LEEBA, 12 OCB2d 18 (BCB 2019)

(Docket No. BCB-4296-18)

Summary of Decision: The City claimed that the Union failed to bargain in good faith during negotiations for a collective bargaining agreement for Sanitation Enforcement Agents. Specifically, the City alleged that the Union filed for impasse after two days of negotiations, 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 that would narrow the pay gap between its members and Sanitation Workers assigned as sanitation police. The Union further argued that it considered and rejected the City's proposals and that the City's refusal to diverge from the civilian pattern justified its impasse requests. The Union also denied that it sought to bargain over a prohibited subject of bargaining. The Board found that the Union did not violate 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 during negotiations for a collective bargaining agreement for Sanitation Enforcement Agents ("SEAs"), the Union failed to bargain in good faith 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 after two days of negotiations, 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[2] that would narrow the pay gap between SEAs and Sanitation Workers assigned as sanitation police.[3] The Union further argues that it considered and rejected the City's proposals and that the City's refusal to offer wage increases greater than the civilian pattern justified its

[1] In the same petition, the City argued that the Union bargained in bad faith during negotiations for a collective bargaining agreement for Environmental Police Officers ("EPOs"), another title represented by the Union. Since EPOs are in a different bargaining unit than SEAs and separate negotiations were held for each unit, we address the City's claims regarding EPOs in a separate decision. *See LEEBA*, 12 OCB2d 17 (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.

[3] Some Sanitation Workers assigned to the Enforcement Division of the New York City Department of Sanitation ("DSNY") are known as sanitation police. We take administrative notice that the collective bargaining agreement covering Sanitation Workers does not indicate that those assigned as sanitation police are paid differently than Sanitation Workers. According to the Union, Sanitation Workers are paid up to $50,000 more than SEAs for the same work.

impasse requests. The Union denies that it sought to bargain over pensions. The Board finds that the Union did not engage in bad faith bargaining. Accordingly, the petition is denied.

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.

SEAs are employed in the DSNY's Enforcement Division and their main function is to enforce the New York City Administrative Code as it pertains to sanitation, recycling, graffiti, and some health code violations.

Unit and Bargaining History

Prior to 2005, SEAs were in the "Citywide" level of bargaining. *See* NYCCBL § 12-307(a)(2) ("matters which must be uniform for all employees subject to the career and salary plan, such as overtime and time and leave rules, shall be negotiated only with . . . the certified representative or representatives of bargaining units which include more than fifty percent of all such employees"). Local Law 56 of 2005 ("Local Law 56") amended the NYCCBL to, among other things, add SEAs to the "uniformed" level of bargaining, which provides for bargaining at the unit level for "all matters." NYCCBL § 12-307(a)(4). The NYCCBL now provides that, for purposes of NYCCBL § 12-307(a)(4) only, "employees of the uniformed sanitation service shall also include persons employed at any level of position or service by the [DSNY] as [SEAs] and supervisors of [SEAs]." NYCCBL § 12-307(a)(4)(iii).

At the time of the enactment of Local Law 56, SEAs were in a different bargaining unit than Associate Sanitation Enforcement Agents ("ASEAs"). SEAs were in the same bargaining unit as Traffic Enforcement Agents Levels I and II ("TEAs"). The Communications Workers of America ("CWA") was the certified bargaining representative of this unit of SEAs and TEAs, known as Certification No. 25-74.[4] On January 10, 2014, in response to representation petitions regarding titles affected by Local Law 56, the Board of Certification amended Certification No. 25-74 to remove TEAs and add ASEAs.[5] *See DC 37*, 7 OCB2d 1, at 85 (BOC 2014), *affd. sub nom., Matter of City Empls. Union, Local 237, Intl. Bhd. of Teamsters v. N.Y.C. Off. of Collective Bargaining*, Index No. 100180/2014 (Sup. Ct. N.Y. Co. Jul. 28, 2015) (Moulton, J.).

After January 2014, although SEAs and ASEAs were now in one bargaining unit, CWA and the City continued to negotiate separately for the two titles. On March 21, 2016, the City and CWA signed a memorandum of agreement ("MOA") covering only SEAs for the period of March 10, 2010, to December 30, 2017 ("2010-2017 SEA MOA"). The City and CWA also signed a MOA covering only ASEAs but that MOA was not ratified by the members. Thus, the most recent agreement covering ASEAs expired in 2010 while the most recent agreement covering SEAs expired in 2017.

In July 2016, the Union filed a petition to represent the SEA and ASEA bargaining unit. Based on the results of an election, in February 2017, the Board of Certification certified the Union

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[4] CWA's affiliate Local 1182 represented SEAs and TEAs.

[5] Prior to 2014, CWA's affiliate Local 1181 represented ASEAs and Associate Traffic Enforcement Agents in a bargaining unit known as Certification No. 26-74.

as the bargaining representative of the unit of SEAs and ASEAs, now known as Certification No. 4-17. *See LEEBA*, 10 OCB2d 4 (BOC 2017).

Current Bargaining

Following its certification, the Union and City negotiated separately for ASEAs and SEAs, bargaining first for ASEAs.[6] Between March and September 2017, the parties met twice to negotiate a successor agreement to the ASEA agreement that expired in 2010.[7] The Union was seeking increases consistent with a uniformed pattern, along with wages and other terms for ASEAs consistent with Sanitation Workers assigned as sanitation police, whom it asserts perform the same duties as ASEAs. The City's wage proposals for ASEAs were consistent with the civilian pattern. In September 2017, the Union requested a declaration of impasse. On June 14, 2018, after a few more bargaining sessions and three days of mediation, this Board declared that the parties were at impasse regarding an agreement for ASEAs.

The petition before us here only concerns bargaining for a successor to the 2010-2017 SEA MOA. Between February 27, 2018, and October 17, 2018, the parties met three times. Each bargaining session lasted between one to two hours. It is undisputed that the Union's caucuses

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[6] The parties considered negotiating one MOA covering both SEAs and ASEAs but decided to negotiate separate MOAs instead as the agreement covering ASEAs expired in 2010, much earlier than 2010-2017 SEA MOA.

[7] We take administrative notice of the facts concerning the ASEA bargaining from the parties' submissions in the ASEA impasse proceeding, docketed as I-268-17.

over the City's proposals in these sessions were brief. At the hearing, each party presented only one witness for each bargaining session.[8]

On February 27, 2018, the day before the first bargaining session, the Union sent an email to the City containing its 21-page proposal, entitled "LEEBA's Proposal For Sanitation Enforcement Agents Collective Bargaining Agreement 2018" ("Union's SEA Proposal"). (City Ex. 1) The proposal was adapted from the collective bargaining agreement between the City and Uniformed Sanitationmen's Association, Local 831, International Brotherhood of Teamsters ("USA"), that covers Sanitation Workers for the period September 21, 2011, to January 19, 2019 ("Sanitation Workers Agreement"). The Union's SEA Proposal does not have a contract term, but contains a proposed salary schedule for 2018 and a proposed 3 percent salary increase on June 2, 2018.[9] The Union's SEA Proposal grievance procedure differs from the Sanitation Workers Agreement in that it provides for the assignments of delegates designated by the Union to the DSNY Enforcement Division.

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[8] New York City Office of Labor Relations ("OLR") First Deputy Commissioner and General Counsel Steve Banks was the lead negotiator for the City until September 2018, attended the first two sessions, and testified as to the negotiations up to September 2018. OLR Associate Commissioner Daniel Pollak replaced Banks as lead negotiator in September 2018, attended the last session, and testified as to negotiations from September 2018 up to the filing of the instant petition. Union President Kenneth Wynder attended every session and testified for the Union.

[9] Many sections of the Union's SEA Proposal are identical or similar to the Sanitation Workers Agreement. For example, the salary schedule and proposed 2018 wage increase are the same. The Union's SEA Proposal contains two provisions lifted verbatim from the Sanitation Workers Agreement that have no applicability to SEAs. It has a provision regarding snow removal, which is a task SEAs do not perform. It also contains a provision for the City to pay into the USA Compensation Annuity Fund ("USA Fund"), a fund only for employees represented by USA. The Union's SEA Proposal does not include any of the numerous side letters which are part of the Sanitation Workers Agreement.

The parties first bargaining session for SEAs was the next day, February 28, 2018. Banks testified that at the February session, the City asked for clarity regarding the Union's SEA Proposal but did not receive any. Banks, however, acknowledged that at the February meeting, a Union official explained that the Union's position was that they wanted parity with Sanitation Workers assigned as sanitation police. Wynder testified that the Union explained that SEAs perform "the same job" as sanitation police and should receive the same pay, but that the City "didn't want to hear it." (Tr. 229; 231) Wynder also testified that the substance of the discussion was that SEAs are now "considered uniform services" as a result of Local Law 56. (Tr. 227)

Banks also acknowledged that at the February 2018 session, the parties discussed the "inconsistencies" in the Union's SEA Proposal, such as the snow removal provision and the proposal to contribute to the USA Fund. (Tr. 70) Wynder clarified that the Union was not seeking to have the City contribute to the USA Fund; rather, the Union was looking to establish a fund for SEAs similar to the USA fund referenced in the Sanitation Workers Agreement.

The parties next met on May 7, 2018. The City presented a proposal with wage increases of slightly more than 2.25 percent, based upon what the City expected would be the cost of a civilian pattern over three years. The City's proposal also addressed health insurance, direct deposit, and welfare/annuity fund administration. Banks testified that the Union stated that "there would be no further discussion of proposals made by either side." (Tr. 77) At the hearing, Wynder was not asked if he made this statement.

In June 2018, the City and District Council 37 signed 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.[10] 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, less than a month after the Board declared that the ASEA negotiations were at impasse, the Union requested a declaration of impasse for SEAs ("July 2018 SEA Impasse Request"). The letter described the May 2018 session as the "final negotiation session" and claimed that "OLR stated that its offer would not and cannot be more [than the civilian] pattern" and that the City "refused to acknowledge [SEA] Uniform status." (City Ex. 3) The Union stated that it is not "willing to accept" the civilian pattern and that it seeks "parity."[11] (*Id.*) The letter further stated that Local Law 56 "granted [SEAs] uniform service and sanitation services, which provides for parity of wages and benefits including a home rule [message] for a retirement bill."[12] (*Id.*) The Union argued that, since "OLR cannot break pattern," there is a "clear, concise impasse between the parties." (*Id.*) The letter concluded:

> 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 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.

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[10] The total cost of the civilian pattern was 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.

[11] Banks testified that the Union never explained what it meant by parity.

[12] A home rule message is written support from the City for legislation. Banks testified that the July 2018 SEA Impasse Request was the first time the City learned that the Union was seeking a home rule message.

(*Id.*)

In a July 20, 2018 letter to the OCB, the City opposed the Union's request for impasse, alleging that the Union had failed to engage in good faith bargaining and that it insisted "on parity with Sanitation Workers assigned to work as [s]anitation [p]olice." (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.

On October 2, 2018, the parties met for the third time. The City presented an amended bargaining proposal that reflected wage increases consistent with the civilian pattern that had a net compensation increase over three years of approximately 6.5 percent.[13] At this session, Pollak replaced Banks as lead negotiator for the City. He testified that the Union "immediately" rejected the new proposal and said that it wanted to go to impasse. (Tr. 165) Pollak further testified that when he asked what contract term the Union was proposing, the Union's response was "whatever an arbitrator decides." (Tr. 168) Wynder testified that he told Pollak that if he could offer more than the civilian pattern, the Union was willing to continue to bargain.

In an October 19, 2018 letter to the OCB, the Union made its second request for impasse, stating that the City had informed the Union that it "could not improve" its offer. Pollak disputed

[13] The proposed contract term was 43 months (December 31, 2017, to July 30, 2021). It provided wage increases of 2 percent as of December 31, 2017; 2.25 percent as of December 31, 2018; and 3 percent as of January 1, 2019. The proposal did not provide for wage increases after January 2019. The City calculated that, after compounding, the wage increases totaled 7.42 percent over three years. The proposal included additional funding of 0.26 percent in 2018 and 0.27 percent in 2019, bringing the total cost to 7.95 percent. However, there was an offset of -1.41 percent in health care savings, making the net value to SEAs of the proposal 6.51 percent.

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.

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).[14] 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

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[14] 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; . . . .

the totality of the parties' actions. However, it argues, 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 the Board found last year that the Union engaged in bad faith bargaining with respect to another unit is indicative of how the Union operates with "complete disregard" for the Board, OLR, and the NYCCBL's good faith bargaining obligations. (City Br. at 17) (citing *LEEBA*, 11 OCB2d 1 (BCB 2018))

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

According to the City, by putting forth a "replica" of the Sanitation Workers Agreement as its proposal, the Union's engaged in the "exact pattern of behavior" the Board found to be bad faith in *LEEBA*, 2 OCB2d 29 (BCB 2009). (City Br. at 15; 16) The City further argues that the Union has taken an inflexible bargaining stance similar to what the Board determined was bad faith bargaining in *LEEBA*, 2 OCB2d 29, and crossed the line between rigid adherence to a position and purposeful obstructionism. The City asserts that the Union's statements constitute admissions that it never intended to engage in the give and take required of good faith collective bargaining. The Union statements highlighted by the City are: "there would be no further discussion of proposals made by either side" and "what part of, we are not accepting any offer OLR has that this agency and OLR not understand." (City Br. at 14) (quoting Tr. 77; City Ex. 3)

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 SEA Proposal does not contain a contract term, which the City characterizes as the most basic demand. It argues that Union presented the Sanitation Workers Agreement "without even reviewing" how it impacted SEAs. (City Br. at 15)

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.[15]

Union's Position

The Union argues that it did not engage in bad faith bargaining. 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 the Union does not "want to jump into that road again." (*Id.*) However, the Union argues that it is plainly obvious that the City has repeatedly refused to address the Union's concerns over wage parity in this bargaining round. Therefore, it

[15] 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.

is not bad faith for the Union to avail itself of remedies provided in the law. According to the Union, this is a situation where neither side is prepared to accede to the other's demands.

The Union argues that its demands were clear and that it was obvious to the City that the Union was seeking a uniformed pattern and a contract that would help close the pay gap between SEAs and Sanitation Workers assigned as sanitation police. Its position is that SEAs and sanitation police perform the same job, yet some sanitation police make $50,000 a year more than SEAs.

The Union acknowledges that it made statements to the effect that it would no longer negotiate or consider the City's proposals. 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." (Tr. 217) Wynder also testified that the Union always had a "justification" for its bargaining positions. (Tr. 233) 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.

The Union's understanding of the Board of Certification's decision regarding Local Law 56 is that it meant SEAs had uniformed service status and were entitled to a collective bargaining agreement based on a uniformed pattern. The Union states that it based its proposal on the Sanitation Workers Agreement "[i]n order to expedite the negotiation process." (Union Br. at 3) The Union further argues that any lack of specificity in its proposal is irrelevant as the City understood that the Union's primary motivation in this round of bargaining was to achieve wage increases beyond those offered as part of a civilian pattern.

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 did not breach 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 also 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 Sch. Dist.*, 50 PERB ¶ 4532 (ALJ 2017) (following *Town of Southampton*).[16]

When reviewing claims of surface bargaining, the Board must determine whether the 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 a 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. Sch. Dist.*, 27 PERB ¶ 3020, at 3049 (1994), *affd., Matter of Deposit Cent. Sch. 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.

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[16] 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. The negotiations for the SEAs have been quite unique. First, the parties are negotiating terms for only one of the two titles in the bargaining unit. Second, the parties are at impasse regarding ASEAs, the other bargaining unit title. Although the ASEA impasse is for an earlier round of bargaining, it is particularly relevant because the issue before the ASEA impasse panel concerns economic terms and positions identical to those in the SEA negotiations.

By the time the Board determined that the parties were at impasse regarding ASEAs, the parties had already exchanged bargaining proposals and met two times to discuss SEAs. In the first bargaining session, the Union submitted its SEA Proposal seeking parity with Sanitation Workers and asserted that SEAs were considered uniformed pursuant to Local Law 56, which mirrors its positions regarding ASEAs. At the second session, the City countered with a proposal consistent with the expected civilian pattern, which was its bargaining position regarding ASEAs. Accordingly, prior to the Union making its first impasse request regarding SEAs, the parties had discussed each other's positions on the economic issues, and it was clear that the parties' positions were similar, if not identical, to those that had been raised for the ASEAs. In this context, we find the Union's actions to be hard bargaining, not surface bargaining.

We do not find that the Union engaged in bad faith bargaining when it sought a declaration of impasse following the second bargaining session or by insisting on proceeding to impasse if the

City did not accept its demands.[17] *See City of Newburgh*, 15 PERB ¶ 3116 (1982) (PERB rejected city's claim that union engaged in bad faith bargaining by improperly declaring impasse after only two brief meetings). 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 litigation unless the City acceded to its salary demand." *Id.* at 12. In response, 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.

As noted above, the SEA title is one of two titles in this bargaining unit and the other title, ASEAs, was already at impasse when the Union claimed that the negotiations regarding SEAs had stalled, and that the conditions were suitable for a declaration of impasse. It is undisputed that the Union informed the City that it would continue to negotiate if the City would offer more than the civilian pattern. While the City may have been willing to work within the civilian pattern to try to meet the Union's priorities for SEAs, the City never offered a proposal that was based on the uniformed pattern or provided greater compensation than the civilian pattern. Thus, it was reasonable for the Union to believe that further negotiations would not meet its goal of reducing the pay disparity between SEAs and Sanitation Workers. *See City of Syracuse*, 47 PERB ¶ 4543,

[17] In reaching this conclusion, we do not opine as to whether the parties here 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.

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"). There is no requirement that the Union yield on its demands, which are identical to those already before the ASEA impasse panel. 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.

As noted above, at the last bargaining session, Wynder indicated a willingness to continue bargaining if the City would make an offer in excess of the civilian pattern. Further, the Union recognized that good faith bargaining required that it have a "justification" for its bargaining positions. (Tr. 233) In the SEA bargaining sessions, it explained its belief that Local Law 56 entitled SEAs to a uniformed pattern and that the similarity in duties of SEAs and sanitation police justified wage parity with Sanitation Workers.[18] Wynder also acknowledged that impasse is a long and difficult process that the Union would rather not repeat. Thus, we do not find that the Union

[18] New York courts have already determined that NYCCBL § 12-307(a)(4) designation to the "uniformed services" for purposes of collective bargaining "do[es] not require wage parity . . . with other uniformed service employees." *Mayor of City of N.Y. v. Council of the City of N.Y.*, 6 Misc. 3d 1022(A), 2005 N.Y. Misc. LEXIS 257, * 17 (Sup. Ct. N.Y. Co. 2005), *affd.*, 38 A.D.3d 89 (1st Dept 2006), *affd.*, 9 N.Y.3d 23 (2007) (holding that Local Laws 18 and 19 of 2001, which amended NYCCBL § 12-307(a)(4) to add certain titles to the uniformed fire service, were not unlawful because the City Council had not affected "terms and conditions of employment" by passing these laws). We note that it is well established that the addition a title to the uniformed level of bargaining for purposes of NYCCBL § 12-307(a)(4) "prescribe[s] how bargaining is to be conducted – a bargaining process – not a particular bargaining result." *Id.* at * 16 (noting that titles added to the uniformed fire services "will not receive the same wages as uniformed firefighters because of the designation."). *See also DIA*, I-246-06, at 30 (rejecting the union's argument that the amendment to NYCCBL § 12-307(a)(4) mandated the uniformed pattern).

lacked a desire to reach a negotiated agreement. Rather, based on the ASEA negotiations and the wide differences in positions on the economic issues, the Union viewed protracted negotiations as futile. We note that irrespective of its request 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 does not support the conclusion that the Union's proposal or its positions were too vague, that it refused to clarify them, or that it merely went through the motions of bargaining. The City understood that the Union's main demand was a contract based on a uniformed pattern that would close the pay gap between SEAs and Sanitation Workers. In addition, Wynder explained the reasons the Union based its proposal on the Sanitation Worker Agreement. While Pollak denies that he stated that the City could not improve its offer, it is undisputed that Wynder stated that he would continue to meet with the City if it could offer more than the civilian pattern. In addition, the City acknowledged that the inconsistencies in the Union's SEA Proposal were discussed at the first bargaining session. For example, the Union explained that its reference to the USA Fund in its proposal was for a similar Union administered fund for SEAs. Similarly, since none of the City's proposals addressed the Union's chief concerns (uniformed pattern and pay parity), we do not find that the brevity of the Union's caucuses indicates a lack of consideration of those proposals by the Union. Thus, it is clear that there were substantive discussions, that the Union listened to and 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 statements that bargaining had concluded, that it was not accepting the City's proposals, and/or that it would let an arbitrator decide the contract duration or other terms. However, in context, these statements evince the Union's frustration with the City's insistence on an agreement that conformed to the civilian pattern. The Union demonstrated a willingness to negotiate and, despite stating in its July 2018 SEA Impasse Request that the May 2018 session was the "final negotiation session," the Union met again with the City in October 2018 and stated that it would continue to meet with the City if the City would consider a contract with compensation exceeding the civilian pattern. (City Ex. 3) Accordingly, based on 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 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 the 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 . . ., in an unwavering manner, over the course of several years of bargaining." *Id.* at 12 (emphasis added). This is the Union's first round of bargaining for SEAs. While many sections of the

Sanitation Workers Agreement were copied verbatim, other sections of the Union's SEA Proposal, such as the grievance provision, were tailored for SEAs. Further, the Union's SEA Proposal does not include anything from the numerous side letters that are part of the Sanitation Workers Agreement. Thus, while the Union used the Sanitation Workers Agreement as a template to draft a contract for SEAs, it has not insisted upon "an exact replica" of another unit's contract. *Id.* The Union's SEA Proposal demanded the same salary and salary increase as Sanitation Workers for 2018. However, the Union's statement that it would continue to negotiate if the City offered more than the civilian pattern suggests that it was not insisting on complete parity in its first round of bargaining.

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 bad faith bargaining. *See LEEBA*, 2 OCB2d 29, at 10. However, nothing in the record supports a finding that the Union sought to bargain over pensions or any other prohibited subject of bargaining. Pensions demands were not raised by the Union in any of the bargaining session, nor mentioned in its SEA Proposal. To the contrary, the July 2018 SEA Impasse Request indicates that the Union made a permissible request for a home rule message.[19]

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[19] We have held that, while nonmandatory 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*, Index 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)).

We find that, under these circumstances, the Union engaged in permissible hard bargaining and did not breach its duty to bargain in good faith.[20] Accordingly, we dismiss the petition.

[20] 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.

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 Sanitation Enforcement Agents.

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