LEEBA, 15 OCB2d 3 (BCB 2022)

(IP) (Docket No. BCB-4439-21)

Summary of Decision*:** Union alleges that the City violated NYCCBL § 12-306(a)(4). Following a declaration of impasse, the Union argued that the City bargained in bad faith by offering terms consistent with the civilian pattern in light of a prior impasse award and the previous round of bargaining. The City argued that it was not bad faith bargaining to stand firm on positions that led to the declaration of impasse. The Board found that the City did not bargain in bad faith by maintaining its position after the declaration of impasse and dismissed the petition. ***(Official decision follows.)

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

-and-

THE CITY OF NEW YORK,
THE OFFICE OF LABOR RELATIONS OF THE CITY OF NEW YORK, and
THE NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

DECISION AND ORDER

On July 15, 2021, the Law Enforcement Employees Benevolent Association ("LEEBA" or "Union") filed a verified improper practice petition alleging that the City of New York ("City") and the Department of Environmental Protection violated its duty to bargain in good faith pursuant to § 12-306(a)(4) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) ("NYCCBL"), by offering only terms consistent with the civilian pattern of bargaining to the Environmental Police Officer ("EPO") bargaining unit

during negotiations following the declaration of impasse. (Pet. ¶ 1) The Union argues that the City is obligated to offer more than the civilian pattern because a prior impasse award recommended that the parties take steps toward the goal of achieving relative pay parity between EPOs and uniformed services employees and the parties did so in the previous round of bargaining. The City asserts that adherence to its bargaining position prior to the declaration of impasse is not bad faith bargaining. In addition, it asserts that the prior impasse award did not create bargaining obligations for subsequent rounds of bargaining and that the previous round of bargaining was consistent with the civilian pattern. The Board finds the City did not bargain in bad faith by maintaining its bargaining position after the declaration of impasse. Accordingly, it dismisses the petition.

BACKGROUND

The Union was certified to represent the EPO bargaining unit in 2005. *See LEEBA*, 76 OCB 3 (BOC 2005) (creating a separate bargaining unit for EPOs because they are defined as police officers under the New York Criminal Procedure Law and the primary characteristics of the title are the prevention and detection of crime and the enforcement of the general laws of the state). Thereafter, the parties were unable to agree on contract terms, and the Union sought a declaration of impasse. In 2010, the Board declared the parties were at impasse, and a panel was appointed to resolve the dispute.

In 2012, an impasse panel issued its award ("Impasse Award") covering contract terms for the period from 2005 to 2010. The panel found that "EPOs as police officers should be awarded a uniformed services pattern of settlement" and "recommend[ed] terms that will start the process toward the goal of bringing them closer to parity in pay and benefits with uniformed services

employees."[1] (Impasse Award at 19) Noting that "the current police officer pay and benefits did not occur overnight, but are a product of years of negotiations and impasse panel awards," the panel recommended that "the parties work together toward the goal of achieving relative parity in the future and that they take progressive steps towards this goal." (*Id*. at 19-20).

Thereafter, the parties negotiated a successor agreement covering the period from 2010 to 2017. The Union asserts, and the City denies, that the terms of that agreement were "something closer to uniformed pay." (Pet ¶ 14). According to the Union, "the City argued that it was financially unable to bring EPOs to parity with one contract" and "promised that they would work toward parity going forward and specifically in the next round of negotiations, referring to the current round." (Rep. ¶ 10)

In bargaining for the period from 2017 to 2021, it is undisputed that the City made proposals based on a civilian pattern, and the Union demanded that the City offer terms and conditions consistent with the value of the uniformed pattern in order to move EPOs towards wage parity with New York City Police Department ("NYPD") police officers. *See LEEBA*, 12 OCB2d 17, at 20 (BCB 2019) (finding that the Union engaged in permissible hard bargaining). The Board declared that the parties were at impasse, and the Office of Collective Bargaining designated a three-person panel to resolve the impasse on February 12, 2020. We take administrative notice that no impasse hearings were held.

Instead, over a year later, the parties resumed bargaining on March 16, 2021. A second bargaining meeting was held on May 11, 2021. In advance of that session, the City sent a revised

[1] "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." *LEEBA*, 12 OCB2d 17, at 2 n.2 (BCB 2019). "In some rounds of bargaining, there are two separate patterns: one for uniformed employees and one for civilian employees." *Id*.

proposal that extended the term of the proposed 2010-2017 agreement and used the funding generated by the extension to increase wages "at the top step" of the pay scale. (Ans. ¶ 43) According to the Union, the City's new offer was still consistent with the value of the civilian pattern established for the years 2017-2021. At the second bargaining session, the Union rejected the City's proposal and expressed a desire to move forward with the impasse process. Sometime after May 11, 2021, the parties spoke by telephone. The City informed the Union that it was "not offering anything above" the civilian pattern and "if that was insufficient for a voluntary agreement, there was an impasse panel already designated and the parties could proceed with that process." (Ans. ¶ 20)

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the City violated NYCCBL § 12-306(a)(4) "by its inflexible position" offering only contract terms that were consistent with the civilian pattern. (Pet. ¶ 22) The Union asserts that the 2012 Impasse Award "established" that EPOs are entitled to more than a civilian pattern and that it is bad faith for the City to obligate them to seek impasse "on the exact same issue for each and every contract negotiation into perpetuity." (Pet. ¶¶ 5, 7) The Union notes that the City has exhausted its attempts to overturn the award and cannot "resort[] to pretending that nothing ever happened." (Pet. ¶ 9) In addition, the Union argues that it is bad faith for the City to agree that EPOs are "more than civilians" in the 2010-2017 round of bargaining and then revert to arguing that EPOs are civilians in the 2017-2021 round of bargaining. (Pet. ¶ 10) It contends that the City's attempt to "force the [U]nion to give up all its incremental gains and return" to the civilian pattern is a failure to consider a reasonable compromise. (Pet. ¶ 11) Further, it notes that the parties are required to act in good faith "regardless of the existence of impasse and

impasse proceedings." (Rep. ¶ 12)

The Union claims that the 2010-2017 MOA did not conform to the civilian pattern and that the City has not always insisted on the civilian pattern. According to the Union, in the prior round of bargaining, the City stated that it could not afford the "uniformed pattern … all at once" and that it was "financially unable to bring EPOs to parity with one contract." (Rep. ¶ 5, 10) It asserts that the City "promis[ed] that it will move toward a uniformed pattern" and "would work toward parity going forward and specifically in the next round of negotiations, referring to the current round." (Rep. ¶ 5, 10) The Union contends that "misrepresenting true motives and a true bargaining position in order to induce an agreement" in the 2010-2017 round was more than just hard bargaining. (Rep. ¶ 10)

City's Position

The City argues that the petition should be dismissed because the "refus[al] to alter their proposals from prior to the impasse declaration" does not constitute a violation of the NYCCBL. (Ans. at 5) Noting that it had no obligation to bargain after the declaration of impasse, the City asserts that it is illogical that "good faith bargaining that led to an impasse proceeding" could be "transformed" into bad faith bargaining.[2] (*Id*. at 4-5) Instead, the City characterizes the Union's petition as dissatisfaction with the City's proposal and "essentially an argument that the parties haven't reached a settlement and should be at impasse which they are." (Ans. ¶ 51) The City alleges that the Union is seeking to improperly circumvent the impasse process by filing this

[2] The City notes that, at the 2021 bargaining meetings, "both parties reiterated the proposals that lead to impasse." (Ans. at 4) According to the City, the Union is seeking a Board decision "unfairly impos[ing] different standards," whereby it is bad faith for the City to adhere to its pre-impasse position but permissible for the Union to adhere to its pre-impasse position. (Ans. ¶ 73)

petition instead of scheduling hearings before the impasse panel, which is the entity that should be determining the terms and conditions of employment for EPOs.

The City contends that the 2012 Impasse Award addressed only terms and conditions of employment for the 2005 to 2010 round of bargaining and "did not create any bargaining obligations … in subsequent rounds of bargaining." (Ans. ¶ 55) It asserts the Award does not "supersede" the NYCCBL and did not guarantee either a baseline proposal or the uniformed pattern. (Ans. ¶ 56) Accordingly, the City claims that the Award did not "state or imply" that the failure to offer the uniformed pattern ten years and one contract later, "for a time period with different circumstances," would be bargaining in bad faith. (Ans. ¶ 56)

According to the City, the 2010-2017 agreement conformed to the civilian pattern, and it is not unreasonable for it to "stand firm" on offering the civilian pattern in this round of bargaining. (Ans. ¶ 59) The City asserts that it is engaging in permissible hard bargaining, just as this Board found LEEBA did when it refused to consider a civilian pattern in 2019. *See LEEBA*, 12 OCB2d 17, at 25.

DISCUSSION

The NYCCBL sets forth a framework for bargaining and delineates what subjects must be bargained, but it does not mandate a particular result. *See, e.g., Mayor of City of New York v. Council of City of New York*, 6 Misc. 3d 1022(A) (Sup. Ct. N.Y. Co. 2005) (noting that local laws amending the NYCCBL's levels of bargaining "prescribe how bargaining is to be conducted - a bargaining process - not a particular bargaining result"), *affd*., 38 A.D.2d 89 (1st Dept. 2006), *affd*., 9 N.Y.3d 23 (2007). The terms of a collective bargaining agreement are determined by the parties during negotiations or, if they cannot reach an agreement, by an impasse panel. *See* NYCCBL

§ 12-311(c)(2). When the parties have bargained to impasse, "the function of the impasse panel is to obtain a full understanding of the respective positions of the parties and of all facts and circumstances which may have a bearing upon the controversy, and to formulate a solution to the problems constituting balanced and objective recommendations for the terms of settlement which the panel shall communicate to the parties." *District No. 1, Pacific Coast Dist., MEBA*, 7 OCB 21, at 5 (BOC 1971) (citing NYCCBL § 12-302); *see also* NYCCBL § 12-311(c)(3); *NYSNA*, 6 OCB2d 23, at 11 (BCB 2013) (noting that "[t]he impasse panel is empowered to evaluate each party's bargaining positions and arguments concerning the negotiation.").

In order to adequately address the Union's claim, it is necessary to review the history and legal parameters surrounding pattern bargaining. Pattern bargaining has long been a cornerstone of public sector collective bargaining in New York City. *See PBA*, I-225-96, at 14 (Impasse Award Sept. 8, 1997) (noting that a relationship between the salaries of Police Officers and Firefighters dates back to January 1898). It is considered essential to maintaining stable labor relations since it "permits the City to plan budgets and determine the level of services it may offer the public while protecting those unions who are last to resolve their negotiations from the claim that there is no money left for them." *Licensed Practical Nurses and Technicians of New York, L. 721, SEIU*, I-218-94, at 10 (Impasse Award Oct. 10, 1995). Over the years, when unions have sought agreements valued greater than established pattern, impasse panels have considered whether a deviation from the pattern was appropriate. *See, e.g.*, *PBA*, IA-2014-009, at 66 (PERB Impasse Award Nov. 13, 2015); *PBA*, IA-2006-24 (PERB Impasse Award May 22, 2008), at 8; *CEU, Local 237, IBT*, I-188-86, at 15 (Impasse Award Mar. 20, 1987).

Further, while in recent years there have been separate patterns for uniformed and civilian employees, that has not always been the case. In the 1978-1980 round of bargaining, the pattern

was set by a coalition of three civilian unions and the Uniformed Sanitation Association, and the remaining uniformed unions later negotiated the same settlement. *See PBA*, I-225-96, at 3. In the following round, a coalition of civilian unions anFd a coalition of uniformed unions negotiated separate patterns. However, in the 1990-1991 round, impasse panels awarded the Police Benevolent Association and the Uniformed Firefighters Association "the same net cost basic pattern established by the civilian unions." *Id*. at 5. Moreover, there is nothing in the NYCCBL that mandates that civilian and uniformed employees be granted the same or different wage and benefit patterns. The NYCCBL compels only good faith bargaining on mandatory subjects. *See* NYCCBL § 12-306(e).

Here, LEEBA argues that the City has violated NYCCBL § 12-306(a)(4) by offering only terms consistent with the civilian pattern. LEEBA maintains that this conduct demonstrates bad faith bargaining in light of the Impasse Award and the previous round of bargaining.[3] We do not agree. This Board has refrained from "opining on whether EPOs are entitled to or should receive a particular pattern or parity with NYPD police officers." *LEEBA*, 12 OCB2d 17, at 20 n.21; *see also PBA of District Attorneys' Office*, 19 OCB 3, at 19 (BCB 1977) ("[I]t is well settled Board policy that we will not substitute our judgment for that of an impasse panel charged with issuing recommendations in a contract dispute …"). Instead, the Impasse Award and previous round of bargaining are simply factors that the impasse panel may consider in determining any unresolved

[3] We do not address the factual dispute concerning alleged statements made by the City in the 2010-2017 round of bargaining. While the City may have made certain representations in the last round of bargaining that were inconsistent with its position in the current round, it is clear that the City maintained a consistent position in this round of bargaining, and therefore this factual dispute does not affect our conclusion here.In addition, the alleged change in the City's position from one round to the next was known to the Union more than four months prior to the filing of this petition. *See* NYCCBL § 12-306(e).

bargaining issues. *See* NYCCBL § 12-311(c)(3)(b)(i);[4] *DIA*, I-246-06, at 24 (Impasse Award Feb. 13, 2008) (determining "whether the civilian or uniform pattern should be awarded to the DIA unit for the 2003-2006 round of bargaining"). Many impasse panels have followed prior impasse awards, but some have not. *See Licensed Practical Nurses and Technicians of New York, L. 721, SEIU*, I-218-94, at 16 (disagreeing with a prior impasse panel); *CEU, Local 237, IBT & NYCHA*, I-188-86, at 14 (rejecting the argument that it was bound by the legal and factual findings of a prior impasse panel).

Further, it is well established that "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, *affd. sub nom., Matter of Deposit Cent. School Dist. v. Pub. Empl. Relations Bd*., 27 PERB ¶ 7017 (Sup. Ct. Delaware Co. 1994) (Mugglin, J.), *affd*., 214 A.D.2d 288 (3d Dept 1995), *lv dismissed and denied*, 88 N.Y.2d 866 (1996); *see also Local 3, IBT*, 43 OCB 10, at 8 (BCB 1989) (noting that "[w]hile the NYCCBL sanctions comparability bargaining, the parties are under no obligation under that statute to arrive at an agreement based on comparability with another bargaining unit"). In considering whether the parties have bargained in bad faith, this Board "evaluat[es] the 'totality of a party's conduct.'" *LEEBA*, 2 OCB2d 29, at 8-9 (BCB 2009) (quoting *Glomac Plastics, Inc. v. Natl. Labor Relations Bd*., 592 F.2d 94, 98 (2d Cir. 1979)). As this Board previously explained, "[A]damant insistence on a bargaining position is not in and of itself a refusal to bargain in good faith …" *CWA, L. 1180*,

[4] NYCCBL § 12-311(c)(3)(b)(i) provides that an impasse panel shall consider "comparison of the wages, hours, fringe benefits, conditions and characteristics of employment of the public employees involved in the impasse proceeding with the wages, hours, fringe benefits, conditions and characteristics of employment of other employees performing similar work and other employees generally in public or private employment in New York City or comparable communities."

6 OCB2d 30, at 10 (BCB 2013)).

Here, we find that the City did not violate the NYCCBL by adhering to its bargaining position after the declaration of impasse. Adherence to prior positions at impasse is common and insufficient to establish bad faith. *See, e.g.*, *Uniformed Forces Coalition*, 35 OCB 11, at 25 (BCB 1985), *affd. sub nom. Matter of Uniformed Forces Coalition v. Office of Collective Bargaining*, No. 10330/85 (Sup. Ct. N.Y. Co. Apr. 2, 1986) (noting that post-impasse the parties "remained firmly fixed in their positions, particularly on the size of an overall economic package").

Accordingly, the Union's petition is dismissed.

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 Law Enforcement Employees Benevolent Association against the City of New York, docketed as BCB-4439-21, is hereby dismissed.

Dated: February 9, 2022
New York, New York

SUSAN J. PANEPENTO
CHAIR

M. DAVID ZURNDORFER
MEMBER

PAMELA S. SILVERBLATT
MEMBER

CHARLES G. MOERDLER
MEMBER

PETER PEPPER
MEMBER