UFA v. City, 49 OCB 44 (BCB 1992) [Decision No. B-44-92]

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

THE UNIFORMED FIREFIGHTERS
ASSOCIATION OF GREATER NEW YORK,

Petitioner,

-and-

THE CITY OF NEW YORK,

Respondent.
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DECISION NO. B-44-92

DOCKET NO. BCB-1513-92
(I-209-92)
(I-210-92)

DECISION AND ORDER

On July 29, 1992, the Uniformed Firefighters Association of Greater New York ("the UFA" or "the Union"), filed a scope of bargaining petition and a memorandum of law in support thereof, seeking a determination on whether Article III, §§1 and 5A (concerning the number of hours in the work year) and Article VI, §2(c)(i) and (ii) (concerning the exclusion of certain longevity payments in the computation of salary for pension purposes) from the 1987-1990 collective bargaining agreement ("the Agreement") between the UFA and the City of New York ("the City") are within the scope of mandatory collective bargaining. On August 21, 1992, the City filed an answer to the petition, which it amended on August 24, 1992. The UFA filed a reply and a memorandum of law in support thereof, on September 25, 1992.

Background

In August 1990, the UFA and the City commenced collective bargaining negotiations for an agreement to succeed the one covering the period July 1,

1987 to June 30, 1990.[1] On July 3, 1991, the City's then First Deputy Commissioner of Labor Relations wrote a letter to the UFA President, which provides:

> As you know, A.8619 is pending in the Senate and Assembly. The enactment of A.8619 into law will decrease the City's contribution into the Fire Pension Fund. The commencement date of the availability of the portion of the savings attributable to your union realized by the City from the enactment of A.8619 into law, and thereby available for collective bargaining, will be the same as the commencement date of your successor contract, July 1, 1990. If we cannot agree as to the translation of those savings into an amount which is available for collective bargaining, this issue of the amount of savings attributable to your union from the enactment of A.8619 into law may be submitted to impasse pursuant to the New York City Collective Bargaining Law.[2]

On April 2, 1992, the UFA filed a Request for Appointment of an Impasse Panel, pursuant to §1-05 of Title 61 of the Rules of the City of New York ("RCNY").[3] Therein, the Union alleged that the parties reached an impasse in

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[1] The bargaining unit consists of all Firefighters and Fire Marshals (Uniformed) employed by the City (See Article I of the Agreement.)

[2] In Decision No. B-8-92, which issued on March 26, 1992, the Board of Collective Bargaining ("the Board"), inter alia, held that the July 3, 1991 letter constituted "a unilateral expression of [the City's] willingness to submit an allegedly nonmandatory issue to an impasse panel."

[3] Title 61 of the RCNY, entitled: Office of Collective Bargaining, Chapter 1 - Practice and Procedure (hereinafter referred to as "the OCB Rules"), provides, in relevant part:

> **§1-05 Impasse Panels.**
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> * * *
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> **(b) Request for impasse panel-contents.** A request for the appointment of an impasse panel may be made jointly by the public employer and the certified or designated employee organization, or singly by either party. ... The request shall be filed with the board and shall contain:
>
> (1) The names and addresses of the parties;

(continued...)

their collective bargaining negotiations on the singular issue of the value of savings attributable to the Union from the enactment of A.8619. In its request, the UFA maintained that negotiations had not been exhausted on any other issue in collective bargaining at that time. The UFA's request was docketed as Case No. I-209-92.

In a letter dated April 20, 1992, addressed to Malcolm D. MacDonald, Director of the Office of Collective Bargaining and Chairman of the Board of Collective Bargaining, the City opposed the UFA's request on the ground that conditions necessary for the creation of an impasse panel did not exist at

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[3](...continued)

(2) The date when negotiations began and the date of the last meeting;

(3) The nature of the matters in dispute and any other relevant facts, including a list of the specific employer and.or employee organization demands upon which impasse has been reached;

(4) A statement that collective bargaining (with or without mediation) has been exhausted and that conditions are appropriate for the creation of an impasse panel;

* * *

(c) Upon receipt of a request for an impasse panel, the director may conduct or cause to be conducted an investigation to ascertain if the conditions for an impasse panel have been met, namely, the collective bargaining negotiations have been exhausted and that the conditions are appropriate for the creation of an impasse panel.

* * *

(f) Authorization of panel. If the board determines that collective bargaining negotiations (with or without mediation) have been exhausted and that conditions are appropriate for the creation of an impasse panel. it shall instruct the director to appoint such a panel. In reaching its determination, the board may conduct or direct such additional investigation, conferences or hearings as it deems advisable and proper. The director may appoint an impasse panel, without prior consultation with the board, upon request of both parties.

* * *

that time. The City argued that "[i]f the UFA desires that an impasse panel determine the valuation issue, it must wait until collective bargaining on all mandatory issues on which the parties have not agreed has been exhausted. At that time, it may submit a request for the creation of an impasse panel setting forth all mandatory issues on which the parties have not agreed, and those outstanding permissive issues, such as the valuation issue, that the City has consented to have presented to an impasse panel." In response to the City's April 20th letter, the UFA argued that "resolution of the question of the value of savings generated by legislative changes in the pension system interest rate assump-tions [will] clarify, for both sides, the resources available to resolve the remaining issues." Pursuant to the OCB Rules, Chairman MacDonald designated Deputy Chairman Alan R. Viani to investigate the status of the negotiations and to assist in such further efforts at negotiation as might be made.

On May 6, 1992, the City filed its own Request for Appointment of an Impasse Panel. The City alleged that after numerous negotiation sessions, including more than 12 sessions aided by the mediation services of Deputy Chairman Viani, the parties have reached an impasse in their collective bargaining negotiations on issues relating to wages, hours and working conditions. The City's request was docketed as Case No. I-210-92.

On May 20, 1992, Deputy Chairman Viani reported to Chairman MacDonald that his attempts at mediation have not met with success, that collective bargaining negotiations between the parties have been exhausted, and that conditions are appropriate for the creation of an impasse panel. Accordingly,

Mr. Viani recommended the appointment of an impasse panel to hear and decide the dispute.

On May 21, 1992, the UFA submitted its second Request for the Appointment of an Impasse Panel, this time alleging that the process of collective bargaining between the parties on all issues relating to wages, hours and working conditions had been exhausted. In that both parties now were in agreement that conditions were appropriate for the creation of an impasse panel, and given Mr. Viani's report, as well as his own evaluation of the circumstances surrounding the lengthy negotiations between the parties, Chairman MacDonald concluded that an impasse panel should be appointed.

All three requests were consolidated for one proceeding. Following a selection process agreed upon by the parties and consistent with the OCB Rules, on July 8, 1992, a three member panel was designated to hear the dispute. The instant petition was filed on July 29, 1992.[4]

Relevant Statutory Provisions

Civil Service Law, Article 14 - Public Employees' Fair Employment Act ("Taylor Law"):

§201 Definitions

* * *

4. The term "terms and conditions of employment" means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment provided, however, that such term shall not include agency shop fee deduction for negotiating units comprised of employees of the state or any benefits provided by or

[4] It should be noted that on August 21, 1992, the City filed its own scope of bargaining petition, which was docketed as BCB-1517-92, seeking a determination on whether 58 numbered demands raised by the Union in these negotiations are mandatory subjects of bargaining. See Decision No. B- -92.

to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, any benefits so negotiated shall be void. [Chapter 392 of the Laws of 1967, eff. Sept.1, 1967 as amended by L. 1971, c. 503 §1, eff. June 17, 1971; L. 1973, c. 382, §6, eff. Apr. 1, 1973; L. 1977, c. 677, §2 and c. 678, §1.]

* * *

Retirement and Social Security Law, Article 11 - Limitations Applicable to New Entrants:

§443 Final Average Salary.

* * *

b. Notwithstanding the provisions of subdivision a of this section, with respect to the members of the New York state employees retirement system and New York state policemen's and firemen's retirement system, the final average salary, shall be equal to one-third of the highest total salary earned during any continuous period of employment for which the member was credited with three years of service credit, exclusive of any form of termination pay (which shall include any compensation in anticipation of retirement), any lump sum payment for deferred compensation, sick leave, or accumulated vacation credit, or any other payment for time not worked (other than compensation received while on sick leave or authorized leave of absence); provided, however, if the salary earned during any year of credited service included in the period used to determine final average salary exceeds the average of the salaries of the previous two years of credited service by more than twenty per centum, the amount in excess of twenty per centum shall be excluded from the computation of final average salary. [Chapter 382 of the Laws of 1973, eff. May 31, 1973 as amended by L. 1986, c. 379, §1, eff. July 21, 1986.]

* * *

Retirement and Social Security Law, Article 12 - Negotiation of Retirement Benefits:

§470 Temporary suspension of retirement negotiations.

Until July first, nineteen hundred ninety-three changes negotiated between any public employer and public employee, as such terms are defined in section two hundred one of the civil service law, with respect to any benefit provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees or payment to retirees

or their beneficiaries, shall be prohibited. Thereafter, such changes shall be made only pursuant to negotiations between public employers and public employees conducted on a coalition basis pursuant to the provisions of this article; provided, however, any such changes not requiring approval by act of the legislature may be implemented prior to July first, nineteen hundred ninety-three, if negotiated as a result of collective bargaining authorized by section six of chapter six hundred twenty-five of the laws of nineteen hundred seventy-five. [Chapter 382 of the Laws of 1973, eff. May 31, 1973 as amended by L 1977, c. 84, §1, eff. April 1, 1977; L. 1978, c. 464, §5, eff. July 1, 1978; L. 1979, c. 321, § 5, eff. June 29, 1979; L. 1981, c. 381, §5, eff. June 30, 1981; L. 1983, c. 413, §5, eff. June 30, 1983; L. 1985, c. 284, §5, eff. June 30, 1985; L. 19867, c. 203, §1, eff. June 30, 1987; L. 1989, c. 236, §1, eff. July 1, 1989; L. 1991, c. 196, §1, eff. June 28, 1991.]

New York City Administrative Code, Title 12, Chapter 3 - New York City Collective Bargaining Law ("NYCCBL"):

§12-307 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....

* * *

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 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. [Added by

L.L. 1972, No. 1, eff. Jan. 12, 1972 as amended by L.L. 1980, No. 51, eff. Sept. 24, 1980.]

§12-309 Powers and duties of board of collective bargaining; board of certification; director.
a. Board of Collective Bargaining. The board of collective bargaining, in addition to such powers and duties as it has under this chapter and as may be conferred upon it from time to time by law, shall have the power and duty:

* * *

(2) on the request of a public employer or certified or designated employee organization to make a final determination as to whether a matter is within the scope of collective bargaining. [Subd. a amended by L.L. 1972, No. 1, eff. Jan. 12, 1972; L.L. 1972, No. 2, eff. Jan. 12, 1972; subd. b amended by L.L. 1972, No. 1, eff. Jan. 12, 1972.]

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§12-311c Impasse Panels.

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(3)(c) The report of an impasse panel shall be confined to matters within the scope of collective bargaining. Unless the mayor agrees otherwise, an impasse panel shall make no report concerning the basic salary and increment structure and pay plan rules of the city's career and salary plan. If an impasse panel makes a recommendation on a matter which requires implementation by a body, agency or official which is not a party to the negotiations: (i) it shall address such recommendation solely to such other body, agency or official; (ii) it shall not recommend or direct that the municipal agency or other public employer which is party to the negotiations shall support such recommendation; and (iii) it may recommend whether a collective bargaining agreement should be concluded prior to such implementation. Any alternative recommendations proposed by an impasse panel, in the event such implementation does not occur, shall not exceed the cost of the original recommendations. [Amended by L.L. 1972, No. 1, Jan. 12, 1972; L.L. 1972, No. 2, eff. Jan. 12, 1972; L.L. 1980, No. 51, eff. Sept. 24, 1980.]

* * *

New York City Administrative Code, Title 13, Chapter 3 - Fire Department Pension Fund and Related Funds:

§13-313 Definitions.

6. "Final compensation", in the case of an original plan member, shall mean the annual compensation earnable by a member for city-service upon the date of his or her retirement. [Section

amended by L. 1981, ch. 385, July 1; subd. 6 amended by L. 1965, ch. 365, July 1.]

§13-359 Retirement allowances of improved benefits plan members; for service.

a. Subject to the provisions of subdivision b of this section, upon retirement for service, an improved benefits plan member not subject to article eleven (as defined in subdivision four-i of section 13-313 of this subchapter) shall receive a retirement allowance which shall consist of:

1.(a) An annuity based on his or her required annuity savings at the termination of his or her required minimum period of service, and in addition, a pension which when added to the annuity shall be equal to one-half of his or her annual earnable compensation on the date of retirement, for his or her minimum period of service. [Added by L. 1981, ch. 385, July 1.]

* * *

New York City Administrative Code, Title 15, Chapter 1 - Fire Department:

§15-112 Working Hours.

a. The commissioner shall divide the deputy chiefs, battalion chiefs, captains, lieutenants, engineers and firefighters, marine engineers and pilots in boats of the department into platoons, and such divisions shall be fully completed and the provisions hereof fully effectuated. None of such platoons, or any member thereof, shall be assigned to more than one tour of duty in any twenty-four consecutive hours. The commissioner shall install a two platoon system.

The two platoon system shall consist of not more than two tours of duty of not more than nine hours each, to be followed by a rest period of at least forty-eight hours for all members. After such rest period there shall be not more that two tours of duty of not more than fifteen hours to be followed by a rest period for all members of at least seventy-two hours which shall continue in such sequence so that not more than six nine-hour tours of duty and six fifteen-hour tours of duty shall be worked in any twenty-five consecutive calendar days, except, in the event of conflagrations, riots or other similar emergencies or for the necessary time consumed in changing tours of duty, in which events such platoons or members thereof shall be continued on duty for such hours as may be necessary.

This section shall in no manner affect any provision of law providing for furlough or leave of absence of such members of the department.

b. The mayor and all other officials charged with such duty are hereby authorized, empowered and directed to carry out the

> provisions of this section and to provide any and all necessary funds to effectuate the purposes thereof.
>
> c. Notwithstanding the provisions of any other section of this title, the provisions of this section, as amended, in relation to the establishment and continuance of the platoon system and the tours of duty and the hours thereof shall not be repealed, superseded, supplemented or amended by local law, and the same may only be repealed, superseded, supplemented or amended as prescribed in section eleven of article nine of the constitution and upon the affirmative action of the qualified voters of the city of New York on a referendum submitted at a general election. [Added ch. 929/1937, §1; amended ch. 802/1948, §2; amended ch. 791/1961, §1 and §2; amended ch. 100/1963, §408; section added ch. 907/1985, §1.]

Positions of the Parties

The Union's Position

The UFA argues that as a matter of law, an impasse panel must confine its award to matters within the scope of mandatory collective bargaining.[5] According to the Union, the impasse panel appointed to hear the instant dispute "cannot include in its award, or incorporate by reference or implication, contractual provisions from the parties' 1987-1990 collective bargaining agreement which are nonmandatory subjects of bargaining." In other words, the UFA submits, the impasse panel may not "carry over" the contract provisions at issue herein, i.e., Article III, §§1 and 5A and Article VI, §2(c)(i) and (ii) of the Agreement, without the Union's consent.

In support of this position, the Union points out that the last round of bargaining between these parties also was decided by an impasse panel, consisting of Arvid Anderson, Lewis M. Gill and Eli Rock ("the Anderson

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[5] The UFA cites NYCCBL §12-311c(3)(c), supra, at 9.

Panel").[6] The Union cites the report and recommendations in that matter, as follows:

> We have decided to provide two packages in the alternative at the election of the UFA's rank and file membership. We do so because we recognize that the scope of bargaining decision issued by the Board of Collective Bargaining [Decision No. B-4-89] and the New York City Collective Bargaining Law mandate that absent the consent of the parties, this Panel may only consider issues and, therefore, base its award, on matters which are mandatory subjects of bargaining. In the present case, the City has made it clear that we are free to consider the VSF [Variable Supplements Fund] and the matter of hours of work. Accordingly, one of our options will include these issues, subject to an affirmative vote by the rank and file membership of the UFA within thirty days of the receipt of this award. [Id. at 72-73.]

According to the UFA, the Anderson Panel recognized that it could not award the option which contained recommendations that were outside the scope of bargaining without the consent of both parties.[7]

The Union concedes that "it previously consented to accept matters which contravene statute" in the last round of bargaining. However, the UFA argues, the fact that a nonmandatory subject of bargaining became a contractual obligation in a prior round of bargaining does not transform that matter into

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[6] See the report and recommendations of the Impasse Panel in Matter of the Impasse between UFA v. City, Case No. I-193-88, which issued on April 14, 1989.

[7] The Union also cites Carolan v. Mancuso, No. 14280-89, slip op. (N.Y. Sup. Ct. Nov. 8, 1989), aff'd without opinion, (1st Dept. June 14, 1990). According to the Union, the court held that the vote in favor of the option recommending an increase in hours was deemed the "consent" that the Anderson Panel needed in order to make recommendations concerning nonmandatory subjects of bargaining.

a mandatory subject of bargaining nor obligate the parties to negotiate that subject in the future.[8]

Turning to the instant case, the UFA seeks a determination by the Board that because the terms of the following provisions of the 1987-90 Agreement contravene statutory law on the subjects they address, they are nonmandatory subjects of bargaining and thus, may not be included, or incorporated by reference or otherwise, as part of the impasse panel's award without the Union's consent:

Article III - Work Schedule

Section 1.

Firefighters shall be scheduled to work 2127.6 hours per annum. To the extent that the schedule for Firefighters provides for more than 2127.6 hours annually, additional tours off shall be granted to offset the number of additional scheduled hours in each calendar year. In the event that a Firefighter does not receive such specific additional time or because of illness or the needs of the Fire Department is unable to take such additional tours off during the calendar year, the entitlement may be carried over into and shall be taken during the immediately succeeding year but not beyond.

* * *

Section 5.

A. Fire Marshals shall be scheduled to work 2127.6 hours per annum. To the extent that the schedule for Fire Marshals provides for more that 2127.6 hours annually, additional tours off shall be granted to offset the number of additional scheduled hours in each calendar year. In the event that a Fire Marshal does not receive such specific additional time or because of illness or the needs of the Fire Department is unable to take such additional tours off during the calendar year, the entitlement may be carried over into and shall be taken during the immediately succeeding year but not beyond.

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The Union seeks to have Article III, §§1 and 5A declared nonmandatory and, thus, not able to be submitted to the impasse panel over its objections

[8] The Union cites Decision No. B-4-89.

because a 2127.6 hour work year creates a "24 Group Chart." This configuration of tours, the Union claims, is inconsistent with the work schedule mandated by
§15-112 of the New York City Administrative Code ("the Code"), supra, at 10-11. According to the UFA, the "two platoon system" referred to in §15-112 of the Code sets forth the work schedule of firefighters in a precise manner, creating a "2088 hour yearly work schedule" in a configuration of tours known as the "25 Group Chart."[9]

Any suggestion that §15-112 of the Code does not set a 2088 hour work year, the Union submits, "is belied by the parties' bargaining history." The UFA claims that up until the 1987-1990 Agreement, its members had traditionally worked a 2088 work year pursuant to contracts that always expressly incorporated the 25 Group Chart of §15-112 of the Code. As the City well knows, the Union argues, in the last round of bargaining "a 24 Group Chart evolved which discarded the two platoon system of §15-112 of the Code in favor of a new work chart which included a 2190 hour work year as well as a 48 hour 'Mini-vacation' and 15 hour 'adjusted tour' to be taken the following year."

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[9] Cognizant of the fact that §15-112 of the Code does not list Fire Marshals among the titles covered by its provisions, the UFA points out that Firefighters and Fire Marshals have been in the same bargaining unit since 1970 and, except where there exist bargaining demands specific to Fire Marshals, that the two titles always have been treated similarly. The UFA also points out that the Anderson Panel adopted this view in its recommendations concerning the work hours of Firefighters and Fire Marshals in Case No. I-193-88.

The Union also maintains that the City, in its opposing arguments, utterly fails to address the fact that a statutory provision, namely §15-112 of the Code, "mandates a 25 Group Chart [emphasis in original]." The UFA asserts that the existence of a statute governing the issue of work charts and hours clearly places Article III outside the scope of mandatory collective bargaining. According to the Union, in Carolan v. Mancuso, No. 14280-89, slip op. (N.Y. Sup. Ct. Nov. 8, 1989), aff'd without opinion, (1st Dept. June 14, 1990), the court expressly affirmed the proposition that the work charts and hours of Article III, §§1 and 5A are non-mandatory subjects of bargaining.

Article VI - Salaries

* * *

Section 2.
Longevity pay shall continue to be paid as follows:

> [Subsections (a) and (b) of this section provide for incremental increases of varying dollar amounts after 5, 10, 15 and 20 years of service.]

(c) (i) The adjustment after the 5th and 10th years shall not be computed as salary for pension purposes until after completion of 20 years of service.

(ii) The adjustment after the 15th and 20th years shall not be computed as salary for pension purposes until after completion of 25 years of service.

* * *

In the case of Article VI, §2(c)(i) and (ii), the Union points out that the subject of pensionable salary is governed by §443 of the Retirement and Social Security Law ("RSSL"), supra, at 6-7, and §§13-313(6) and 13-359 of the Code, supra, at 9-10. The UFA argues that Article VI, §§2(c)(i) and (ii) of the Agreement, which state that longevity increments will not be credited as

earned compensation for pension purposes, are inconsistent with and, thus, contravene the statutory definitions of "final average salary," "final compensation" and "annual earnable compensation" set forth in RSSL §443 and Code §§13-313 and 13-359, respectively. According to the Union, even though these statutes direct that pensions be calculated based on final compensation earned or earnable, "Article VI, §2(c)(i) and (ii) provide a salary base for pension purposes not based on earned compensation but rather reduced earned income."

The Union alleges that the City is wrong in relying on Clanton v. Spinnato, 131 A.D.2d 475, 516 N.Y.S.2d 242 (2d Dept. 1987), for the proposition that the Fire Department and the Board of Trustees of the Fire Department Pension Fund should be permitted some discretion in defining "earnable compensation." In that case, the Union argues, the court did not address "the diminution of a salary base, as provided by Article VI, §2(c)(i) and (ii). Rather," the Union asserts, "Clanton endorses a sensible, if not obvious, definition of 'earned compensation' for pension purposes which is entirely consistent with the UFA's definition" in the instant case.

The Union urges rejection of the City's suggestion that the Board is ousted of its jurisdiction to decide whether Article VI, §2(c)(i) and (ii) is a nonmandatory subject of bargaining on account of RSSL §470, supra, at 7-8. The Union asserts that the legislative history and case law offered by the City does not support the notion that RSSL §470 divests the Board of its jurisdiction to decide scope of bargaining questions, only that it prohibits negotiated changes in pension benefits. The UFA argues that RSSL §470 "does not address changes in pension benefits which arise out of operation of law."

The UFA also contends that the City's reliance on Security Unit Employees Council 82 v. Rockefeller, 76 Misc.2d 435, 351 N.Y.S.2d 348 (Sup. Ct. Albany Co. 1974), for the proposition that RSSL §470 bars any changes in pension benefits is misplaced. In that case, the Union submits, the court considered only whether RSSL §470 was constitutional and found, inter alia, that the statute did not violate Article V, §7 of the New York State Constitution because "the legislation in question does not attempt to vitiate any employee benefits which have become vested [351 N.Y.S.2d at 353]." Certainly, the Union argues, a non-negotiated change in pension benefits which results in improved pension benefits would not violate the State's Constitution.

Finally, with respect to the City's argument that the Board should reject the Union's attempt to have Article VI, §2(c)(i) and (ii) declared nonmandatory because the entire provision is nonseverable, the UFA submits that the policy of the Board, unlike that of the Public Employment Relations Board ("PERB"), is to 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.[10]

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The City's Position

The City opposes the UFA's request to have Article III, §§1 and 5A and Article VI, §2(c)(i) and (ii) of the Agreement declared nonmandatory for the following reasons:

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[10] The Union cites Decision No. B-4-89.

Article III - Work Schedule

At the outset, the City denies the Union's assertion that §15-112 of the Administrative Code provides for a work schedule of 2088 hours per year. The City contends that §15-112 "sets forth the maximum number of hours that may be scheduled in a 25 day period, but does not address the number of hours that may be scheduled in a year, nor, if calculated would the number of yearly hours under the Code be 2088."

The City argues that the subject of hours has long been held by the Board to be a mandatory subject of bargaining.[11] The City also argues that §15-112 of the Code "does not explicitly prohibit bargaining over firefighter working hours,[12] nor does it create a statutory right to a limited number of work hours for firefighters." In this connection, the City points out that even in Carolan v. Mancuso, No. 14280-89, slip op. at 9, (N.Y. Sup. Ct. Nov. 8, 1989), aff'd without opinion, (1st Dept. June 14, 1990), the court held that the parties could "bargain and agree on hours of employment notwithstanding statutory restrictions."

In support of its position concerning the bargaining status of Article III, §§1 and 5A, the City relies on fact that the Taylor Law and the NYCCBL, both of which were enacted substantially after §15-112 of the Code, does not carve out firefighter work hours as a nonmandatory subject. It is reasonable to conclude, the City asserts, "that the legislature did not intend to limit the requirement that work hours for firefighters be a mandatory subject of

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[11] The City cites Decision No. B-4-89, at 30.

[12] The City cites Spring Valley PBA v. Village of Spring Valley, 80 A.D.2d 910, 437 N.Y.S.2d 400 (2d Dept. 1991).

bargaining." Furthermore, the City argues, the conduct of the parties over the past 25 years makes clear that it was their understanding that there is no provision prohibiting bargaining over firefighter work hours.

Article VI - Salaries

The City opposes the Union's attempt to have Article VI, §2(c)(ii) and (ii) of the Agreement (concerning the pension-ability of certain longevity increments) declared nonmandatory on several grounds. In the first instance, the City alleges that RSSL §470 imposes a statewide "moratorium" on bargaining over pensions and prohibits any changes negotiated between a public employer and public employee absent an act of the legislature.[13] The City points out that the court, in Security Unit Employees Counsel 82 v. Rockefeller, 76 Misc.2d 435, 351 N.Y.S.2d 348, 352 (Sup. Ct. Albany Co. 1974), concluded that RSSL §470, "has for its purpose the maintenance of a stable economic environment in the public sector [citation omitted]."

According to the City, "[u]nder a moratorium, language may not be removed from the contract or modified through collective bargaining by the parties or otherwise." The City argues that because the effect of declaring Article III, §2(c)(i) and (ii) nonmandatory could result in a change in the existing pension framework, such action would contravene the language and intent of RSSL §470. "That this change is attempted through a scope of bargaining petition rather than through negotiations," the City argues, "should have no bearing on the matter." Furthermore, the City submits, were the Board to find that Article VI, §2(c)(i) and (ii) is outside the scope of

[13] The City cites several legislative memoranda and budget reports generated in connection with the passage of RSSL §470.

bargaining and subject to deletion from the contract, "it has neither the jurisdiction nor the legal basis to hold that longevity will become fully pensionable."

The City also argues that the UFA has misrepresented the provisions of the RSSL and Administrative Code that it claims are contravened by the terms of Article VI, §2(c)(i) and (ii) of the Agreement. Contrary to the UFA's interpretation, the City submits that RSSL §443 and Code §§13-313(6) and 13-359 are merely definitional and do not grant any substantive rights. Thus, the City argues, they are subject to a fair and reasonable construction by the Fire Department and Board of Trustees of the Fire Department Pension Fund ("the Fund"). As the agency charged with the administration of the Fund, the City asserts that the Fire Department and the Fund's Board of Trustees retain a measure of discretion, which includes the right to determine what constitutes compensation for pension purposes.[14]

The City also contends that were the Board to agree with the Union and find that Article VI, §2(c)(i) and (ii) concerns a nonmandatory subject of bargaining, it would have to delete the entire longevity provision of the Agreement, inasmuch as the subsections which the UFA seeks to remove are inseparable from the remainder of the longevity schedule. Recognizing that the Board, unlike PERB, will sever demands if those demands are of a dual rather than a unitary character,[15] the City argues that the longevity pension adjustments sought to be deleted by the Union are inextricably intertwined

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[14] The City cites Clanton v. Spinnato, 131 A.D.2d 475, 516 N.Y.S.2d 242 (2d Dept. 1987).

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

with the remainder of the longevity schedule, thus, constituting a unitary provision. The City further argues that where a unitary demand regarding retirement benefits is presented, the entire demand must be rejected if the portion sought to be deleted is not severable.[16]

Finally, the City points out that the parties have included the pensionability exclusion provision in every contract between them since 1973. Were the Board to hold that the inclusion of this provision is prohibited at this juncture, it would, in effect, be declaring that the parties have been breaking the law for almost 20 years. The City argues that it is an established principle of construction to presume that the parties have not acted unlawfully.[17]

Discussion

At the outset of our analysis, it will be useful to establish the frame of reference within which the parties' contentions are to be evaluated. The question of whether a particular demand is a mandatory subject of bargaining under NYCCBL §12-307a, supra, at 8, turns on whether the subject matter concerns wages, hours or working conditions. If the demand does not concern any of these matters, then it is a nonmandatory subject of bargaining (permissive or voluntary) and may be submitted to an impasse panel only on

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[16] The City cites Town of Haverstraw v. Rockland County PBA, 11 PERB ¶3109, at 3178 (1978); Hudson Falls Firefighters, Local 2730 v. Hudson Falls, 14 PERB §3021 (1978).

[17] The City cites Lundy v. Orr, 205 A.D. 296, 199 N.Y.S. 480 (1st Dept. 1923); Ciocca-Lombardi Wine Co. v. Fucini, 204 A.D. 392, 198 N.Y.S. 114 (1st Dept.), aff'd, 236 N.Y. 584, 142 N.E. 293 (1923); and Lorillard v. Clyde, 86 N.Y. 384 (1881).

mutual consent.[18] If the demand does concern wages, hours or working conditions, bargaining is mandated by law except as qualified by NYCCBL §12-307b, supra, at 8, which reserves various specified areas exclusively for management decision,[19] or if

a. the subject has already been determined by statute, leaving no room for negotiation;[20] or

b. the employer's statutory obligations on the subject are nondelegable for public policy reasons;[21] or

c. there may be general public policy limitations on collective bargaining on the subject that are not derived from statute.[22]

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[18] See Decision Nos. B-16-71; B-11-68.

[19] It is well settled that mandatory subjects of bargaining which are qualified by NYCCBL §12-307b (the management rights clause), are rendered permissive or voluntary subjects and may not be referred to an impasse panel except: (1) on mutual consent; or (2) where a practical impact has been found to exist. See Decision Nos. B-4-89; B-16-71; B-11-68.

[20] See Decision Nos. B-41-87 (subject had been pre-empted by statute); B-5-75 (demand required a contravention of law); See also, Union Free School Dist. No. 2 of Town of Cheektowaga v. Nyquist, 38 N.Y.2d 137, 379 N.Y.S.2d 10 (1975).

It is noted, however, that a matter covered by statute is not necessarily beyond the scope of mandatory collective bargaining provided that the subject does not contravene the intention of the statute. See Decision No. B-4-89 (demand for transfer of credit between pension funds mandatory to extent statute permits such transfer).

[21] See Decision No. B-15-77 (demand for tenure infringed on the Police Commissioner's statutory authority to detail members of the police force as detectives at will). See also, Board of Education v. Areman, 41 N.Y.2d 527, 394 N.Y.S.2d 143 (1977); Cohoes City School District v. Cohoes Teachers Ass'n, 41 N.Y.2d 774, 390 N.Y.S.2d 53 (1976).

[22] See Board of Education v. PERB, 555 N.Y.S.2d at 663. In citing this circumstance as one of the few instances when,

(continued...)

In the latter three circumstances, bargaining on such a demand would be prohibited (unlawful).

Article III - Work Schedule

As a preliminary matter, we find that notwithstanding the fact that §15-112 of the Code does not include Fire Marshals among the list of Fire Department titles subject to its coverage, the parties apparently agree that both titles should be treated alike for purposes of a Board determination on this question. In support of this approach, we note that at no time does the City distinguish between or urge a different result concerning the bargaining status of Article III, §1 (concerning Firefighters) and §5A (concerning Fire Marshals) of the Agreement. Nor does the City deny the Union's contention that Firefighters and Fire Marshals always have been treated similarly in collective bargaining absent demands specific to either title.[23]

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[22](...continued)
what might otherwise be a negotiable term and condition of employment is prohibited from being collectively bargained, the Court of Appeals explained:

> [W]e never actually prohibited bargaining or invalidated a collective bargaining agreement on such nonstatutory public policy ground. As we have noted, a public policy strong enough to require prohibition would "almost invariably involv[e] an important constitutional or statutory duty or responsibility." (Matter of Port Jefferson Teachers Assn. v. Brookhaven-Comsewogue Union Free School Dist., 45 N.Y.2d 898,899.)

[23] See note 9, supra, at 15. See also, Decision No. B-21-87, at footnote 5, citing Matter of the Impasse between Uniformed Firefighters Association and City of New York, Case No. I-187-86 (Jan. 6, 1987). The panel in that case held: "[Fire] Marshals are not firefighters, they are investigators. Yet they
(continued...)

On the merits, the UFA has raised the issue of the bargaining status of a contract provision which specifies a work year of 2127.6 hours. It notes that §15-112 of the Code provides that the work schedule shall be such that "not more than six nine-hour tours of duty and six fifteen-hour tours of duty [shall be worked] in any twenty-five consecutive calendar days." The Union maintains that the configuration set forth in the Code, which is otherwise known as a 25 Group Chart, creates a 2088 hour work year. The City disagrees, arguing that §15-112 of the Code only sets forth a "maximum number of hours that may be scheduled in a 25 day period." In the City's view, §15-112 of the Code does not explicitly prohibit bargaining over firefighter working hours; nor is it clear that the statute leaves no room for bargaining over working hours.

Section 12-307a of the NYCCBL states that the parties "have the duty to bargain in good faith on ... hours (including but not limited to overtime and time and leave benefits)...." It is well-settled that the number of hours in the work day and work week is a mandatory subject of bargaining.[24] It is clear, however, that more is involved here than the mere total number of hours in the work year. The problem in this case arises from various restrictions that may be imposed on the right to bargain about hours.

In City v. Patrolmen's Benevolent Association, Decision No. B-24-75, the parties raised the issue of the bargainability of a work day in excess of

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[23](...continued)
persist in working what is essentially a firefighter's schedule."

[24] Decision Nos. B-4-89; B-16-81; B-24-75; B-10-75; B-5-75.

eight hours in view of a statutory proscription in §971 of the Unconsolidated Laws against a "tour of duty in excess of eight consecutive hours." In that instance, we found that a matter covered by statute is not necessarily beyond the scope of mandatory collective bargaining, provided that the demand does not contravene the intention of the statute.[25]

In City of New York v. Uniformed Firefighters Association of Greater New York, Decision No. B-4-89, various demands involving hours and aspects of the work schedule were raised in the context of a statutory provision on the subject. In particular, the bargainability of UFA's demand to provide for a 37.5 hour work week in conjunction with a work schedule consistent with the 25 Group Chart proscribed by §15-112 of the Code was considered. In that case, we held that while a demand to bargain over hours of work was within the scope of mandatory collective bargaining, the determination of work charts was within statutory management rights and, thus, the demand was not a mandatory subject of bargaining.[26]

As a result of our decision in that case, the Anderson Panel decided to provide two packages in the alternative:[27] Option 1 containing, inter alia, a recommendation to increase the hours of work to 2127.6 per year; and Option 2, which did not contain any recommendations concerning work hours. The Panel was aware that because the increase in hours necessitated an alteration of the

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[25] See also, Decision Nos. B-4-89; B-41-87.

[26] See also, Decision Nos. B-21-87; B-16-81; B-24-75; B-10-75; B-5-75.

[27] See discussion of the report and recommendations of the Anderson Panel in Matter of the Impasse between UFA v. City, Case No. I-193-88, supra, at 12.

work schedule (a nonmandatory subject of bargaining), Option 1 was subject to the mutual consent of both parties.[28] Indeed, Carolan v. Mancuso, No. 14280-89, slip op. (N.Y. Sup. Ct. Nov. 8, 1989), aff'd without opinion, (1st Dept. June 14, 1990), was an unsuccessful attempt by a UFA member to have declared null and void that portion of the Anderson Panel's award because it included recommendations concerning a nonmandatory subject of bargaining.[29]

In the instant matter, the parties again raise the issue of the bargainability of contract clauses concerning hours of work (Article III, §§1 and 5A of the Agreement) in light of §15-112 of the Code. The question here is whether a 2127.6 hour work year, which was the result of the UFA rank and file having chosen Option 1, is a matter which a new impasse panel is free to consider absent the consent of both parties. In view of the foregoing bargaining history between these parties, there can be no serious question that there is a direct cause and effect relationship between the total number of hours in the work year and the work schedule of firefighters. Carried to its logical conclusion, to the extent that the terms of Article III, §§1 and

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[28] See id. at 73, where the Anderson Panel stated: "In the event timely approval by UFA's rank and file membership is not conferred, the alternative package, which consists only of mandatory subjects, shall be awarded."

[29] In Carolan, the court considered whether the vote of the rank and file membership accepting Option 1 should be set aside. On the question of whether the UFA may bargain and agree on hours of employment as part of the collective bargaining process notwithstanding statutory restrictions, the court held:

> It is clear that the UFA ... was authorized to consent to the inclusion of the work schedule in the option 1 award after the vote accepting Option 1 by the rank and file membership was announced. [Id. at 9.]

5A of the Agreement has the effect of altering the work schedule to one other than a 25 Group Chart, the matter concerns a nonmandatory subject of bargaining.

Furthermore, although we make no comment here on the method used by the parties in formulating Article III, §§1 and 5A of the Agreement in order to avoid the limitations on scheduling set forth in §15-112 of the Code, we note that the restrictions therein inhere to the benefit of the class of employees that the law was intended to protect. As we previously stated, bargaining on a matter that is covered by law is permissible.[30] However, a demand that a statutory benefit be diminished is not a mandatory subject of bargaining.[31] In Decision No. B-11-89, when faced with the question of whether the City could demand from the UFA a waiver of the statutory right of bargaining unit employees to receive protective clothing without charge, we said:

> It would undermine state policy as embodied in regulations and in the state Labor Law [§27-a] to force a Union, which has the power to waive certain rights of employees as their agent [see Antinore v. New York, 49 A.D.2d 6, 8, 8 PERB ¶7513 (4th Dep't 1975), aff'd 40 N.Y.2d 921, 9 PERB ¶7528 (1976)], to consent to any compromise of the employees' statutory privileges.

We found there, as we do here, that the matter concerned a nonmandatory subject of bargaining over which the Union cannot be required to negotiate.

Accordingly, we find that the impasse panel's report and recommendations for terms of a settlement in this matter may not include the present terms of

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[30] Decision No. B-24-75.

[31] Decision No. B-11-89. See also, City of Binghamton v. Helsby, 9 PERB §7019 (Sup. Ct. Albany Co. 1972) (a city demand that benefits under General Municipal Law, §207-a be diminished was held to be a nonmandatory subject of bargaining).

Article III, §§1 and 5A of the Agreement as a factor "considered in the determination of wages, hours, fringe benefits and other working conditions ... [NYCCBL §12-311c(3)(b)(5)]" over the Union's objections.

Article VI - Salaries

Here, we are presented with the question of whether contract language, the intent of which is to exclude certain longevity increments from the computation of final salary for pension purposes, is outside the scope of mandatory collective bargaining. There is no dispute that the Union's purpose in seeking a Board declaration that Article VI, §2(c)(i) and (ii) of the Agreement is a nonmandatory subject of bargaining is to increase its members' salary base for pension purposes. The Union focuses its argument on the interpretation of several statutory definitions of final salary for pensions purposes, alleging that contrary to the higher pension benefits that would be achieved using these definitions, its members' final salary for pension purposes has been based on a reduced amount on account of Article VI, §2(c)(i) and (ii) of the Agreement. The City disagrees with the Union's interpretation of the law and maintains that RSSL §443 and §13-313(6) and 13-359 of the Code grant no substantive rights. Moreover, the City contends that RSSL §470 prohibits any changes that would affect the existing pension framework absent an act of the legislature.

Our threshold inquiry in examining whether a party may be compelled to negotiate a matter covered by statute is whether the subject concerns wages, hours or working conditions. It is well-settled that the requirement of good faith bargaining extends to matters covered by statute when they relate to

terms and conditions of employment.[32] If a subject does concern one of these matters, it is within the scope of mandatory collective bargaining unless prohibited on one of the grounds set forth, infra, at 24-25. On the other hand, if the subject matter does not concern wages, hours or working conditions, then it is a nonmandatory subject of bargaining regardless of whatever rights or benefits may be conferred by the statute in question.[33]

Clearly, there is no dispute that the subject at issue concerns a matter that is covered by law. Both parties urge a finding, albeit a different finding, based on the alleged dictates of statutory law on the subject of pensions. Thus, our next inquiry is whether Article VI, §2(c)(i) and (ii) of the Agreement concerns a matter that is within the scope of mandatory collective bargaining. To answer this question, we note that §201.4 of the Civil Service Law (the "Taylor Law"), supra, at 6, provides that "any benefits provided by or to be provided by a public retirement system" shall not be included in the term "terms and conditions of employment." By its terms, Article VI, §2(c)(i) and (ii) of the Agreement concerns a matter excluded from the scope of mandatory collective bargaining by Taylor Law §201.4, inasmuch as it purports to define whether certain salary payments are to be counted for pension purposes, a matter otherwise governed by the relevant provisions of the applicable pension statutes. We find, therefore, that as a threshold matter, Article VI, §2(c)(i) and (ii) of the Agreement concerns a nonmandatory subject of bargaining. As previously stated, because neither party may be

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[32] Decision Nos. B-4-89; B-41-87; B-25-85.

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

compelled to negotiate over a nonmandatory subject of bargaining, it follows that these provisions may not be "carried over" into the successor agreement over the Union's objections.

The City would have us declare that RSSL §470, which expressly prohibits "changes negotiated between any public employer and public employee ... with respect to any benefit provided by or to be provided by a public retirement system," precludes us from making the above determination. We reject that argument for the following reasons. First, we have held that the fundamental nature of a bargaining demand "is unaffected by the parties' actions or intentions."[34] Therefore, the fact that the Union intends, by the removal of Article VI, §2(c)(i) and (ii) from the Agreement, to increase the pensionable salary base of its members is not dispositive of the bargainability of these provisions.

Second, and more importantly, our finding that Article VI, §2(c)(i) and (ii) concerns a nonmandatory subject of bargaining is not dispositive of the issue of pensionability of the longevity increments affected by this decision. Whether the longevity increments become fully pensionable upon removal of these provisions is a question to be resolved in some other forum (e.g., the Trustees of the Fund and, ultimately, the courts). Our jurisdiction in this matter is confined to determining whether the matter is within the scope of collective bargaining. Having determined that Article VI, §2(c)(i) and (ii) of the Agreement concerns a nonmandatory subject of bargaining, our inquiry is at an end. It should be noted that our determination on the bargaining status

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[34] See Decision No. B-4-89, at 16.

of any particular demand does not constitute an expression of any view on the merits of that demand.[35]

The City next argues that the removal of Article VI, §2(c)(i) and (ii) from the Agreement would require the removal of the entire longevity provision set forth in Article VI, §2,[36] since the pension adjustments are "part and parcel of the entire longevity schedule and cannot be separated." We do not agree. We find that the longevity schedule set forth in Article VI, §2 of the Agreement has several distinct and significantly different aspects and constitutes an example of a contract provision having a dual character, i.e., a demand having elements that are mandatory subjects of bargaining (longevity pay) and elements that are nonmandatory subjects of bargaining (pensionability

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

[36] Article VI, §2 of the Agreement may be summarized as follows:

> (a) Provides a longevity pay schedule for Firefighters, effective 7/1/87.
>
> (b) Provides a longevity pay schedule for Firefighters, effective 7/1/89.
>
> (c)(i) and (ii) [The language at issue herein.]*
>
> (d) Provides that the calculation of night shift differential shall be based only upon the applicable amounts of night shift differential provided prior to July 1, 1989.
>
> (e) Provides that ITHP and pension calculations shall only include the amount of the longevity payment that is pensionable.
>
> *The longevity adjustments sought to be deleted by the UFA are also noted for cross-referencing purposes in Article VI, §1, which sets forth the salary schedules of Firefighters.

of certain longevity increments). In the event we find that a particular element of a contract provision is outside the scope of mandatory collective bargaining, this Board has followed a long-standing practice of advising the parties of those elements which are mandatory subjects and of those which are nonmandatory.[37] We applied this practice in Decision No. B-4-89, to a demand similar to the instant matter concerning the pensionability of accrued vacation and personal leave day compensation.[38] In that case we found that notwithstanding the statutory limitations on bargaining over the pensionability aspect of the demand, the purely economic provisions were severable and, thus, preserved for bargaining.

Therefore, to the extent that Article VI, §2(c)(i) and (ii) of the Agreement provides that certain longevity increments "shall not be computed as salary for pension purposes," it is not mandatorily bargainable and may not be submitted to an impasse panel over the Union's objections. The remainder of Article VI, §2 may be put before the impasse panel to the extent that its provisions concern mandatory subjects of bargaining.

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[37] Decision Nos. B-4-89; B-16-81; B-24-75.

[38] <u>See</u> Decision No. B-4-89, at 102-106.

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 request of the Uniformed Firefighters Association of Greater New York, to declare Article III, §§1 and 5A of the Agreement to concern a nonmandatory subject of bargaining be, and hereby is granted; and it is further

DETERMINED, that the request of the Uniformed Firefighters Association of Greater New York, to declare Article VI, §2(c)(i) and (ii) of the Agreement to concern a nonmandatory subject of bargaining be, and hereby is granted.

Dated: New York, New York
November 18, 1992

MALCOLM D. MacDONALD
CHAIRMAN

GEORGE NICOLAU
MEMBER

DANIEL G. COLLINS
MEMBER

THOMAS J. GIBLIN
MEMBER

JEROME E. JOSEPH
MEMBER

I dissent DEAN L. SILVERBERG
MEMBER

I dissent STEVEN H. WRIGHT
MEMBER