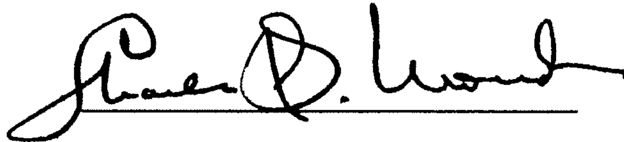
Dissent of Charles G. Moerdler

I dissent from so much of the majority opinion as asserts the existence of a management preogative pursuant NYCCBL Section 12-307(b). None exists and the cited ordinance is without juridical foundation and meaningless for the reasons set forth in the dissenting opinion in *Matter of the Improper Practice Proceeding between Uniformed Firefighter Association, Petitioner, and The City of New York, et ano* (BCB 2648-07) and its progeny (Copy Attached). Except as thus noted, I concur in the Order proposed by the Majority.

December 19, 2013



Charles G. Moerdler

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING
---X
In the Matter of the Improper Practice Proceeding

- between -

UNIFORMED FIREFIGHTERS ASSOCIATION, BCB – 2648 – 07

Petitioner,

- and –

THE CITY OF NEW YORK and THE FIRE
DEPARTMENT OF THE CITY OF NEW YORK,

Respondents.
---X

DISSENTING OPINION OF CHARLES G. MOERDLER

I dissent because in material respects the majority opinion is fundamentally flawed and cannot stand as a matter of law. Indeed, cases that the Majority itself cites squarely negate its holding.

(A)

The majority errs in holding that NYCCBL § 12-307b validly creates or warrants some sort of enforceable "managerial prerogative" or "management right." Bluntly put, the cited section is, to the extent thus construed, in conflict with governing State law, provides no validity at all for the cited position, and this Board decisions predicated thereon are without authority in law. The rationale for that position –one repeatedly articulated over the years --is explicated at length in the Dissent in Uniform Firefighters Association, Decision No. B-39-206, (IP) Docket No. BCB 2531-06 (Dissenting Opinion). See also Dissenting Opinion in Uniform Firefighters Association, Decision No. B-2-2004, Docket No. BCB-2314-02 and Concurring Opinion in

NY 73078292v1
NY 73079904v3
11/30/10 02:56PM

Uniformed Fire Officers Association, Local 854, IAFF, AFL-CIO, Decision No. B-6-2003, Docket No. BCB-2218-01.

As more fully detailed in the Dissent in Uniformed Firefighters Association, Decision No. B-39-2006, the so-called "management rights" or "management prerogatives" proviso of NYCCBL § 12-307b must, in order to have any validity or force as a statutory enactment, "be substantially equivalent to the governing state law [the Taylor Law, N.Y. Civ. Serv. Law § 212(1)] as it relates to matters within the scope of mandatory negotiations," else it is invalid (at least as a creature of statutory enactment).[1] That occurs because the Taylor Law mandates that mini-PERB provisos and procedures (such as the New York City Charter provisions here at issue) shall be "substantially equivalent" to those specified under paramount State law. N.Y. Civ. Serv. Law § 212(1). Dispositively, there is no provision of law, in the Taylor Law or elsewhere in applicable State law, that provides a substantial equivalent to NYCCBL § 12-307b. Without more, that ends the inquiry as a matter of law.[2] For, to repeat, that omission to provide a

---

[1] The phrase "substantially equivalent" has been defined by PERB as "that which is equal in essential and material parts" to some state law counterpart. See, Lefkowitz, Public Sector Labor and Employment Law 487 (2 ed. 1998) ("Lefkowitz"). Mini-PERB provisos or procedures that fall short of that standard are subject to challenge. See Lefkowitz, supra at 798; cf., Shanker v. Helsby, 515 F. Supp. 871, 877 (SDNY 1981). Manifestly, this Board should decline to follow or apply provisos or procedures that are invalid.

[2] The majority plucks, apart from context, isolated fragments from several PERB opinions to suggest that, notwithstanding the noted statutory void, some relevant management prerogative has been conjured up that can be invoked here. . (See Majority Opinion,pp. 8-9). When read in context, the cited fragments do not aid the majority's underlying thesis. See esp. Discussion *infra*, point (B). The Majority's reference to County of Nassau, 18 PERB ¶ 4557, aff'd 18 PERB ¶3076 at 3164 (1985),aptly illustrates my point. There, Nassau County filed an Improper Practice charge against the Adjunct Faculty Association for the latter's failure to concede at fact finding that certain provisions of its expired bargaining agreement were non-mandatory subjects of bargaining. The Administrative Law Judge in reviewing what were and were not mandatory subjects of bargaining, stated the following, only the first portion (the non-italicized portion) of which the majority quotes, while ignoring the italicized materials:

> *In general,* the right to assign, closely related to other areas of management prerogative –the determination of employee qualifications, promotional and evaluation criteria, the right to transfer, belongs to the employer. *Seniority is one of the few long recognized inroads into this area;, however, the use of seniority is limited by the employer's right to determine qualifications for employment. [A]s in White Plains, I read into the instant seniority demand an understanding that the employer's right to determine qualifications for appointment is unrestricted.*

The Administrative Law Judge then went on to hold that stated sections of the demand therefore "*are mandatory subjects of negotiation .They relate to seniority and the manner in which it can be accumulated.*" *County of Nassau,*

"substantial equivalent in State law render this proviso of validity under the Taylor Lasw. Add to that the further observation that State law mandates that "... it is the public policy of the state and the purpose of this act [the Taylor Law] to promote harmonious and cooperative relationships between government and its employees ...." and the conclusion becomes obvious: there is simply no authority under State law for the sweeping, one-sided provisions of NYCCBL § 12-307b. Harmonious and cooperative relationships between government and its employees cannot subsist where one side is afforded the unfettered right to act as it pleases simply by invoking the mantra "managerial prerogotive.". [3]

NYCCBL § 12-307b may not properly be asserted as the predicate for a management right warranting the majority determination. (See Majority Op., p. 8). [4] Reversal of the majority's determination is warranted and I strongly urge that judicial proceedings be instituted to obtain review on the several grounds herein tendered and, in that process, to finally resolve this important and recurring issue.

---

supra, at 4623 (Emphasis added; footnote references omitted). Similarly, *Town of Easthampton* 42 PERB PAR.4534 AT 4628 (ALJ 2009) does not on this record aid the majority's thesis (" Seniority as a factor in making assignments is mandatory, unless, as here, seniority is the sole criterion.") In the case before this Board seniority was not previously nor is it proposed to be the "the sole criterion." See, Point (B), *infra. and Majority Opinion pp. 3-4..*

[3] Thus, the majority aptly summarizes the City's position as being that, under NYCCBL § 12-307(b) ,"...the employer has a right to unilaterally determine and assign job duties of employees." That sweeping claim to unfettered unilateral prerogative effectively undermines collective bargaining and its attendant precepts.

Parenthetically, it is not inconceivable that management (like labor) may under limited circumstances have certain inherent rights, responsibilities and fundamental prerogatives and duties. However, they must be clearly discernible based on some ascertainable and cognizable predicate, applicable on a case-by-case basis and under a more circumscribed, accepted and balanced standard than the sweeping language of NYCCBL § 12-307b, much less the overbroad manner in which it is here applied by the majority. The asserted management prerogative exception to mandatory collective bargaining is not, as the Board urges, justifiable simply by reference to NYCCBL § 12-307b.

[4] Importantly, no appellate judicial tribunal has to date expressly sustained the provision against a challenge such as here is stated. It merits note that the argument has been advanced that, because NYCCBBL §12-307b has been cited and relied upon over many years, it somehow has effectively become "the law" by some form of estoppel. Respectfully, that view lacks merit, the law is clear, it mandates substantial equivalency to paramount state law. N.Y. Civ. Serv. Law § 212(1). Erroneous construction, though adhered to for decades and compounded by further error (conscious or otherwise) does not create an enforceable precept by estoppel or otherwise.

(B)

The crux of this dispute, as stated by the majority, is that where a change in the *status quo* is found to have occurred *–and that precise finding was here made in the majority opinion* (Majority Opinion p.7)—an improper practice can be found to have occurred, but only where "... that change can be shown to have been a mandatory subjective of collective bargaining." (*id* at 7-8). Cases that the majority itself cites specifically hold that such a change is, on this record, a mandatory subject of bargaining.

The starting points for discussion are the "All Unit Circulars"("AUC"), pertinent portions of which are quoted in the majority opinion at pp. 3-4. Under the prior or 1992 AUC, three qualifications for a position as a regular unit chauffeur were stated:that the candidate (1) "have passed Chauffer Training School", (2) that the selection "shall be by seniority" and (3) that the candidate not "have received less than satisfactory annual evaluations in any area that reflects on the duties and responsibilities of a chauffeur." Manifestly, seniority was not the sole basis for determination. In the 2009 AUC, three further qualifications were added :"aptitude, demeanor, judgment" (in addition to "seniority"). *Id* at 4. *Id.*. Again seniority was not the *sole* criterion, a conclusion the majority also reaches.(See Majority Opinion at p. 7). Nonetheless, the majority concludes that an improper practice was not stated for reasons noted in Section (A) above and the notion that a mandatory subject of collective bargaining was not stated. (*Id.* at 7-9). Therein lies the second ground of reversible error. Thus, posited we turn to the cases the majority cites.

As previously noted (see, fn.2, *supra*), cases that the majority itself cites at pp.8-9 of its Majority Opinion squarely hold that it is only where seniority is the *sole* criterion for the determination. See discussion at fn.2 *supra.* Thus, the most recent PERB opinion relied upon by the majority states:

> The demand is also nonmandatory because it requires tour assignments to be made solely based upon seniority, which, as argued by the Town, does not allow assignments based on other factors, such as special training or expertise. *Seniority as a factor in making assignments is mandatory*, unless, as [t]here, seniority is the *sole* criterion."

Town of Easthampton, supra, at 4628. (Emphasis added). Similarly, in *Schenectady Patrolmen's Benev Assn.*, 20 NYPER (LRP) 4636, *aff'd*, 21 PERB 3022 (1988), which the majority also relies upon, it was noted:

> Seniority as a factor in making assignments is mandatorily negotiable provided, as here, it is not the sole criterion. ... While general demands for the establishment of unit-wide training programs are nonmandatory because they relate to the level of service provided by the employer and concern qualifications for employment... the training herein is limited to promotional opportunities and it reserves to the City the determination of qualifications. Accordingly, the demand is mandatorily negotiable.

Id., at p.16 (Footnote citations omitted). See also, *County of Nassau, supra,* 18 PERB ¶ 4628.

(C)

While there is some tension between an employer's ability to set qualifications and a union's right to bargain for seniority-based assignments, the Board improperly invokes it here. First, neither the original policy nor the new policy provided for seniority to be the "sole" criteria for assignment, making the Board's reliance on cases such as UPOA. 35 OCB 23 (BCB 1985) cases misplaced. See Majority Opinion pp. 8-9. Both iterations of the policy here at issue required something more than mere seniority, viz., that the employee have successfully completed the training requirement and not received less than satisfactory evaluations in any area that reflects on the duties and responsibilities of a chauffeur. Second, the new policy does not purport to change these qualifications and thus does not implicate management's rights to so do. Rather, under the revised policy, once the same qualifications are met, the employer is now permitted to make its selection by entirely subjective means through consideration of "aptitude, demeanor and judgment." These amorphous added considerations are simply a means of

undoing objective, seniority-based assignment of otherwise qualified personnel. As such, mandatory bargaining rights are implicated.

CONCLUSION

For each or any of the above-noted reasons, the improper practice should have been sustained and the majority's contrary determination should be reversed.

Dated: New York, New York
December 1, 2010

CHARLES G. MOERDLER
Member