LEEBA, 12 OCB2d 17 (BCB 2019)

(Docket No. BCB-4296-18)

Summary of Decision: The City argued that the Union bargained in bad faith during negotiations for a collective bargaining agreement for Environmental Police Officers. Specifically, the City alleged that the Union filed for impasse prematurely, demanded bargaining over a prohibited subject of bargaining, refused to clarify its demands, and refused to consider the City's proposals. The Union argued that the City understood that it was seeking wage increases consistent with a uniformed pattern and that the Union sought to significantly narrow the pay gap between its members and NYPD police officers. The Union further argued that it considered and rejected the City's proposals and that the City's refusal to vary from the civilian pattern justified its requests for impasse. The Union also denied that it sought to bargain over a prohibited subject of bargaining. The Board found that the Union did not breach its duty to bargain in good faith. Accordingly, the petition was denied. ***(Official decision follows).***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK,

Petitioner,

-and-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Respondent.

DECISION AND ORDER

On November 7, 2018, the City of New York ("City") filed a verified improper practice petition against the Law Enforcement Employees Benevolent Association ("Union" or "LEEBA")

alleging that the Union breached its duty to bargain in good faith during negotiations for a collective bargaining agreement for Environmental Police Officers ("EPOs"), in violation of § 12-306(b)(2), (c)(1), (c)(2), and (c)(3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL").[1] The City alleges that the Union filed for impasse prematurely, made demands over pensions, which are a prohibited subject of bargaining, refused to clarify its demands, and refused to consider the City's proposals. The Union argues that the City understood that it was seeking wage increases consistent with a uniformed pattern and that the Union sought to significantly narrow the pay gap between EPOs and New York City Police Department ("NYPD") police officers.[2] The Union further argues that it considered the City's proposals and that the City's refusal to offer wage increases greater than the civilian pattern justified the Union's impasse requests. The Union denies that it sought to bargain over pensions. The Board finds that the Union did not breach its duty to bargain in good faith. Accordingly, the petition is denied.

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[1] In the same petition, the City argued that the Union breached its duty to bargain during negotiations for Sanitation Enforcement Agents ("SEAs"), another title represented by the Union. Since SEAs are in a different bargaining unit than EPOs and separate negotiations were held for each unit, we address the City's claims regarding SEAs in a separate decision. *See LEEBA*, 12 OCB2d 18 (BCB 2019).

[2] Pattern bargaining refers to the practice in which the first union to reach a settlement with an employer establishes wage increases during a finite period, the net cost of which forms a pattern which is offered by the employer to other bargaining units. This construct has "long been established as a cornerstone of New York City labor relations." *DIA*, I-246-06, at 26 (Impasse Award Feb. 13, 2008); *see also PBA*, I-225-96, at 4-5 (Impasse Award Sep. 8, 1997); *Local 721, SEIU*, I-195-89 (Impasse Award Jan. 8, 1990). In some rounds of bargaining, there are two separate patterns: one for uniformed employees and one for civilian employees.

BACKGROUND

The Trial Examiner held a one-day hearing and found that the totality of the record, including the pleadings, exhibits, and briefs, established the relevant facts as set forth below.

The Union is the certified bargaining representative of City employees in the EPO title. EPOs protect the watershed areas, water supply systems, and installations maintained by the City's Department of Environmental Protection ("DEP"). EPOs are defined as police officers under § 1.20(34)(o) of the New York Criminal Procedure Law, with the authority to enforce the laws of New York State.

This is the parties' third round of bargaining. In order to understand the parties' arguments regarding this round of bargaining, it is necessary to recount the parties' bargaining history.

Bargaining History

During negotiations for a collective bargaining agreement to cover EPOs for the period of time after October 2005, both parties filed improper practice petitions alleging that the other had engaged in bad faith bargaining.[3] The Board dismissed the Union's petition but granted the City's petition, finding that the Union breached its duty to bargain in good faith. *See LEEBA*, 2 OCB2d 29 (BCB 2009). The Board concluded that the Union had insisted on bargaining over pensions for nearly two years after the Board had educated the Union that pensions were a prohibited subject of bargaining. *Id.* at 11. The Union also insisted on a collective bargaining agreement for EPOs that was a duplicate of a Patrolmen's Benevolent Association ("PBA") collective bargaining agreement covering NYPD police officers. The Board directed the parties to return to negotiations

[3] The Union was certified to represent EPOs in June 2005. *See LEEBA*, 76 OCB 5 (BOC 2005).

and ordered the Union to bargain in good faith. The parties did not reach a negotiated agreement because they disagreed on economic terms including whether EPOs should receive the uniformed or civilian wage pattern.

On January 25, 2010, the Board declared that the parties were at impasse. An Impasse Panel issued its Report and Recommendations in January 2012 ("Impasse Award"). *See LEEBA*, 1-2-09 (Impasse Award Jan. 14, 2012). In general, the Impasse Award provided that: (i) the uniformed pattern should be applied to EPOs; (ii) the parties should work together toward the goal of achieving relative wage parity between EPOs and NYPD police officers; and (3) it was not appropriate to immediately grant wage parity with NYPD police officers in light of the cost to the City and because "current police officer pay and benefits did not occur overnight, but are a product of years of negotiations and impasse panel awards."[4] (Impasse Award, at 20)

Both sides filed objections to the Impasse Award, and the Board remanded the matter back to the Impasse Panel to reconsider its conclusions without reference to a draft consultant report that had not been accepted into evidence.[5] *See LEEBA*, 5 OCB2d 18, at 30-31 (BCB 2012), *affd., Matter of City of New York v. Law Enforcement Empls. Benevolent Assn.*, 2013 N.Y. Slip Op.

[4] The pertinent specific recommendations of the Impasse Panel were that (i) EPO wage increases shall conform to the uniformed pattern; (ii) the remaining economic benefits (uniform allowance, night shift differential, leave for on-duty injury, and use of part of the Welfare Fund to fund a legal defense fund) should become effective as of March 31, 2010; and (iii) the term of the agreement should be from October 20, 2005, through March 31, 2010. (*See* Impasse Award, at 22-26)

[5] Specifically, the Impasse Panel was directed to excise all references to the draft report that had not been introduced into evidence; to determine whether it would have reached the same conclusions and made the same recommendations without any consideration of the draft report; and, if necessary, to clarify and/or amend its Impasse Award accordingly.

33779(U) (Sup. Ct. N.Y. Co. July 23, 2013) (Madden, J.) ("*City v. LEEBA*"). The Board affirmed the Impasse Award in all other respects. In June 2012, the Impasse Panel issued its Amended Report and Recommendation ("Amended Impasse Award"), in which it explained that it did not rely on the draft consultant report in reaching its conclusions and that, therefore, its conclusions and recommendations remained the same. *See LEEBA*, 1-2-09 (Impasse Award June 30, 2012). Both sides filed objections to the Amended Impasse Award and, on September 4, 2012, the Board affirmed the Amended Impasse Award in its entirety. *See LEEBA*, 5 OCB2d 29 (BCB 2012), *affd., City v. LEEBA*, 2013 N.Y. Slip Op. 33779(U).

The City filed an Article 78 motion in New York Supreme Court seeking to annul the Board's decisions in their entirety, while the Union filed a cross-petition arguing that the Board's decisions should be annulled in part. On July 23, 2013, the Supreme Court affirmed the Board's decisions in all aspects except for the duration of the contract and remanded the matter to the Board solely to determine the term of the contract. *See City v. LEEBA*, 2013 N.Y. Slip Op. 33779(U).

At the parties' request, the matter was held in abeyance after the issuance of the Supreme Court's decision. In February 2014, the parties entered into a memorandum of agreement ("MOA") covering the period from October 20, 2005, through April 19, 2008 ("2005-2008 EPO MOA"), while leaving unresolved the implementation of the remaining 23 months of the Amended Impasse Award.[6] The parties had several bargaining sessions but were unable to reach an agreement as to the implementation of the remainder of the Amended Impasse Award. In February

[6] The 2005-2008 EPO MOA provided for the same increases in wages and other economic benefits as the Amended Impasse Award but the effective date for the other economic benefits was two years earlier than that provided for in the Amended Impasse Award.

2015, the Board determined that the contract term set in the Amended Impasse Award was appropriate. *See LEEBA,* 8 OCB2d 6 (BCB 2015). Thus, the Amended Impasse Award was effective through March 31, 2010.

On January 21, 2016, the parties entered into a MOA for the period of April 1, 2010, through September 30, 2017 ("2010-2017 EPO MOA"). At the hearing in this case, New York City Office of Labor Relations ("OLR") First Deputy Commissioner and General Counsel Steve Banks testified that the 2010-2017 EPO MOA followed the civilian pattern.[7] Kenneth Wynder, the Union's President, testified that the 2010-2017 EPO MOA initially moved EPOs closer to pay parity with NYPD police officers, but that progress towards parity was erased by terms of a subsequent PBA contract covering August 2012 through July 2017.

Current Bargaining Round

Bargaining for the successor to the 2010-2017 EPO MOA began on October 16, 2017. As of October 19, 2018, the parties had met five times. Each bargaining session lasted between one and two hours. It is undisputed that the Union's caucuses over the City's proposals in these

[7] We note that EPOs are classified as Rule X employees in the Miscellaneous Service and thus excluded from the Career and Salary Plan. *See LEEBA*, 79 OCB 18, at 19 (BOC 2007). Therefore, we have found that NYCCBL § 12-307(a)(2), which addresses Citywide bargaining over "matters which must be uniform for all employees subject to the career and salary plan," does not apply. *See id*. However, they also do not fall within either the "uniformed" or "similar to uniformed" levels of bargaining set forth in NYCCBL § 12-307(a)(4) and (a)(5), respectively. *See id*. NYCCBL § 12-307(a)(4) applies to employees defined as police officers under the Criminal Procedure Law who are "also defined as a police officer" in the Administrative Code; EPOs are not defined as police officers under the Administrative Code. Nevertheless, it is undisputed that this bargaining unit can negotiate terms and conditions of employment at the unit level like employees described in NYCCBL § 12-307(a)(4) and (a)(5).

sessions were brief. At the hearing, each party presented only one witness for each bargaining session.[8]

The first session was held on October 16, 2017. Wynder testified that at that session, the City informed the Union that it would propose a contract based on the expected civilian pattern, which was anticipated to consist of wage increases of 2.25 percent over three years. In response, Wynder informed the City that a contract based on a civilian pattern would be unacceptable. He further informed the City that the Union was seeking a contract that would help close the gap between EPOs and NYPD police officers as recommended by the Amended Impasse Award. Banks did not rebut Wynder's testimony concerning this session; he testified that the October 2017 session was for "setting the expectations and beginning the bargaining process" and that no specific proposals were exchanged. (Tr. 38)

On January 4, 2018, Wynder emailed the City the Union's bargaining proposal and its first impasse request.[9] The Union's two-page bargaining proposal did not specify the contract term but included a list of salaries for 2017 and 2018. There is no dispute that the listed salaries were based on NYPD police officer salaries set forth in the PBA's contract. Wynder testified that the Union believed its proposal was in line with a uniformed pattern and would bring EPOs to pay parity with NYPD police officers. The Union's proposal also included the following five "Non Salary Items":

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[8] Banks was the lead negotiator for the City until September 2018, attended the first four sessions, and testified as to the negotiations up to September 2018. OLR Associate Commissioner Daniel Pollak took over as lead negotiator in September 2018, attended the last session, and testified regarding negotiations from September 2018 up to the filing of the instant petition. Wynder, who attended every session, testified for the Union.

[9] The Deputy Chair of the Office of Collective Bargaining ("OCB") was copied on the email.

> 1) 3 quarter disability benefits[;]
> 2) 20 year retirement (grand fathered) before 2010[;]
> 3) 22 years retirement after 2010[;]
> 4) Swapping shifts [; and]
> 5) Increase in annuity to [] $5.31 per day to match NYPD.

(City Ex. 8) The body of the January 4 email reads:

> Attached is the proposal and request for impasse regarding the [EPOs]. Since we all know that [OLR] can not and will not negotiate the terms of our proposal, we now respectfully request that OLR, OCB and DEP not waste LEEBA's time and money acting like they actual[ly] will or want to meet our demands. This is our final request and we will not negotiate anything less [than] our demands. Please move forward with impasse unless [OLR] sends a written proposal [accepting] our demands.

(*Id.*) Attached to the Union's January 4, 2018 email was a Request for Appointment of Impasse Panel form that stated: "Proposal submitted awaiting their counter which will not meet our demands. Therefore we are requesting Impasse."[10] (*Id.*)

A second bargaining session was on February 6, 2018. At this session, the City responded to the Union's proposals and presented its own. Banks characterized the Union's first three non-salary demands as pension demands and testified that he informed the Union that pension demands are a prohibited subject of bargaining. In response, the Union explained that it was not requesting to bargain over pensions but was requesting written support from the City for legislation to achieve these benefits, which the parties referred to as a "home rule message."[11] (Tr. 119) Banks testified

[10] In a January 19, 2018 letter to the OCB, the City opposed the Union's request for impasse, noting that the parties had a bargaining session scheduled for February 6, 2018.

[11] Banks acknowledged that in some instances, the City has negotiated "to jointly support legislation which may or may not have an economic impact." (Tr. 118)

that he requested but was never provided a copy of the legislation that the Union wanted the City to support. Wynder testified that the Union provided a copy of the proposed legislation to the City sometime between March and June 2018 but could not recall the specific date.

The City calculated that the total cost of the Union's proposal and explained to the Union that their proposal represented a 48.5 percent increase in EPO compensation.[12] According to Banks, the City informed the Union that it could not agree to "a settlement of the magnitude of two years for 48.5 percent." (Tr. 114) The Union countered that the Amended Impasse Award provided that the parties should work towards parity and that, while the parties had already negotiated one contract, EPOs still lacked parity with NYPD police officers. Wynder testified that the City refused to discuss wage increases that would move EPOs toward parity with NYPD police officers. Banks asserts that the City did not refuse to discuss parity.

The City presented its first written proposal to the Union at the February 2018 session. Like the Union's proposal, it was two pages. The proposal contained wage increases over three years based upon the City's expectation for a civilian pattern.[13] The City's proposal also addressed health insurance, direct deposit, and welfare/annuity fund administration. Banks testified that the Union "quickly rejected, ignored" the City's offer and that the parties had "no substantive discussion of it." (Tr. at 44; 45) Banks further testified that "the statement from our counterparts

[12] Banks testified that the City "never received legitimate clarity" regarding what the Union was "seeking in terms of swapping shifts or the annuity." (Tr. 36) He further testified that due to the overall lack of clarity of the Union's proposal, the City had to make assumptions when costing it.

[13] The City's proposal called for wage increases of 0.5 percent in 2017, 0.75 percent in 2018, and 1 percent in 2019. Because of compounding, the total cost slightly surpassed 2.25 percent.

across the table was that the intent [of] this round was to not negotiate any agreement at all and to go to impasse" and have an arbitrator decide the agreement. (Tr. at 45) Wynder did not rebut that he made these statements at the February 2018 session. However, he testified that the Union considered the City's proposals at the February session.

In a February 7, 2018 letter to the OCB, the Union made its second request for impasse ("February 2018 EPO Impasse Request"), stating:

> there will be no more negotiation sessions and no mediation. Our demands were not met, and LEEBA will not waste any of its time regarding this matter until the [OCB] declares impasse. LEEBA will also be pursuing other avenues to assure equality and equal treatment of its members.

(City Ex. 11) Subsequent to this letter, the parties continued to meet.

The third bargaining session was held on March 20, 2018. Banks testified that the Union reiterated its desire to go to impasse and "have an arbitrator make the decision." (Tr. 56) However, he also testified that at the March session, there were discussions regarding the "continued effort to see if the chasm between where the parties appeared to be could be addressed." (Tr. 55) At the hearing, Wynder was not asked any questions specific to the March bargaining session.

The parties met again on April 23, 2018. Banks testified that, in preparation for the April session, the City amended its proposal "to be responsive to what the Union had raised." (Tr. 57) However, the overall value of the City's wage proposals did not change.[14] Banks testified that in

[14] In the City's April 2018 proposal, the 2017 and 2019 wage increases were the same as in its February 2018 proposal. Instead of a 2018 wage increase, the Recurring Increment Payment would increase by $1,511. To fund that increase, the April 2018 proposal reduced pay for work on holidays to straight time instead of time and a half.

response to the City's new offer, the Union maintained its position that it wanted pay parity with NYPD police officers. Wynder testified that Banks stated that the City would only offer a civilian pattern and would not offer compensation in excess of the expected civilian pattern. Banks was not asked if he made the above statements but acknowledged that the City never made an offer in excess of the civilian pattern.

In June 2018, the City and District Council 37 entered into a MOA for 2017 through 2021. According to the City, this agreement established a civilian pattern with a total cost of 7.95 percent over 43 months.[15] On or about June 28, 2018, the City informed the Union that it would amend its proposal to reflect the civilian pattern.

In a July 3, 2018 letter to the OCB, the Union made its third request for impasse ("July 2018 EPO Impasse Request"). The letter described the April meeting as the "final negotiation session" and claimed that "OLR stated that its offer would not and cannot be more [than the civilian] pattern." (City Ex. 13) The Union stated that it was not "willing to accept" the civilian pattern and that it sought "parity with NYPD as per [the Amended Impasse Award]" as to "wages and benefits including [a] home rule [message], which was already denied by [OLR] during negotiations." (*Id.*) The Union argued that, since "OLR cannot break pattern," there was a "clear, concise impasse between the parties." (*Id.*) The letter concludes:

> As stated to [OLR] and now to [OCB] "what part of, we are not accepting any offers OLR has [does] this agency and OLR not understand.["] Impasse is clearly stated in [OCB] law and LEEBA is entitled to such law, unless this office is attempting to bully this

[15] The total cost of the civilian pattern was also offset by 1.41 percent in mandated savings set forth in a health care agreement for 2019 to 2021 made on June 28, 2018, between the City and the Municipal Labor Committee.

> union into returning to negotiations and conceding its demands for the demands of [OLR]. We at LEEBA respectfully declare impasse and request that this Board this month grant LEEBA in writing arbitration impasse.

(*Id.*)

In a July 20, 2018 letter to the OCB opposing the Union's request for impasse, the City alleged that the Union had failed to bargain in good faith, was insisting "on parity with [NYPD] [p]olice [o]fficers," and "will not consider any offer that provides for less than parity." (City Ex. 4)

On August 27, 2018, the OCB's Deputy Chair informed the parties that since they had not yet exhausted negotiations, she was directing them to continue bargaining and report back to the OCB in 60 days with an update.

The parties met for a fifth bargaining session on September 5, 2018. The session was attended by Pollak, who had replaced Banks as lead negotiator. The City provided the Union with a second amended proposal that contained wage increases and a total cost that was consistent with the civilian pattern.[16] According to Pollak, the Union caucused over the City's new proposal for "less than five minutes." (Tr. 154) Pollak testified that after he confirmed that the City's proposal was consistent with the civilian pattern, the Union rejected the proposal, stating that it wanted parity with police officer pay and would go to impasse to get it. Pollak further testified that the

[16] The proposed contract term was 43 months (October 1, 2017, to April 20, 2021). The City's September 2018 proposal provided wage increases of 2 percent as of October 1, 2017; 2.25 percent as of October 1, 2018; and 3 percent as of November 1, 2019. The proposal did not provide for wage increases after November 2019. The City calculated that the cost of the wage increases totaled 7.42 percent compounded. The proposal included additional funding of 0.26 percent in 2018 and 0.27 percent in 2019, bringing the total compounded cost to 7.95 percent.

Union did not make any counter proposals and did not "engage in any real discussion" of the City's proposal. (Tr. 157) He acknowledged that "there was some back and forth" but claims that when he asked Wynder to seriously consider the City's proposal, Wynder responded that he was "not considering anything." (Tr. 161) Pollak testified that the City did "not agree with the concept of parity."[17] (Tr. 182) Pollak also testified that at the September 2018 session, he raised the Union's pension demand and stated that pensions were a prohibited subject of bargaining. The Union responded that it was seeking a home rule message and was not seeking to bargain pensions. At the hearing, Wynder was not asked any questions specific to the September 2018 session.

On October 1, 2018, Pollak sent Union counsel a letter containing an amended version of its September 2018 proposal that sought to "address many of LEEBA's stated priorities." (City Ex. 16) Pollak acknowledged the net value of the modified proposal was the same as the City's September 2018 proposal. Pollak's letter also requested that the parties schedule another bargaining session. The Union did not respond to Pollak's letter.

In an October 19, 2018 letter to the OCB, the Union made its fourth request for impasse, stating that the City had informed the Union that it "could not improve" its offer. (City Ex. 17) Pollak disputed that the City stated that it could not improve its offer but acknowledged that the City did not put forth a proposal whose value exceeded the civilian pattern. On November 7, 2018, the City filed the instant petition.

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[17] Pollak further testified that the City did not agree with the Union's interpretation of the Amended Impasse Award as requiring parity.

POSITIONS OF THE PARTIES

City's Position

The City argues that the Union, through a very direct and overt course of conduct, engaged in a pattern of bad faith bargaining designed to bypass the collective bargaining process in violation of NYCCBL § 12-306(b)(2), (c)(1), (c)(2), and (c)(3).[18] The City recognizes that the parties are not required to move from their bottom line positions or agree with the other side. The City also acknowledges that bad faith bargaining is a question of intent, which is determined by a review of the totality of the parties' actions. However, it argues that the Union's behavior has frustrated the City's attempts to engage in meaningful collective negotiations and that approaching bargaining with the singular intention of going to impasse is bad faith. In determining the Union's intent, the City argues that the fact that last year the Board found that the Union engaged in bad faith

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[18] NYCCBL § 12-306(b)(2) provides, in pertinent part, that: "It shall be an improper practice for a public employee organization or its agents: . . . to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining . . . ."

NYCCBL § 12-306(c) provides, in pertinent part:

> The duty of a public employer and certified or designated employee organization to bargain collectively in good faith shall include the obligation:
>
> (1) to approach the negotiations with a sincere resolve to reach an agreement;
>
> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
>
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays; . . . .

bargaining with respect to another bargaining unit is indicative of how the Union operates with "complete disregard" for the Board, OLR, and the NYCCBL's obligations for good faith bargaining. (*See* City Br. at 17) (citing *LEEBA*, 11 OCB2d 1 (BCB 2018))

The City asserts that the Union's demands for impasse from the very beginning demonstrate bad faith. This focus on impasse, according to the City, demonstrates that the Union determined that bargaining was over before it began, sought to "short-circuit the collective bargaining process entirely," and to have an arbitrator decide the contract. (City Br. at 15)

The City insists that the Union's behavior in this round of bargaining is "identical" to its conduct that was found to be bad faith in *LEEBA*, 2 OCB2d 29, and crossed the line between rigid adherence to a position and purposeful obstructionism. (City Br. at 2) The City asserts that the Union's statements constitute admissions that the Union never intended to engage in the give and take required of good faith bargaining. Union statements highlighted by the City are: "the intent [of] this round was to not negotiate any agreement at all and to go to impasse"; "I'm not considering anything"; "[t]his is our final request and we will not negotiate anything less [than] our demands"; "what part of, we are not accepting any offer OLR has that this agency and OLR not understand"; and "there will be no more negotiation sessions and no mediation." (City Br. at 11) (quoting Tr. 45; 161; City Exs. 8, 11, 13)

Further, the City argues that even if the Union had intended to bargain in good faith, its refusal to clarify its vague proposals precluded any meaningful negotiations. The City notes that the Union's proposal does not contain a contract term, which the City characterizes as the most basic demand, and asserts that it had to make assumptions in order to cost the Union's proposal.

The City asserts that the Union sought to negotiate pensions, a prohibited subject of bargaining. Citing *LEEBA*, 2 OCB2d 29, it argues that the Union's repeated insistence to bargain over pensions is sufficient for the Board to find *per se* bad faith bargaining. The City argues that even if the Union was just demanding a home rule message, it is still bad faith bargaining as a home rule message is a non-mandatory subject of bargaining, and insistence upon a non-mandatory subject of bargaining is improper.[19]

Union's Position

The Union argues that the entire bargaining history is an "indispensable element" in understanding the present dispute. (Union Br. at 5) According to the Union, the Amended Impasse Award entitles EPOs to a contract based on a uniformed pattern that will move EPOs towards parity with NYPD police officers. The Union maintains that since uniformed pattern increases are greater than the civilian pattern, every time the EPOs receive only a civilian pattern increase, the gap between the EPOs and NYPD police officers grows wider and the goal of achieving parity between the two groups slips further away. According to the Union, in light of past bargaining, impasse arbitration, and litigation, it was obvious to the City that the Union was seeking wage increases consistent with a uniformed pattern and a contract that would help close the pay gap between EPOs and NYPD police officers.

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[19] The City also argues that the Board should consider acts that occurred more than four months before the filing of the petition. The Union has not raised any timeliness defenses. Accordingly, we need not, and do not, address this issue. *See SSEU, L. 371*, 9 OCB2d 3, n. 18 (BCB 2016). Finally, the City argues that the Board must disregard the Wynder Affidavit attached to the Union's Answer as procedurally deficient. As Wynder testified in the instant matter, the Board relies only on his testimony, not his affidavit. Accordingly, we do not find the Union's procedural defects in filing its Answer to be prejudicial to the City.

As to the Union's impasse requests, Wynder testified that the Union viewed impasse as a "last resort" because it has "been down this road before." (Tr. 221) He stated that, since it took nine years before it got the Amended Impasse Award, the Union does not "want to jump into that road again." (*Id.*) However, the Union argues that it is obvious that the City has repeatedly refused to address its concerns over wage parity in this bargaining round. Therefore, it is not bad faith for the Union to avail itself of remedies provided in the law. According to the Union, the record reflects that the parties to this negotiation have clear differences on foundational issues that are preventing the two sides from achieving a meeting of the minds. Such a dispute, the Union argues, is not bad faith.

The Union acknowledges that it made statements to the effect that it would no longer negotiate or consider the City's proposals. However, Wynder explained that these statements reflected the Union's "frustration" over the failure to achieve parity so long after the Amended Impasse Award and the refusal of the City to offer anything other than the civilian pattern. (Tr. 241) Nevertheless, the Union always attended the bargaining sessions and considered every offer made by the City. In fact, Wynder testified that he understood that negotiation means "give and take" and that to reach the Union's goal of parity with NYPD officers may take more than one contract. (Tr. 217) The Union cites Board precedent that insistence on a bargaining position is not *per se* bad faith or a refusal to bargain in good faith.

Finally, the Union argues that it never insisted on bargaining over pensions and that the record reflects that it was seeking a home rule message, which is an entirely lawful request.

DISCUSSION

Taking all of the parties' arguments, the testimony, and the evidence into consideration, we find that the Union has not breached its duty to bargain in good faith.

NYCCBL § 12-306(b)(2) provides that "[i]t shall be an improper practice for a public employee organization or its agents . . . to refuse to bargain collectively in good faith . . . ." This duty includes the obligation "to approach negotiations with a sincere resolve to reach an agreement." NYCCBL § 12-306(c)(1). *See CWA, L. 1180*, 6 OCB2d 30, at 9-10 (BCB 2013); *Cheatham*, 27 OCB 13, at 8 (BCB 1981).

The Board determines good faith by "evaluating the 'totality of a party's conduct.'" *LEEBA*, 2 OCB2d 29, at 9 (quoting *Glomac Plastics, Inc. v. Natl. Labor Relations Bd.*, 592 F.2d 94, 98 (2d Cir. 1979)). The Board reviews "the entire circumstances surrounding bargaining" including "events and comments" to determine "the subjective intent motivating conduct at the bargaining table." *Id.* (citations omitted). "Objectively, intent can be determined only by the actor's word and deeds; and where there is a variance between the two, experience would dictate that greater reliance be placed on the latter." *Id.* at 8 (quoting *Town of Southampton*, 2 PERB ¶ 3011, at 3274 (1969)).

The New York State Public Employment Relations Board ("PERB") has also long held that the question of good or bad faith bargaining "should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct."

Town of Southampton, 2 PERB ¶ 3011, at 3274; *see also City of Buffalo*, 35 PERB ¶ 3010 (2002); *Buffalo City School District*, 50 PERB ¶ 4532 (ALJ 2017) (following *Town of Southampton*).[20]

When reviewing claims of surface bargaining, the Board must determine whether a party is merely going through the motions of bargaining without a sincere desire to reach an agreement or is engaged in hard bargaining, which is permissible insistence on a bargaining position. *See CWA, L. 1180*, 6 OCB2d 30, at 11; *City of New York*, 9 PERB ¶ 4502, at n. 23 (ALJ 1976), *affd.*, 9 PERB ¶ 3031 (1976). Hard bargaining "is not in and of itself a refusal to bargain in good faith." *CWA, L. 1180*, 6 OCB2d 30, at 10; *see also Cheatham*, 27 OCB 13, at 9; *Town of Scriba*, 35 PERB ¶ 3011, at 3027 (2002). A party "is entitled to stand firm on a position if [it] reasonably believes that it is fair and proper or that [it] has sufficient bargaining strength to force the other party to agree." *Id.* (quoting *Atlanta Hilton & Tower*, 271 NLRB at 1603). Accordingly, "parties are not required in meeting their duty to bargain in good faith to make any specific concession, nor are they required to reach any particular agreement." *Deposit Cent. School Dist.*, 27 PERB ¶ 3020, at 3049 (1994), *affd., Matter of Deposit Cent. School Dist. v. Pub. Empl. Relations Bd.*, Index No 73317/1994, 27 PERB ¶ 7017 (Sup. Ct. Delaware Co., Dec. 1, 1994) (Mugglin, J.), *affd.*, 214 A.D.2d 288 (3d Dept 1995), *lv dismissed and denied*, 88 N.Y.2d 866 (1996). *See also Natl. Labor Relations Bd. v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134 (1st Cir. 1953), *cert. denied*, 346 U.S.

[20] The analysis of the Board and PERB is consistent with that of the National Labor Relations Board ("NLRB"). *See Brink's USA*, 354 NLRB 312, 324 (2009) (A party's "overall conduct must be scrutinized to determine whether it has bargained in good faith. The total conduct will show whether [the party] is lawfully engaging in hard bargaining or unlawfully endeavoring to frustrate the possibility of arriving at any agreement.") (citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)).

887 (1953) ("the Board cannot force an employer to make a concession on any specific issue or to adopt any particular position").

Based on the record, we find that the totality of the Union's conduct does not establish that it breached its duty to bargain in good faith. Instead, the facts demonstrate that the Union was engaged in permissible hard bargaining, standing firm on a position it believed was fair and proper.[21] *See CWA, L. 1180*, 6 OCB2d 30, at 10. While the Union was insistent regarding its chief demands, specifically a contract based on a uniformed pattern and moving EPOs towards parity with NYPD police officers, the record does not indicate that the Union would accept nothing but full parity with NYPD police officers.

At the first bargaining session, the City indicated that it intended to make proposals based on a civilian pattern, and the Union informed the City that it was demanding a contract based on a uniformed pattern to help close the pay gap between EPOs and NYPD police officers. Accordingly, prior to the Union making its first impasse request, the parties had discussed each other's positions on the economic issues, and the Union had indicated its priorities. Thereafter, consistent with their initial positions, the Union put its demands in writing, and the City rejected the Union's proposal and made a proposal based on a civilian pattern.

The parties' bargaining history demonstrates that the parties have consistently disagreed regarding whether EPOs are entitled to a uniformed pattern or parity with NYPD police officers. In their first round of bargaining, the Union succeeded in achieving uniformed pattern increases

[21] In reaching this conclusion, we are not opining on whether EPOs are entitled to or should receive a particular pattern or parity with NYPD police officers.

through impasse. In the current bargaining round, the City expressed a willingness to work within the civilian pattern to try to meet the Union's priorities. It was reasonable for the Union to believe that a settlement in that context would not meet its goal of reducing the pay disparity between EPOs and NYPD police officers. There is no requirement that the Union yield on demands that it has consistently advocated for over the last 13 years. Such a finding would run counter to our precedent and that of PERB and the NLRB. *See CWA, L. 1180*, 6 OCB2d 30, at 10; *Deposit Cent. Sch. Dist.*, 27 PERB ¶ 3020, at 3049; *Atlanta Hilton & Tower*, 271 NLRB at 1603; *Natl. Labor Relations Bd.*, 205 F.2d at 134. The parties' conduct in this round of bargaining demonstrated that despite their success in obtaining a negotiated agreement for 2010-2017, both sides remained unwilling to make concessions on this longstanding threshold economic issue.[22] *See City of Newburgh*, 15 PERB ¶ 3116 (1982) (finding that a request for impasse was not bad faith bargaining when the employer's conduct contributed to a lack of meaningful negotiations).

In this regard, we do not find that the Union engaged in bad faith bargaining when it sought a declaration of impasse following the first bargaining session or insisted on proceeding to impasse if the City did not accept its demands. While we have found that a premature announcement of impasse is a factor to be considered in determining bad faith, it is not, in and of itself, bad faith bargaining. *See CWA, L. 1180*, 6 OCB2d 30, at 12-13. In *CWA, L. 1180*, the City argued that the union demonstrated bad faith "by indicating that it would proceed to impasse and then pursue

[22] In reaching this conclusion, we do not opine as to whether the parties are at impasse. Under the OCB Rules, the Deputy Chair must complete the impasse investigation prior to making a recommendation to the Board. The amount of time that has passed since the last bargaining session would make appropriate the Deputy Chair's further inquiry into the parties' positions after issuance of this Decision.

litigation unless the City acceded to its salary demand." *Id.* at 12. The Board stated that "[b]oth sides to the bargaining process have the ability to assert all their rights and avail themselves of all remedies under state and federal laws to achieve their goals." *Id.* at 13. *See also City of Syracuse*, 47 PERB ¶ 4543, at 4665 (ALJ 2014) (filing for impasse does not evince bad faith where "the union's belief on the date which it filed for impasse that the parties would not reach agreement without third-party assistance was reasonable").

Wynder acknowledged that impasse is a long and difficult process that the Union would rather not repeat. Thus, we do not find that the Union lacked a desire to reach a negotiated agreement. Rather, based on the wide differences in position on the economic issues, the Union viewed protracted negotiations as futile. Further, we note that irrespective of its requests for a declaration of impasse, the Union continued to participate in bargaining. Accordingly, this is not a scenario where a party sought a declaration of impasse unilaterally and then refused to attend future bargaining sessions. The record also reflects that the Union did not merely go through the motions of bargaining, but listened to, discussed, and considered the City's proposals. It is undisputed that the Union inquired as to whether the City could improve its offers. Banks acknowledged that at the March 2018 bargaining session, there was a discussion regarding the parties' "continued effort to see if the chasm between where the parties appeared to be could be addressed." (Tr. 55) Further, Pollak acknowledged that at the September 2018 meeting "there was some back and forth" between the City and the Union. (Tr. 162)

Similarly, the record does not support the conclusion that the Union's proposal or its positions were too vague or that it refused to clarify them. The Union's bargaining proposal was

not so vague that the City was unable to understand or cost it, albeit with assumptions. In addition, the City demonstrated its understanding of the Union's position inasmuch as it was able to modify both its pre- and post-civilian pattern proposals to address some of the concerns the Union raised during the bargaining sessions. We also note that the City acknowledged that when it inquired about the demands it believed concerned pensions, the Union clarified that those demands all concerned a request for a home rule message. Moreover, since none of the City's proposals addressed the Union's primary economic concerns (uniformed pattern and pay parity), we do not find that the length of the Union's caucuses on the City's proposals indicates a lack of due consideration of those proposals by the Union. As a result, it is clear that there were substantive discussions, that the Union considered the City's proposals, and that the Union's proposal and positions were not so vague as to demonstrate an unwillingness to reach a negotiated agreement.

It is undisputed that the Union's representative made more than one statement that it would not consider the City's proposals, that bargaining had concluded, and/or that it would not continue to negotiate. However, overall the Union's actions did not demonstrate an unwillingness to negotiate. Rather, they reflect a firm adherence to a well-known and longstanding position and a belief that the City would not be willing to compromise on its position.[23] Accordingly, based on the parties' bargaining history and the Union's actions, we do not find its statements indicative of bad faith. *See CWA, L. 1180*, 6 OCB2d 30, at 11 (under the totality of the union's conduct, threat

[23] In its February 2018 EPO Impasse Request, the Union stated that there "will be no more negotiation sessions." (City Ex. 11) Nevertheless, the Union attended the March 2018 bargaining session and the parties met again in April 2018. In spite of stating in its July 2018 EPO Impasse Request that the April meeting was the "final negotiation session," the Union met again with the City in September 2018. (City Ex. 13)

of litigation does not evince bad faith); *Town of Southampton*, 2 PERB ¶ 3011, at 3274 (in gauging intent, where there is a variance between a party's word and deeds, greater reliance is placed on the deeds); *City of Syracuse*, 47 PERB ¶ 4543, at 4664 (no bad faith found despite union president's statements that union was going to interest arbitration).

In reaching this conclusion, we do not find that the Union's conduct during this round of bargaining is "identical" to the conduct found to constitute bad faith bargaining in *LEEBA*, 2 OCB2d 29. (City Br. at 2) In *LEEBA*, 2 OCB2d 29, we found that the Union engaged in bad faith bargaining by "tak[ing] inflexible bargaining stances, insisting that EPOs require, *in all respects, an exact replica of a 'police contract,'* as agreed to by unions representing uniformed members of the [NYPD], in an unwavering manner, over the course of several years of bargaining." *Id.* at 12 (emphasis added). In this round of bargaining, the Union has not insisted upon "an exact replica" of a PBA contract but rather upon a contract based upon a uniformed pattern. *Id.* Also, in this round of bargaining, the Union has focused on moving towards pay parity with NYPD officers, as opposed to demanding a contract "in all respects" equivalent to the PBA contract.[24] *Id.*

Lastly, we do not find that the Union insisted on bargaining over pensions. Insisting on negotiating a demand a party knows to be a prohibited subject of bargaining, such as pensions, is

[24] The City also urges the Board to consider that the Union's breach of its duty to bargain in good faith in *LEEBA*, 11 OCB2d 1, is indicative of the Union's "complete disregard for the Board." (City Br. at 18) In *LEEBA*, 11 OCB2d 1, we found that the Union violated the NYCCBL with respect to a different bargaining unit by repeatedly demanding to negotiate economic terms during the term of a contract and refusing to finalize the predecessor union's MOA. We do not find the Union's conduct in that case to be similar to the alleged conduct here. Therefore, we do not consider the facts or legal conclusions in *LEEBA*, 11 OCB2d 1, to be applicable to this matter.

bad faith bargaining. *See LEEBA*, 2 OCB2d 29, at 10. The Union's written bargaining proposal included demands concerning "3 quarter disability benefits"; "20 year retirement (grand fathered) before 2010"; and "22 years retirement after 2010." (City Ex. 8) However, as noted above, it is undisputed that both times the City challenged these demands, the Union explicitly stated that it was not seeking to bargain pensions but was instead requesting a home rule message.[25] There is no evidence that the Union took any action inconsistent with these statements. Therefore, we do not find that the Union insisted on bargaining over a prohibited subject.

We find that, under these circumstances, the Union engaged in permissible hard bargaining and did not breach its duty to bargain in good faith. Accordingly, we dismiss the petition.

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[25] We have held that, while non-mandatory subjects of bargaining may not be submitted to impasse, "legislative demands, to the extent they seek mutual support for legislation, remain permissive subjects of collective bargaining over which the parties may negotiate." *UFA*, 43 OCB 4, at 301 (BCB 1989), *affd.*, *Matter of Uniformed Firefighters Assn. of Greater N.Y. v. N.Y.C. Off. of Collective Bargaining*, No. 12338/1989 (Sup. Ct. N.Y. Co. Feb. 6, 1990) (Santaella, J.), *affd.*, 163 A.D.2d 251 (1st Dept. 1990). *See also Town of Walkill*, 34 PERB ¶ 4543 (ALJ 2001) (continued presentation of nonmandatory items for discussion up to the point of impasse was insufficient to establish bad faith bargaining) (citing *City of Buffalo*, 18 PERB ¶ 3015 (1985)). Indeed, Banks testified that the City had negotiated over proposed legislation in the past. (*See* Tr. 118-20)

ORDER

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

ORDERED, that the Improper Practice Petition filed by the City of New York against the Law Enforcement Employees Benevolent Association, docketed as BCB-4296-18, hereby is dismissed to the extent it alleges that the Union bargained in bad faith during negotiations for a collective bargaining agreement for Environmental Police Officers.

Dated: July 30, 2019
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

GWYNNE A. WILCOX
MEMBER

PETER PEPPER
MEMBER