochester Fire Fighters, Local 1071, IAFF (AFL-CIO) v. City of Rochester, 12 PERB ¶3047 (1979); City of Rochester v. Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

[40] The City cites NYCCBL Section 12-307a(2); Decision Nos. B-2-73; B-4-69; B-11-68.

so vague as to preclude an informed response from the City during collective bargaining.

Discussion

At the outset, we note that the parties do not dispute that a demand seeking safe working conditions is a mandatory subject of bargaining. Rather, the City argues that Demand No. 6(A), as set forth, is so vague that it is unable to determine what the City would be required to do or whether nonmandatory subjects of bargaining might be involved. In addition, the City points out that since this demand concerns an issue which requires uniformity Citywide, it nay be raised only by the Citywide bargaining representative designated by the Board to negotiate at the Citywide level.[41] In response, the Union asserts that its demand seeks "a basic right" and declines to further define the areas of its concern until the hearing before the Impasse Panel.

We find the City's latter argument dispositive of the issue in the first instance. Generally, the Board has been guided by the principle that the most appropriate level of bargaining is the broadest level, with certain exceptions.[42] One such exception is that contained in Section 12-307a(2) of the NYCCBL, which provides that there nay be bargaining for a variation of

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[41] District Council 37, AFSCME, AFL-CIO.

[42] Decision No. B-18-75.

any Citywide policy where considerations special and unique to a particular department, class of employees, or bargaining unit are involved.

With respect to the instant matter, we have long held that matters related to health and safety constitute citywide issues of bargaining.[43] For example, in Decision No. B-11-68, we considered demands concerning, inter alia, adequate lighting, ventilation, adherence to maximum occupancy certificates and hazardous working conditions. There, we stated, "[u]niformity is essential for it is neither practical nor possible to negotiate different physical plant conditions with different unions." We explained, further:

> Working under hazardous conditions is a matter of concern to all employees, but the nature and extent of the danger will vary according to the duties of particular classes of employees. The risks faced by employees whose services, or substantial portions thereof, are rendered away from departmental offices are different from those of office clericals, for example. On the other hand, hazards resulting from conditions in the office affect all persons who work there, and provisions concerning such hazards necessarily must be uniform.
>
> We conclude, therefore, that only those hazards which are limited to a particular class or classes of employees represented by the [u]nion are bargainable by it

In other words, the Union herein must demonstrate the existence of unique or special considerations limited to the conditions under which LPNs, as a unit, must work to allow for

[43] Decision Nos. B-23-85; B-2-73; B-11-68.

bargaining on the unit level. Because the Union has chosen to withhold from us the particulars of its demand, it has failed to substantiate a basis upon which we may conclude that bargaining is appropriate at the unit level.

Accordingly, we find that Demand No. 6(A), is outside the scope of mandatory collective bargaining between the instant parties.

Demand No.6(B) - Medications be prepared in a closed area

The City submits that the Board has long held demands seeking changes in the physical plant of the employer an infringement on management's right to "determine the methods, means and personnel by which it conducts its operation" and to "exercise complete control and discretion over its organization and the technology of performing its work."[44]

The Union argues that this demand is a mandatory subject of bargaining because it pertains to working conditions and, further, that requiring management to provide such an area "protects the patient and the LPN."

In reply, the City points out that to the extent the Union refers to safety considerations, it "has utterly failed to cite a legal or factual basis for its claim."

Discussion

Section 12-307a of the NYCCBL provides that a public employer has a duty to bargain in good faith on wages, hours and working conditions. In Decision No. B-11-68, we set forth certain principles concerning the scope of collective bargaining to guide and assist parties engaged in negotiations. In defining the three categories of subjects of bargaining (mandatory,

[44] The City cites NYCCBL Section 12-307b; Decision Nos. B-4-89; B-43-86; B-23-85; B-10-81; B-16-75.

nonmandatory and prohibited), and specifically with regard to mandatory subjects, we commented: "The specification is more easily stated than applied, for that phrase [wages, hours and working conditions] may include or exclude a host of borderline or debatable subjects." We have since recognized that the question whether a particular subject concerns a term or condition of employment is to be determined on the basis of the circumstances of a particular case.[45] However, in considering a demand which falls on the borderline, we require that facts be presented which demonstrate that the object of the particular demand is a mandatory subject of bargaining."[46]

In the instant matter, the Union contends that Demand No. 6(B) "should" be a mandatory subject because it concerns a working condition and would provide an element of protection for the patient and the LPN. The City contends that demands concerning equipment and facilities are nonmandatory subjects.

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[45] For example, in Decision No. B-43-86, we considered whether a demand of the Uniformed Firefighters Association ("UFA") seeking for certain of its members individual locker facilities for the cleaning and storage of equipment, was a mandatory subject of bargaining. In that case, we were persuaded that the circumstances of that bargaining unit's work, taken together with the fact that other members of the unit enjoyed the benefit, established that the demand related to a working condition and, thus, constituted a mandatory subject of bargaining. Therefore, we found that "[w]hile we agree that the City's management prerogatives give it broad discretion in allocating the use of its physical plant, we believe that its discretion in this area is not absolute."

[46] Decision No. B-4-89.

There may be several underlying circumstances which could constitute an arguable basis for finding this demand a mandatory subject of bargaining.[47] However, as the City points out, the Union has failed to allege any evidence or persuasive argument, other than its conclusory assertion, that would aid us in reaching this conclusion.

Furthermore, with respect to the nature of demands which involve an element of safety, while PERB has ruled that "[s]afety as a general subject is a mandatory subject of negotiations,[48] in view of the NYCCBL's broad management's rights provision we have traditionally held that the introduction of questions of safety into consideration of bargainability does not render a subject mandatory. Rather, it could constitute a basis for a finding by this Board that a practical impact nay attach to the exercise of management prerogative, as set forth supra, at 5-9.

Therefore, to the extent that this demand would direct the City to make changes in its physical plant, and in view of the lack of a sufficient demonstration by the Union that the demand concerns a term or condition of employment, we must conclude that

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[47] In view of a job which requires employees to be very accurate in their preparation of medication administered to patients, an argument could be made that providing an area for this purpose which is free from distractions involves a working condition within the meaning of the statute. Compare With, Decision No. B-43-86 discussed supra, note 45, at 28.

[48] White Plains Police Benevolent Association v. city of White Plains, 9 PERB ¶3007, 3010 (1976).

Demand No. 6(B) is a nonmandatory subject of bargaining.[49] However, to the extent that the Union has alleged that a safety impact has resulted from the failure to provide an area appropriate for the preparation of medication, this determination is without prejudice to the right of the Union to file a petition supported by evidence of specific, identified practical impact resulting from management's action.

[49] See e.g., Decision No. B-4-89.

Demand No. 7 - Rotation of shift be for no more than three-consecutive month period, once a year with proper advance notification.

The City submits that this demand directly impacts on its statutory managerial right, inter alia, to determine assignments unilaterally.[50] The City argues that a demand that would limit its right to rotate personnel as operations demand or to take all necessary action to carry out its mission in emergencies is outside the scope of mandatory collective bargaining.[51] Moreover, citing the Board's finding in Decision No. B-4-75, the City contends that any demand relating to work schedules which does not concern maximum hours of work per day or per week is a non-mandatory subject of bargaining.

The Union argues that "changes in rotation of shifts is a mandatory subject since it has a significant impact on the terms and conditions of employment."

In its reply, the City submits that because the Union provides no factual or legal basis for the asserted "impact," it has failed to demonstrate, under any theory within the meaning of the NYCCBL, that this demand is within the scope of mandatory collective bargaining.

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[50] The City cites NYCCBL Section 12-307b; Decision Nos. B-4-89; B-35-82; B-19-79; B-5-75.

[51] The City also cites Decision Nos. B-16-81; B-12-76; B-24-75; B-10-75.

Discussion

This is an example of a demand which has a dual character insofar as it involves a mandatory subject in part, and a nonmandatory subject in part. In such cases, consistent with our authority under Section 12-309a(2) of the NYCCBL,[52] we follow a practice of advising the parties of those elements of a demand which are mandatory subjects and of those elements which are nonmandatory subjects of bargaining.[53]

Demand No. 7 seeks two distinct benefits. First, the Union seeks to limit shift rotation (the assignment of an LPN to the performance of duties on a shift other than the one for which the LPN was hired) to three consecutive months per calendar year. To the extent the Union seeks to circumscribe the City's right to assign, reassign or rotate personnel as operational needs require, this demand is clearly outside the scope of mandatory collective bargaining (see discussion, supra, at 21-22).

However, the Union also demands that the City give LPNs advance notification once shift rotation schedules have been promulgated. This aspect of Demand No. 7, viewed independently,

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[52] Section 12-309a(2) of the NYCCBL provides:

> The board of collective bargaining ... shall have the power and the duty ... to make a final determination as to whether a matter is within the scope of collective bargaining.

[53] See e.g., Decision Nos. B-4-89; B-16-81.

seeks publication of information on a matter of work assignments to those who are affected by them. We find that this is a mandatory subject insofar as the Union asks the city to provide an indication as to the hours and work schedules to which LPNs are assigned. This conclusion is consistent with our holding in Decision No. B-2-73, where we held that the New York State Nurses Association's demand for "Posting Work Assignment Schedule" was a mandatory subject because it relates to working conditions."[54] It should be noted, however, that bargaining on this matter is limited to the issue of "advance notification." It would go beyond the limits of mandatory bargaining, and constitute an invasion of the City's statutory management rights, to allow the Union to interfere with the City's right to determine such work schedules.[55]

Accordingly, because the mandatory and nonmandatory elements of this demand are not inextricably intertwined, we conclude that to the extent that the Union seeks to participate in the decision making process concerning shift rotation assignments, Demand No. 7 is outside the scope of mandatory collective bargaining. However, to the extent the Union seeks information once management has made its decision on the matter, we see no infringement in this aspect of the demand and, thus, find it appropriate for consideration by the Impasse Panel.

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[54] See also, Decision No. B-4-89; B-16-81; B-10-75.

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

Demand No. 9 - An LPN employed for is years need not float.

For the same reasons articulated in its challenge to Demand No. 7 supra, at 31, the City contends that this demand is outside the scope of mandatory collective bargaining. The Union argues that a demand which seeks to limit the floating of LPNs based on years of service is "a proper subject of bargaining."

Discussion

The instant demand, as written, seeks the strict application of seniority in determining whether an LPN be assigned to float. The City argues, and we agree, that because this demand would limit the number of employees it could potentially assign to float, it constitutes an impermissible intrusion into managerial prerogative.

We have held that demands seeking the use of seniority as "one factor among others"[56] or a "significant factor"[57] in determining employee assignments, are mandatorily bargainable. However, in Decision No. B-4-89, we stated:

> [D]emands seeking the assignment of personnel based on seniority levels [are] beyond the scope of mandatory collective bargaining ... when they contemplate seniority to be the sole criterion in determining

[56] Decision Nos. B-35-82; B-16-81; B-10-81; B-19-79.

[57] Decision No. B-23-85.

employee assignments.[58]

In a proceeding such as this, it is our policy to limit our holding to the express terms of the demand placed in issue before the Board.[59] Therefore, where, as here, the thrust of a demand is to apply an absolute limitation on management's right to assign employees, without recognition of the exigencies of the department, we will find it constitutes an infringement on the employer's discretion to deploy personnel to meet its operational needs.[60]

Accordingly, we find that Demand No. 9 is a nonmandatory subject of bargaining.

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[58] See also, B-16-81; B-4-81.

[59] Decision Nos. B-4-89; B-16-81.

[60] Cf., Decision No. B-16-81.

Demand No. 10 - Every other weekend off.

For the same reasons articulated in its challenge to Demand No. 7 supra, at 31, the City contends that this demand is outside the scope of mandatory collective bargaining.

The Union argues that a contract provision which provides for "every other weekend off would [only] validate a practice that has been explicitly in effect for many years" and, therefore, would not adversely affect scheduling.

Contrary to the Union's assertion, the City submits that this demand would "force a permanent change in the scheduling established for a number of City employees." However, even assuming, arguendo, that the past practice was to grant LPNs every other weekend off, the City submits that such an argument in no way converts an otherwise nonmandatory subject of bargaining into a mandatory subject.

Discussion

There is no dispute that the promulgation of work schedules, including establishment of the days of the week on which services are to be performed, as well as many other aspects of scheduling, are reserved management rights.[61] We have long held that a union

[61] See Decision Nos. B-4-89; B-45-88; B-21-87; B-24-75; B-10-75; B-5-75; B-6-74; B-4-69.

has a legitimate right to bargain concerning maximum hours of work per day, per week, and per year; number of appearances per year; and time off for vacation, sick leave, or other purposes.[62] However, once agreement is reached on these provisions, it 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.[63]

Specifically, with respect to the instant demand, in Decision No. B-6-74, we found:

> [T]he number of hours to be worked on holidays and weekends is related to the "standards of services to be offered" ... and that it concerns the "methods, means and personnel by which government operations are to be conducted." Therefore, the matter is a [nonmandatory] subject of bargaining and, in view of the employer's objection herein, may not be submitted to the impasse panel.[64]

However, in asserting that Demand No. 10 is mandatorily bargainable, the Union contends that since the configuration of work schedules is such that LPNs have long enjoyed every other weekend off, memorializing the practice in a collective

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[62] See generally, Decision No. B-4-89 and the decisions cited therein.

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

[64] See also, Onondaga-Madison Board of Cooperative Educational Services v. Onondaga-Madison Employees General Association, NYSUT/AFT , 17 PERB ¶4618 (1984), aff'd in part, 17 PERB ¶3109. In that case, the hearing officer held (and it was conceded on appeal) that: "[i]t lies solely within the employer's discretion to determine the hours and days of the week on which it requires the services of its employees."

bargaining agreement would not impact on the city's managerial prerogative. The City disagrees with the Union's factual assertion and maintains that, in any event, this does not constitute grounds for finding a subject mandatorily bargainable.

First, we note that the bargaining status of a subject matter is fixed by law and is unaffected by the parties' actions or intentions.[65] In this respect, we have long held that if agreement is reached on a nonmandatory subject, such agreement may be embodied in a collective bargaining agreement and enforced as a contractual obligation for the term of that agreement. However, even the fact that such agreement had been reached, and included in a contract, will not transform that nonmandatory subject into a mandatory subject in subsequent negotiations. Its quality, in contemplation of law, is fixed.[66]

Applying these principles to the instant matter, we must reject even an unrebutted contention that because the City has for several years, scheduled LPNs every other weekend off, that it is now required to bargain on the subject. Moreover, as is consistent with management's right in this area, the city is free to unilaterally change the configuration of existing work schedules, limited to the extent that the change would alter contractual provisions relating to maximum hours of work, number

[65] Decision No. B-4-89; B-21-87; B-11-68.

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

of days of leave,[67] or after the Union has alleged and this. Board has found that the exercise of management's prerogative has resulted in a practical impact on employees affected by the change.[68]

Accordingly, we find that Demand No. 10 is a nonmandatory subject of bargaining.

[67] E.g., Decision No. B-10-81.

[68] E.g., Decision No. B-21-87.

Demand No. 11 - An LPN need not do nurses notes based upon information provided by nurses aides.

The City submits that this demand is outside the scope of mandatory collective bargaining because it seeks to limit how the City would have its employees complete their assignments.[69]

The Union argues that because LPNs are solely responsible for the content of their notes, requiring them to document the observations of nurses aides "puts an LPN's license in peril."

In response, the City submits that the Union's bare assertion fails to provide a sufficient legal basis for the Board to determine that this demand is bargainable.

Discussion

Section 12-307b of the NYCCBL expressly provides that it is the right of the City to "determine the methods, means and personnel by which government operations are to be conducted." Pursuant to this language, and as we stated supra, at 11-13, to the extent this demand attempts to define what duties are appropriate for a job title, it constitutes an infringement on the City's statutory managerial prerogative to determine the content of a job specification.[70]

[69] The City cites Section 12-307b; Decision Nos. B-23-85; B-10-81; B-16-75.

[70] See, Decision No. B-10-81.

However, the Union also argues that because LPNs are legally responsible for the notes they enter on patient's charts, requiring LPNs to chart the observations of others (nurses aides) creates an undue risk of error and potential loss of their licenses. In response, the City contends, and we agree, that the Union has failed to allege any facts, other than this bare conclusory statement, to support a Board determination requiring the City to bargain on this matter. As set forth supra, at 5-9, such assertions without factual support are insufficient to state a prima facie claim of practical impact. Furthermore, as we stated relative to our consideration of a similar argument urged by the Union in support of Demand No. 4 supra, at 18-20, such assertions are not only speculative but also dependent upon action by independent third parties. Thus, they do not constitute a sufficient basis for finding a demand bargainable.[71]

Accordingly, we find that Demand No. 11 is a nonmandatory subject of bargaining. However, to the extent that the Union has alleged that the exercise of management's discretion has resulted in a practical impact on a term and condition of employment of affected employees, our determination is without prejudice to the right of the Union to file a petition which is supported by evidence of specific, identified practical impact resulting from management's action.

[71] See Decision No. B-10-81.

Demand No. 12 - The right to select time off for vacation will not be [a]ffected by needs of other tours or other titles.

The City contends that a demand which would seek an absolute, inflexible right to time off without regard to departmental limit or exigencies is a nonmandatory subject of bargaining.[72] The City submits that it is not required to bargain over a proposal that, by its terms, would place the scheduling of vacation in a position superior to the city's managerial prerogative under NYCCBL Section 12-307b to, inter alia, determine levels of manning.[73]

The Union did not submit an answer to the City's challenge.

Discussion

There is no dispute that time and leave benefits are within the general subject of hours and, as such, are mandatory subjects of bargaining under Section 12-307a of the NYCCBL. We have also held that regulations and procedures governing the proper use of leave time are within the scope of mandatory collective bargaining.[74]

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[72] The City cites Decision Nos. B-4-89; B-16-81; B-10-81.

[73] The City also cites Decision Nos. B-6-79; B-5-75; B-3-75.

[74] Decision Nos. B-16-81; B-3-75.

With respect to the instant matter, the union seeks a contract provision which will guarantee LPNs a right to schedule time off without regard to the schedules of LPNs working other shifts and/or non-bargaining unit staffing levels for the same shift. The City argues that a demand which would subordinate staffing needs to vacation schedules is beyond the scope of bargaining.

We agree with the City and find that inasmuch as the instant demand seeks to govern the scheduling of a time and leave benefit without recognition of department exigencies, it impermissibly supersedes the City's right to control manpower levels.

In Decision No. B-4-89, we considered a demand for a specific number of days of paid leave per year for blood donation purposes. We found that to the extent the demand sought time off without restriction as to the number of employees who could elect to take the benefit in a particular month, it was a nonmandatory subject of bargaining. Similarly, in Decision No. B-16-81, we considered a demand by the Correction Officer's Benevolent Association seeking a guaranteed right to take vacation time "not hampered by any Department limit or exigency." Finding that this demand "would interfere with management's right to establish and maintain the number of employees needed to deliver the governmental service," we held that it was a nonmandatory subject of bargaining.

Furthermore, in Fairview Professional Firefighters

Association, Local 1586. IAFF v. Fairview Fire District, 12 PERB ¶3118 (1979), PERB considered whether the firefighters' demand for vacation bidding rights independent of the bidding rights of supervisory personnel (who were also in the unit) was a mandatory subject of bargaining. PERB held:

> It is a management prerogative ... to determine the number of firefighters and fire officers who must be on duty at any given time. Subject to its staffing requirements, however, a public employer is required to negotiate as to the manner in which available vacation time may be enjoyed by individuals and groups of firemen. [Citing an earlier decision, the ruling continued,] a public employer "may determine the number of unit employees that it must have on duty during each of the vacation periods. Within that framework, it is obligated to negotiate over the order in which vacation preferences may be granted.[75]

We find that the instant demand goes beyond the framework within which the order of preferences for granting vacation leave may be negotiated. As stated, the demand does not merely seek to negotiate the order in which vacations will be granted among individuals or groups of LPNs. Rather, the Union herein seeks to guarantee LPNs preference in vacation bids totally independent of staffing levels within the unit as well as impose those preferences on employees of other bargaining units, e.g., Registered Nurses, Nurses Aides, Orderlies. Because we find that this demand, on one hand, would create shortages among LPNs as vacation schedules would prevail over staffing needs in exigent

[75] City of Yonkers v. Uniformed Fire Officers Association of the Paid Fire Department of the City of Yonkers, 10 PERB ¶3056 (1977).

circumstances and, on the other, would interfere with the collective bargaining rights of other certified collective bargaining representatives,[76] it is outside the scope of mandatory collective bargaining.

Accordingly, we find that Demand No. 12, as set forth, is a nonmandatory subject of bargaining.

[76] In Decision Np. B-10-81, we held that to the extent a Union's demand concerns levels of staffing among non-bargaining unit employees, it is a prohibited subject of bargaining.

Demand No. 13 - An LPN will not be floated into an area where she is inexperienced, untrained or unfamiliar.

The City argues that any demand which would infringe upon its statutory management right under NYCCBL Section 12-307b unilaterally to assign employees "in the way it deems necessary to fulfill the function of the agency" is outside the scope of mandatory collective bargaining.[77]

The Union contends that this exercise of management's prerogative "is dangerous to the patient and the LPN" and should not be tolerated.

In its reply, the City responds that because the Union provides no factual basis for the dangers alleged, its bare assertion fails to demonstrate that this demand is even arguably within the scope of collective bargaining under any theory within the meaning of the NYCCBL.

Discussion

As we stated supra, at 21-22, a demand which,on its face, seeks to condition the City's ability to reassign ("float") an LPN from one unit to another is clearly not a mandatory subject of bargaining. Moreover, it is well-settled that to the extent a bargaining demand involves "subjects of training and

[77] The City cites Decision No. B-19-79.

qualifications for assignment,"[78] clearly it is not appropriate for submission to an Impasse Panel.

As grounds for asserting that Demand No. 13 properly may be submitted to the Impasse Panel, the Union states that it "should be allowed to present evidence" that will demonstrate the inherent danger of "indiscriminate floating." However, the City points out, and we agree, that to the extent the Union's answer constitutes an allegation of practical impact, its bare conclusory statement is insufficient to warrant even a hearing in this matter.

In Decision No. B-6-87, we dismissed a union's claim that the City committed an improper practice when it refused to bargain concerning its decision to assign Sanitation Workers the task of towing abandoned vehicles. In support of its claim, the union argued that increased threats to employee safety resulting from assigning Sanitation Workers duties about which they have not been trained constituted a per se safety impact. There, we stated "[t]he fact that employees are being assigned to tasks for which they allegedly have not been trained does not, in and of itself, implicate safety considerations." Because the union failed to offer any evidence or persuasive argument to demonstrate a per se safety impact, it was not apparent to the Board that the assignment in question gave rise to any

[78] See Decision No. B-4-89 and the decisions cited therein.

bargainable issues.

Similarly, in the instant matter, the Union failed to offer any evidence or persuasive argument to support its claim that the assignment of LPNs to areas where they are inexperienced, untrained or unfamiliar necessarily will result in threats to employee safety. As set forth supra, at 5-9, a Union must do more than merely present a conclusory allegation that there is a safety impact to state a cognizable claim of practical impact in contemplation of NYCCBL Section 12-307b. As a precondition to our consideration of a practical impact claim, the Union must specify details which demonstrate the existence of such threat.

Accordingly, we find that Demand No. 13 concerns a nonmandatory subject of bargaining and shall not be submitted for consideration by the Impasse Panel. However, our determination is without prejudice to the right of the Union to file a petition which is supported by evidence of specific, identified practical impact on employee safety resulting from management's action.

Demand No. 14 - Each hospital shall provide a day care center to accommodate minor children of LPNs.

The City contends that this demand raises an issue which should be uniform for all employees subject to the Career and Salary Plan. In support of its argument, the City points out that this matter has already been a subject of bargaining at the Citywide level. According to NYCCBL Section 12-307a(2), the City submits, such matters must be negotiated by District Council 37, AFSCME, AFL-CIO, the designated Citywide bargaining representative.[79]

The Union did not submit an answer to the City's challenge.

Discussion

As is fully set forth supra, at 23-26, the Board is guided by the principle that the most appropriate level of bargaining is the broadest level, with certain exceptions.[80] One such exception is that contained in Section 12-307a(2) of the NYCCBL, which provides that there may be bargaining for a variation of any Citywide policy or of a term or condition of any Citywide contract where considerations special and unique to a particular department, class of employees, or bargaining unit are involved.

The City contends that this matter is a Citywide issue and,

[79] The City cites Decision Nos. B-2-73; B-4-69; B-11-68.

[80] Decision No. B-18-75.

therefore, not an appropriate subject of bargaining between the instant parties. The City, in support of this argument, submits that the subject of day care centers has been bargained on at the Citywide level[81] and, thus, constitutes an issue which must be uniform for all employees subject to the Career and Salary Plan.

We have long-rejected the contention that "the necessity for uniformity is for the City alone to determine."[82] Decisions interpreting the NYCCBL as to appropriate levels of bargaining of subjects not statutorily defined as Citywide matters are for this Board alone.[83] Furthermore, the fact that a subject has already been raised at the Citywide level does not, by itself, create a

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[81] We take administrative notice that a Side Letter Agreement has been executed by the City and District Council 37, AFSCME, AFL-CIO, as the certified collective bargaining representative on Citywide matters, and appended to the 1985-87 Citywide Agreement. This letter, in pertinent part, provides:

> This is to confirm our mutual understanding and agreement that a joint labor-management Committee composed of representatives of the Union, the Office of Municipal Labor Relations, the Office of Management and Budget, the Department of Personnel, and the Office of operations shall study needs, costs and feasibility of establishing day care centers near employees' work locations. The Committee shall report its recommendations to the First Deputy Mayor. It is understood and agreed that the Committee's recommendations shall include proposals for the use of seed money of $15,000 per center up to a maximum of five centers and $75,000.

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

[83] Section 12-307a(2) of the NYCCBL specifies only two of the subjects which "must be uniform" for all Career and Salary Plan employees, i.e., overtime and time and leave rules. See also, Decision No. B-12-75.

presumption that an issue is a Citywide matter. However, it nay constitute evidence of the fact that the subject is of equal importance to all Career and Salary Plan employees and, thus, a matter which should be uniform Citywide. As a general rule, matters which would affect all Career and Salary Plan employees and not just those in a particular bargaining unit, constitute Citywide issues unless the union representing that unit can demonstrate special and unique circumstances which would make it appropriate for bargaining at the unit level.[84]

Applying these principles to the instant matter, we find that because bargaining on this matter has taken place at the Citywide level, it is reasonable to conclude that the issue of Day Care Centers concerns all Career and Salary Plan employees and constitutes a Citywide matter. Furthermore, the current Citywide Agreement specifically addresses the subject of the instant demand.[85] Finally, we note that the Union has failed to assert any special or unique considerations that might influence our decision in this matter.

Accordingly, we find that Demand No. 14 is not an appropriate subject of bargaining between the instant parties.

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

[85] In Decision No. B-12-75, in finding a demand for a "supper allowance benefit" (which the union characterized as a form of shift differential) to be a matter appropriate for bargaining on the Citywide level, we noted that the then current Citywide contract made specific provision for shift differentials of all types.

Demand No. 15 - The weekend must be defined.

The City argues that this demand is so vaguely drawn that "it could have any of several meanings" and, therefore, it cannot be determined whether the demand encompasses nonmandatory subjects of bargaining. Accordingly, the City asks that it be deemed outside the scope of mandatory collective bargaining.[86]

In contrast, the Union contends that "because the definition of the weekend in the current contract is so vague,... clearly defining [it] is within the scope of bargaining [emphasis added]."

In its reply, the City asserts that the Union's argument in support of this demand "has no basis in law, fact or reality and, consequently, should be summarily dismissed by the Board."

Discussion

At the outset, we take administrative notice of the fact that neither the Citywide Agreement nor the LPN Unit contract

[86] The City cites Fairview Professional Firefighters Association, Inc., Local 1586, IAFF v. Fairview Fire District, 12 PERB ¶3083 (1979); Rochester Fire Fighters, Local 1071, IAFF (AFL-CIO) v. City of Rochester, 12 PERB ¶3047 (1979); City of Rochester v. Rochester Police Locust Club, Inc., 12 PERB ¶3010 (1979).

attempts to define the term "weekend" as it is commonly known.[87] The only language which approximates such a definition is found in Article II, Section 2 of the Citywide Agreement, which provides that "[w]herever practicable, the normal work week shall consist of five (5) consecutive working days separated by two (2) consecutive days off." We recognize, moreover, that many City agencies, including the New York City Health and Hospitals Corporation, are twenty four hour a day - seven day a week operations. And finally, we note that "it is our policy to favor agreement and execution of contracts to define the rights of the parties and to diminish the necessity of resorting to legal remedies."[88] In pursuance of this policy we encourage agreement on the definition of words, phrases, terms and usages employed in written agreements between parties subject to our jurisdiction. Accordingly, we have held that "to the extent [a demand] seeks to place a particular construction or interpretation on existing contract language, it is a proper subject of bargaining."[89]

Turning our attention to the instant matter, as is fully set forth supra, at 36-39, the promulgation of work schedules, including establishment of the days of the week on which services

[87]Webster's New International Dictionary (2nd ed. 1954), defines "weekend" as "a period between the close of one customary working, business or school week and the beginning of the next, commonly extending from Friday evening to Monday morning."

[88]Decision No. B-3-75

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

are to be performed, as well as many other aspects of scheduling, are reserved management rights.[90] Notwithstanding the City's broad managerial prerogative in this area, we have found demands which seek only information concerning the particular hours of the day and the particular days of the week during which employees may be required to work to constitute mandatory subjects of bargaining.[91] Additionally, to the extent a demand encompasses the incidents of premium pay, i.e., shift differentials, overtime, etc., we may find that the demand seeks an alternative economic benefit and, thus, is mandatorily bargainable despite the alleged prohibited or nonmandatory nature of the original benefit sought.[92]

Here, the City contends, and we agree, that Demand No. 15 is vague on its face. Because the demand might call for unspecified changes in the work schedule, we cannot determine whether the demand would interfere with statutory managerial prerogatives.

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[90] See Decision Nos. B-4-89; B-45-88; B-21-87; B-24-75; B-10-75; B-5-75; B-6-74; B-4-69.

[91] Decision No. B-4-89; B-16-81; B-10-81; B-2-73. See also, our discussion of Demand No. 7 herein, supra, at 32-35.

[92] Compare, Decision No. B-19-79, where we determined that a demand that employees who performed satisfactorily at a higher level be guaranteed the pay level they achieved despite possible subsequent reassignment to a lower level was "one coming within the ambit of 'wages'." See also, Civil Service Employees Association, Inc., Niagara Chapter v. Town of Niagara, 14 PERB ¶4538 (1981), where a hearing officer found that a demand which "merely sets forth what will be the normal work week of unit employees" is mandatory because it could be used to determine overtime.

This view is consistent with Fairview Professional Firefighters Association,[93] where PERB found that a demand that "Work Schedules be expanded to outline more specifically the present 4 group, 2 platoon system [emphasis added]," was too vague because the underscored language might call for unspecified changes in the work schedule. "Because those changes are not specified," PERB held, "neither we nor the District can determine whether the [demand interferes] with the right of the District to set the number of firefighters to be on duty at any given time."

Similarly, in the instant matter, the Union has failed to state its position in a manner that will put the City on notice of its intent.[94] Moreover, although the Union claims that the current definition of the term "weekend" is so vague that it should be clarified, the Union fails to cite the source of the current definition, e.g., by identifying a specific provision in either applicable collective bargaining agreement, for which it seeks a particular construction.

Accordingly, we find that Demand No. 15 is outside the scope of mandatory collective bargaining.

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[93] 12 PERB ¶3083, at 3214.

[94] Decision No. B-4-89; B-43-86.

Demand No. 22 - If the registered nurses receive a wage reopener during the course of their present contract, the LPNs shall also have a wage reopener.

The City submits that to the extent the Union seeks to require the City to renegotiate wages during the term of the agreement, the Board has interpreted Section 12-311a(3) of the NYCCBL to operate as a bar to mid-contract bargaining.[95] Moreover, the City contends, because this demand is clearly one for parity, it is a prohibited subject of bargaining.[96]

The Union did not submit an answer to the City's challenge.

Discussion

At the outset, we reject the City's contention that Section 12-311a(3) of the NYCCBL[97] is applicable to the instant dispute.

[95] The City cites Decision Nos. B-21-15; B-18-75.

[96] The City cites Decision Nos. B-11-79; B-10-75; Rockville Centre Principals Association v. Rockville Centre Union Free School District, 12 PERB ¶3021 (1979).

[97] NYCCBL Section 12-311a(3) provides:

> Nothing herein shall authorize or require collective bargaining between parties to a collective bargaining agreement during the term thereof, except that such parties may engage in collective bargaining during such term on a matter within the scope of collective bargaining where (a) the matter was not specifically covered by the agreement or raised as an issue during the negotiations out of which such agreement arose and (b) there shall have arisen a significant change in circumstances with respect to (such matter, which could not reasonably have been anticipated by both parties at the time of the execution of such agreement.

Admittedly, this section constitutes "a bar to mid-contract bargaining on non-impact matters and on any matters that have already been fully negotiated, regardless of whether or not they are included in the contract."[98] However, by its terms, this section provides that a party may not demand bargaining "during the term" of an agreement on natters that were or should have been negotiated during bargaining for that agreement.[99] Section 12-31la(3), in effect, constitutes a "zipper clause" which operates to prohibit bargaining on such matters after execution of the agreement. Clearly, however, the statute does not prohibit, nor have we construed it as barring, demands made in the ordinary course of bargaining which contemplate reopening negotiations on a specific subject, mid-contract.[100] Furthermore, we have held demands framed to provide for alternative economic benefits, based on some contingency which may or nay not occur mid-contract, to be mandatory subjects of bargaining.[101]

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[98] Decision No. B-21-75.

[99] Unless, as the statute provides, there has been an unforeseen change in circumstances concerning a matter within the scope of collective bargaining. See Decision No. B-66-88.

[100] Compare with, Decision No. B-3-69. In considering whether a bargaining demand was appropriate for submission to an Impasse Panel (and deciding on other grounds that it was not), we found that the parties had agreed to reserve the question of promotional opportunities for Elevator Operators "for further negotiations" in order not to delay settlement of wages, etc.

[101] See Decision Nos. B-6-74 and B-1-74, where we held that demands for a substitute economic benefit in the event the legislature did not enact a certain pension benefit for any year during the life of the agreement were mandatory subjects of bargaining and could be submitted to the Impasse Panel.

Accordingly, we reject the City's contention that Section 12 311a(3) "does not authorize or require the city to bargain with a Union in raid-contract" in all circumstances, as the City suggests.

We now turn to the City's argument that bargaining on this demand is prohibited to the extent that it seeks "parity with another collective bargaining unit [RNs]." It is well-settled that a demand for parity is "antithetical to free and uncoerced negotiations because it fixes wages in such a way as to interfere with the bargaining rights of employees in another unit."[102] In discussing why parity demands are' "incompatible with sound bargaining principles," in Decision No. B-10-75, we cited with approval the City's position that:

> (A) parity clause ... would constitute an improper labor practice because it would interfere with the bargaining rights of employees in the bench mark title who were represented by a different union, not a party to the parity agreement; would require the City to make automatic and unilateral changes in terms and conditions of employment; and would involve the City in assisting the contracting union to limit, control or otherwise adversely affect bargaining in the unit of bench mark employees.

In this connection, we take administrative notice of the 1987-90 Memorandum of Understanding ("Memorandum") between the City and the New York State Nurses Association ("NYSNA"), fully

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[102] Decision Nos. B-4-89; B-11-79; B-10-75.

executed on July 5, 1988, covering the Registered Nurse bargaining unit. In addition to a general wage increase, the Memorandum provides, at Section 5(a):

> Effective July 1, 1988, January 1, 1989, July 1, 1989, January 1, 1990, and July 1, 1990, the salary rates in effect February 1, 1988, July 1, 1988, January 1, 1989, July 1, 1989, and January 1, 1990 respectively, for the classes of positions included in this Agreement shall be adjusted by the addition thereto of the amount of difference, if any, by which the average basic entrance salary of Staff Nurse in the hospitals listed below[103] shall exceed $150 per annum or more the basic entrance salary of Staff Nurse ... employed by the City of New York or by the New York City Health and Hospitals Corporation in effect for the six month period commencing with each date listed above [emphasis added].

It is apparent that Section 5(a) is a form of "wage reopening clause,"[104] providing that the contract rate of RNs' salaries may be increased during the term of the agreement in accordance with the formula set forth therein. We note that this provision does not assure that RNs' salaries will be increased substantially or even at all during the contract term, but merely provides for an increase contingent on the occurrence of specified conditions.

Turning to the instant matter, we conclude that Demand No.

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[103] This list includes 14 private sector, voluntary hospitals located within the City of New York.

[104] M. Kelly, Labor and industrial Relations. Terms, Laws, Court Decision and Arbitration Standards, (Johns Hopkins University Press, 1987) defines the term "wage-reopening clause" as "contractual provisions which stipulate that either party, on demand at a specified period, may reopen the contract to negotiate changes in base contract hourly rates."

22 seeks for LPNs a provision similar to section 5(a) of the RN's Memorandum. The City argues that this is a demand for parity. For the following reasons, we do not agree.

Granting LPNs a similar provision would not interfere with the bargaining rights of the bench mark title (RNs) because any salary increases RNs receive by virtue of Section 5(a) of the Memorandum, by the terms of that section, are not subject to negotiation. Rather, the RN increases, if any, are fixed by a formula and contingent upon factors which are beyond the control of the parties to that agreement. Furthermore, Demand No. 22 does not seek the same benefit, in absolute dollar amounts or application of the same formula as was granted the RNs.[105] Although a demand which calls for the establishment of salary levels in lock-step parity with the salary scales of non-bargaining unit titles nay be prohibited, one that seeks to negotiate a provision for benefits comparable

[105] See Decision No. B-11-79. But see, Lynbrook Police Benevolent Association v. incorporated Village of Lynbrook, 10 PERB ¶3067 (1977), PERB considered whether a salary demand, which was increased one percentage point higher after another union Settled for the higher rate, was a parity demand. There, PERB held:

> Although the level and nature of the benefits specified in the demands are derived from or may parallel the agreement terms of another employee organization, they are not sought to be made subject to automatic adjustment in the event that the other employee organization negotiates a more favorable agreement thereafter.... Hence, the right of that organization to negotiate ... is, in any event, not impaired by the level of benefits that might be negotiated by the parties in the instant case.

to those negotiated by another union representing employees performing similar work is not prohibited.[106] Moreover, we note that the concept of comparability is recognized as an appropriate factor to be considered by an impasse panel in rendering a report and recommendation to resolve a bargaining impasse, pursuant to the provisions of NYCCBL Section 12-311c(3).[107]

We conclude, therefore, that collective bargaining concerning the instant demand is not barred either by the statutory prohibition of mid-contract bargaining or as an instance of parity bargaining. Inasmuch as Demand No. 22 concerns wages, a mandatory subject of bargaining, we find that it is appropriate for consideration by the Impasse Panel.

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[106] Decision Nos. B-4-89; B-10-75.

[107] Section 12-311c(3) of the KYCCBL provides:

(b) An impasse panel ... shall consider wherever relevant the following standards in making its recommendations for terms of settlement:

(1) comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in New York city or comparable communities; ....

Demand No. 29 - LPNs will not be used for escort service both in and outside the hospital.

The City submits that this demand directly impacts on its statutory managerial prerogative, inter alia, to determine assignments unilaterally,[108] arguing that the Board has held demands which place limitations on "the manner in which the City can deploy personnel" to be outside the scope of mandatory collective bargaining.[109]

The Union contends that the specific duties complained of are "beyond the scope of an LPN's title and job description."

In its reply, the City argues that determination of job content is an express management right and that "the City may not be required to include a job description in an agreement which would limit its right to unilaterally change the content of the classification or otherwise limit the exercise of management rights."[110]

Discussion

The instant demand seeks to prohibit the City from assigning LPN's to particular tasks which, the Union claims, are outside

[108] The City cites NYCCBL Section 12-307b; Decision Nos. B-35-82; B-19-79.

[109] The City also cites Decision No. B-4-89.

[110] The City cites Decision Nos. B-4-89; B-43-86.

the scope of an LPN's job description.

We distinguish this demand from our holding with respect to Demand No. 2 (Elimination of non-nursing functions), discussed supra, at 10-13. In the case of Demand No. 2, we held that the Union may not seek to determine which functions are to be included in a particular job specification. In contrast, here the Union alleges that LPNs are performing out-of-title work when they are assigned to escort patients from one location to another, raising an issue which we have held to constitute a mandatory subject of bargaining.[111]

In Decision No. B-10-81, we considered whether the CIR had the right to demand that its members not be assigned duties appropriate to other job titles. There, we stated that "[o]nce the City has established [a] job specification,... the union may properly seek, through bargaining, to require the City not to assign work outside the scope of that specification." However, our holding in that case was qualified inasmuch as we recognized that it was within the City's prerogative to call upon employees to perform out-of-title work in "temporary emergency situations." We held that the City's duty to bargain was limited only to out of-title work which was assigned "on a regular basis under circumstances which could be foreseen when management's decisions on staffing were made [footnote omitted]."

[111] Decision No. B-10-81, discussed supra, at 12.

Applying this analysis to the instant matter, two issues are raised: (1) Whether the duty complained of is actually out-of-title work; and (2) whether this duty is assigned on a regular basis or only in cases of temporary emergency. With respect to the former, we find that the Union specifically alleges that assignments to escort patients constitutes out-of-title work for LPNs. The City does not dispute the assertion but instead challenges the demand on other grounds. Although we agree with the City that a union may not determine which duties are appropriate for a job specification, this argument is insufficient to rebut the Union's claim that out-of-title work is being performed.[112] For purposes of the instant demand, therefore, we deem the City to concede that escort duties are not within the scope of the LPN job specification and constitute out-of-title work.

With respect to the second inquiry, neither party submits sufficient information upon which a decision may be based. However, in view of our conclusion that this demand concerns the assignment of out-of-title work, a subject which is mandatorily bargainable, the extent to which this work is assigned is an issue we need not reach.

Therefore, we limit our holding with respect to the

[112] Compare with, Decision No. B-43-86, where we held that under the circumstances specifically alleged by the Union, the City's general denial was insufficient to rebut the Union's assertions or to raise a triable question of fact.

bargainability of Demand No. 12 as follows: To the extent that the Union seeks to limit the City's ability to call upon employees to perform the duties at issue in temporary emergency situations, Demand No. 29 is a nonmandatory subject of bargaining. To the extent that the Union seeks to place an enforceable limit on the assignment of out-of-title work in circumstances other than unexpected, temporary emergencies, we hold that Demand No. 29 is a mandatory subject of bargaining.

Accordingly, we find that Demand No. 29 may be submitted for consideration by the Impasse Panel to the extent indicated above.

Demand No. 31 - If a psychiatric patient has to be admitted or transferred to a medical unit, the hospital will furnish psychiatric personnel to monitor the psychiatric needs of the patient. LPNs need only provide medical care.

The City contends that this demand infringes on its statutory managerial rights under NYCCBL Section 12-307b because it "would dictate the level and type of personnel" the City may utilize.[113]

The Union argues in support of its demand that requiring trained personnel be assigned to care for psychiatric patients on medical units "protects both the patient and the LPN."

In its reply, the City asserts that not only would this demand infringe on its managerial right to assign personnel,[114] but to the extent the Union refers to safety considerations, it fails to state a prima facie claim of practical impact.

Discussion

There is no dispute that the City's managerial discretion includes the right to unilaterally assign personnel and determine the level of services to be provided by its agencies. In this

[113] The City cites Decision Nos. B-10-81; B-5-75; B-16-74; City of Kingston v. New York State Professional Firefighters Association, Inc., Local 461, 9 PERB ¶3069 (1976).

[114] The City cites Decision Nos. B-4-89; B-35-82; B-19-79.

respect, we have long held that a demand which would prescribe to management the methods, means and personnel it may utilize is beyond the scope of mandatory collective bargaining.[115] However, where the Union alleges additionally that a threat to employee safety results from an exercise of management prerogative, there may be a duty to bargain over the alleviation of a practical impact.[116]

In the instant matter, the Union claims that the City's failure to assign psychiatric personnel in the event a psychiatric patient is transferred or admitted to a medical unit creates a clear threat to the safety of the LPN assigned to care for that patient's "medical" needs. The City contends that the Union's argument fails to warrant a finding of practical impact. We agree. The Union's unsupported and conclusory allegations fail to demonstrate sufficiently that a practical impact on safety exists.

As set forth supra, at 5-9, the Union must present more than mere conclusory allegations of a threat to safety in order to make out a cognizable claim of practical impact. The question whether there is a clear threat to employee safety, if disputed by the employer, is a matter to be determined by this Board before a practical impact can be said to exist. The fact that a

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[115] Decision Nos. B-26-80; B-12-79; B-3-75

[116] E.g., Decision No. B-4-75.

threat to safety may constitute a per se impact justifying the imposition of a duty to bargain does not relieve the Union of the responsibility of first proving the existence of such threat.[117]

Accordingly, we find that Demand No. 31 is a nonmandatory subject of bargaining. However, to the extent that the Union has alleged that the exercise of management's discretion has resulted in an alleged threat to employee safety, our determination is without prejudice to the right of the Union to file a petition supported by evidence of specific, identified practical impact resulting from management's action.

[117] Decision Nos. B-69-88; B-31-88; B-6-87; B-37-82; B-5-75.

Demand No. 32 - If an LPN becomes medically ill while on duty [she] shall not be treated at bar hospital but shall be treated at another hospital.

The City contends that because this demand infringes on its managerial right "to determine the standards of services to be offered by its agencies,"[118] it is not a mandatory subject of bargaining.

The Union did not submit an answer to the City's challenge.

Discussion

Section 12-307a of the NYCCBL expressly provides that the duty to bargain in good faith includes the subject of health benefits.[119] PERB has held that changes in the kind and level of medical insurance benefit enjoyed by unit employees must be negotiated with the union.[120]

In the instant matter, however, we find that in essence, the Union does not seek bargaining on an expansion in the employer's

[118] NYCCBL Section 12-307b.

[119] See Decision No. B-4-89.

[120] City School District of the City of Corning v. Teachers Association, NYSUT, AFT, AFL-CIO, Local 2589, 16 PERB ¶3056 (1983).

Policy of providing medical treatment to LPNs,[121] but to bargain as to the location at which these services are to be provided. Clearly, this demand goes beyond bargaining for a benefit and seeks to direct management's supply of a service in a particular manner. As we have previously held, the manner in which the City delivers services is a matter of management prerogative and a nonmandatory subject of bargaining.[122]

Accordingly, we find that Demand No. 32 is a nonmandatory subject of bargaining.

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[121] We take administrative notice that Article XII of the LPN Unit Contract currently provides:

> First Aid - In emergency situations, Licensed Practical Nurses employed by the Health and Hospitals Corporation shall have access to the employee health services, or if such service is not available, to emergency room facilities.

[122] See e.g., Decision No. B-4-89, where we held that the union's demand seeking an increase in the number of satellite medical offices as well as a voice in their placement was a nonmandatory subject of bargaining.

DETERMINATION

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, and for the reasons set forth in the foregoing decision, it is hereby

DETERMINED, that the following demands of the Union are mandatory subjects of bargaining:

Demand No. 7, to the extent indicated in this decision;

Demand No. 22;

Demand No. 29, to the extent indicated in this decision; and it is further

DETERMINED, that the following demands of the Union are nonmandatory subjects of bargaining between these parties:

Demand No. 2;

Demand No. 3;

Demand No. 5;

Demand No. 6(A);

Demand No. 7, to the extent indicated in this decision;

Demand No. 9;

Demand No. 10;

Demand No. 12;

Demand No. 14;

Demand No. 15;

Demand No. 29, to the extent indicated in this decision;

Demand No. 32;

and it is further

DETERMINED, that the following demands of the Union are also nonmandatory subjects of bargaining, however, this determination is without prejudice to the right of the Union to file a petition which is supported by evidence of specific, identified practical impact resulting from management's action:

Demand No. 4;

Demand No. 6(B);

Demand No. 11;

Demand No. 13;

Demand No. 31.

DATED: New York, New York
October 23, 1989

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INDEX