

**Local 621 SEIU, 15 OCB2d 23 (BCB 2022)**  
(Docket No. I-275-22)

**Summary of Decision:** The Union appealed the Report and Recommendations of an Impasse Panel regarding a dispute with the City over the salary range of Executive Director of Fleet Operations (FD) and Supervisor of Mechanics (Mechanical Equipment) Level III. The Union argued that the Impasse Panel erred in failing to properly consider the nature and duties of the two titles, did not give sufficient weight to the case law cited by the Union, and overemphasized the availability of compensatory time. As a result, the Panel improperly designated the titles as 35-hour positions. The City contended that the Panel properly considered the evidence, testimony, and arguments of the parties, and issued a report that is supported by the record and complies with the criteria set forth in the NYCCBL. The Board affirmed the Report in its entirety and declined to hear oral argument. *(Official decision follows.)*

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**OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING**

**In the Matter of Impasse**

*-between-*

**LOCAL 621, SERVICE EMPLOYEES  
INTERNATIONAL UNION,**

*Petitioner,*

*- and -*

**THE CITY OF NEW YORK,**

*Respondent.*

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**DECISION AND ORDER**

On March 23, 2022, Local 621, Service Employees International Union (“Union”) appealed the report and recommendations (“Report”) of a one-member Impasse Panel (“Panel”) regarding a dispute with the City of New York (“City”) over the salary rates for two new bargaining unit positions: a new title, Executive Director of Fleet Operations (FD) (“Executive

Director”), in the New York City Fire Department (“FDNY”) and the newly established Level III of the existing title of Supervisor of Mechanics (Mechanical Equipment) (“SMME Level III”) at the Department of Transportation (“DOT”). On appeal, the Union argues that the Panel erred by deeming these two titles to be 35-hour rather than 40-hour positions and further compounded this error by calculating the proposed salary range for these titles based upon a 35-hour work week. The Union argues that the Panel’s determination that the work week for these two titles should remain 35 hours is unsupported by the record because the Panel failed to properly consider that the Executive Director and SMME Level III work more than 40 hours per week, that nearly all their subordinates work 40 hours per week, and that the Panel improperly weighed the applicable precedent concerning the accretion of managerial titles and overemphasized the availability of compensatory time. The City contends that the Union has failed to articulate a basis for the Board to reject the conclusions of the Panel and that the instant petition is merely an attempt to relitigate the issue, presenting the same arguments the Union put forth during the impasse proceeding. The City further argues that the Panel soundly rejected these arguments and that the Report is based on the substantial record. The Board upholds the Panel’s Report in its entirety.<sup>1</sup>

### **BACKGROUND**

The Union and the City are parties to a unit collective bargaining agreement that is in *status quo* pursuant to NYCCBL § 12-311(d) of the New York City Collective Bargaining Law

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<sup>1</sup> The Union’s requested Oral Argument on March 23, 2022. The request was denied by the Board pursuant to § 1-05(m)(5) of the Rules of the Office of Collective Bargaining (Rules of the City of New York, Title 61, Chapter 1) (“OCB Rules”) on June 1, 2022.

(New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”). In addition, the Citywide Agreement is also applicable to the bargaining unit and the two titles at issue.

Prior to 2019, Mark Aronberg and Eric Dorcean were unrepresented and part of the City’s managerial pay plan. In 2019, the Union filed petitions with the Board of Certification (“BOC”) seeking to represent the titles of Executive Program Specialist (DOT) and Assistant Commissioner (FDNY). The City and the Union executed stipulations of settlement in 2020 that led to the creation of the SMME Level III and the new Executive Director title. As a result of the settlements, Dorcean became a SMME Level III at DOT and Aronberg assumed the Executive Director title, with neither employee subject to any reduction in salary. The settlements provided that the titles’ salary ranges would be determined through collective bargaining.<sup>2</sup>

The parties held six collective bargaining sessions between August and November 2020 but were unable to agree on the salary rates for the titles.<sup>3</sup> On November 19, 2020, the Union filed a Request for Appointment of Impasse Panel with the Office of Collective Bargaining. On March 1, 2021, Sandra J. Meckler was appointed as the Impasse Panel Arbitrator to make a Report on the disputed issues. The parties submitted a Joint Stipulation of Fact and pre-hearing memoranda to the Panel on May 5, 2021. The parties appeared before the Panel by videoconference on June 8, June 17, July 13, and August 17, 2021, presented evidence and

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<sup>2</sup> We utilize “titles” to refer to both the SMME assignment Level III and Executive Director positions for ease of reading.

<sup>3</sup> Prior to the impasse proceeding, the parties stipulated on February 14 and June 8, 2020, that a single salary range would apply to both titles.

witness testimony, and were given a full opportunity for cross-examination. On December 8, 2021, the parties submitted legal memoranda in support of their positions. At the request of the Panel, the parties supplied supplemental information and evidence on January 14, 21, and 24, 2022, at which time the record was closed.

During the impasse proceeding, the Union argued that both titles should be recognized as 40-hour titles in part because both Aronberg and Dorcean (“incumbents”) perform highly complex jobs and must regularly work more than 40 hours per week to perform their duties. The City argued that the titles at issue are high-level managerial positions that have traditionally been 35-hour week positions. On or about January 31, 2022, the Panel issued its Report, recommending in relevant part that the salary range for the new titles should not be based on “a conversion of the current pay of Dorcean and Aronberg to a 40-hour work week.” (Report at 28) Accordingly, the Panel recommended that “[t]he salary for the FDNY Executive Director civil service title and the Supervisor of Mechanics (Mechanical Equipment) Level III civil service title shall have a minimum salary of \$171,137 and a maximum salary of \$198,472.” (*Id.* at 35)

On February 28, 2022, pursuant to NYCCBL § 12-311(3)(c)(e), the Union rejected the Report. On March 23, 2022, the Union filed the instant appeal in accordance with NYCCBL § 12-311(4)(a) and OCB Rule § 1- 05(m)(2).

### **POSITIONS OF THE PARTIES**

#### **Union’s Position**

The Union filed the instant appeal of the Report because it alleges that the Panel did not give proper weight to the relevant facts and that the record does not support the conclusion that a

35-hour week was appropriate.

The Union alleges that the Panel failed to properly consider the nature and duties of the two titles. First, the Union argues that the Panel did not give enough weight to the undisputed fact that both the SMME Level III and Executive Director routinely work more than 40 hours per week. Indeed, if either incumbent insisted on working only a maximum of 35 hours per week it would cause serious safety concerns for the City. The Union, relying on Aronberg's testimony, points to the 24-hour nature of the duties of the Executive Director as well as the fact that Aronberg routinely reports in person to the scenes of ongoing emergencies as evidence of the critical nature of his job. The Union notes that Aronberg's testimony that he works 62-63 hours per week was un rebutted, and therefore it must be accepted as true.

Second, the Union argues that "virtually all" of the direct and indirect subordinates of the incumbents work 40 hours per week and that it is "irrational" to designate these titles to be 35 hours per week in contrast to the majority of their subordinates. (Pet. ¶ 8D) It points to the fact that 90% of Aronberg's direct and indirect subordinates are 40-hour per week employees. The Union maintains that the 20 administrative staff working a 35-hour week that Aronberg directly oversees are the exception. In addition, the Union avers that since the creation of the SMME title in 1988, every SMME employee works a 40-hour week, except for Dorcean. The Union asserts that compared to SMME Levels I and II, the new Level III necessarily supervises far larger numbers of fleets of vehicles and employees. As Local 621 President Chiaramonte testified, it is "plainly irrational" for a SMME Level II to have a 40-hour week while, by contrast, SMME Level IIIs have a 35-hour week title despite supervising a larger number of employees and managing a larger budget. (Union Memo at 14; Tr. 273) The Union reasons that

if a 40-hour week employee is needed to oversee a smaller fleet, it is “ridiculous” to have larger fleets be overseen by 35-hour week employees. (Union Memo at 14)

The Union next argues that the Panel improperly weighed the applicable precedent concerning the accretion of managerial titles. Specifically, it contends that the “Panel has [not] provided a coherent explanation” as to why it did not follow the previous practice of converting titles newly-accreted to Local 621 from 35-hour to 40-hour work weeks following arbitration because they worked more than 35 hours per week.<sup>4</sup> (*Id.* at 15) The Union asserts that this history shows that whether or not a title is deemed “managerial” is not the dispositive factor. Instead, the Panel should have focused on the actual hours per week that the incumbents work. Further, the Union claims that the Panel incorrectly determined that the job duties of the incumbents have not changed since their accretion. According to the Union, “the history of the Deputy Director and ADFM titles, and the eventual replacement of the latter by the 40-hour Level II in the SMME title, is a decisive precedent” and that the Panel’s finding to the contrary is a “bizarre exception.” (*Id.* at 19-20)

The Union avers that the Panel’s reliance on the impasse report and recommendations in I-262-14 is “entirely misplaced.”<sup>5</sup> (*Id.* at 20) In that case, the titles at issue had been recognized as 35-hour titles for decades. By contrast, the Executive Director title was created in 2020, and SMME Level III has had a 40-hour work week for over 30 years. Therefore, it argues that the

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<sup>4</sup> These instances concerned the titles of Deputy Director of Motor Equipment Maintenance (Sanitation) (“Deputy Director”) and Administrative Director of Fleet Maintenance (“ADFM”).

<sup>5</sup> In I-262-14, the Panel refused to convert the titles of Director of Motor Transport (Police Department) and Director of Motor Equipment Maintenance (Sanitation) to 40 hours per week because the level of service provided by either title was a matter of management discretion.

titles in I-262-14 cannot be compared to the titles at issue here, because “[b]oth of the Titles in issue in this proceeding involve supervision of large fleets (not a single boro-shop as in the current case of Mr. Rasmussen) and at least 100 subordinates.” (Union Memo at 23)

Finally, the Union asserts that the Panel erred when it considered the availability of compensatory time for the new titles because “compensatory time provides no meaningful additional compensations . . . .” (*Id.*) For the above reasons, the Union concludes that the titles at issue should have been found to be 40 hours per week. The Panel erred in determining that a 35-hour work week was appropriate and, as a result, proposed an insufficient salary range. The Union asks the Board to remand the case to the Arbitrator to find that the incumbents’ titles work 40 hours per week and adjust the proposed salary range accordingly.

### **City’s Position**

The City contends that the Panel properly considered the evidence, testimony, and arguments of the parties and issued a Report that is supported by the record and complies with the impasse criteria set forth in the NYCCBL. The City also argues that the Union’s appeal does not meet the statutory requirements of NYCCBL § 12-311(c)(4)(b) and fails to satisfy the Board’s standard for review. Therefore, the City asserts that the appeal must be dismissed.

The City claims that the Union’s petition simply reiterates the arguments it made to the Panel, each of which were fully addressed in the Report upon consideration of a substantial record. Specifically, it asserts that “[t]his appeal does not identify errors of law or of fact that would merit the Board’s consideration but instead presents little more than Petitioner’s disagreement with the Panel’s conclusions while seeking one more chance at persuasion.” (Ans.

at 4-5) The City notes that the Union does not allege that the Panel's Report is tainted by fraud or bias, nor does it challenge the impartiality of the Panel Arbitrator. Therefore, the question before the Board is limited to "whether the record provides substantial support for the Report and Recommendation and whether the Report's conclusions have a 'plausible basis,' or whether those conclusions are flawed by material and essential errors of fact and/or law." (*Id.* at 5-6)

First, the City argues that the Union misstates the record with respect to the nature of the assignments at issue. The City notes that the Union's appeal deliberately conflates the terms "title," which refers to an employee's job assignment, with the term "position" which refers to an employee's civil service status. Despite the creation of a new title, the City argues that the Panel properly acknowledged that both incumbents continued to perform the same work and that their substantive responsibilities remained the same. The Panel considered the alleged changes to each title that occurred were due to COVID and rightfully determined that the record did not establish any significant change to the duties of either title.

Second, the City asserts that the Union fails to provide a basis for rejecting the Panel's conclusion that the work week of the incumbents should remain 35 hours. The Union's attempt to distinguish I-262-14 is not persuasive, and the Panel rightfully determined that the substantial evidence showed "that both employees competently performed their substantively unchanged executive duties with a 35-hour workweek both before and after union representation." (Report at 27-28)

Third, the City claims that the Union's reliance on the fact that the incumbents both supervise many SMMEs who work 40 hours per week bears no consideration because "the



record shows that Dorcean and Aronberg do not directly supervise shop-level trade positions and continue to perform managerial duties notwithstanding their represented status.” (Ans. at 8) The Panel correctly acknowledged that the new SMME Level III “provide(s) effective high-level supervisory oversight without the necessity of a workweek identical to their subordinates.” (Report at 25)

Finally, the City argues that the Report and record demonstrate that the Panel engaged in a comprehensive analysis of the salary range for the SMME Level III and Executive Director and did not err in considering compensatory time, a benefit that neither incumbent received prior to being represented. In sum, the City argues that the Union’s appeal repeats the same arguments that were soundly considered and rejected by the Panel and has provided no basis for challenging the Panel’s Report. The conclusions in the Report are based on objective and impartial considerations of the entire record. Therefore, the City maintains that the Board should uphold the Report as final and binding.

### **DISCUSSION**

Pursuant to NYCCBL § 12-311(c)(4)(b), where the report and recommendations of an impasse panel is appealed to this Board, our review is “based upon the record and evidence made and produced before the impasse panel, shall include an examination of whether the panel’s recommendations take into account the standards for determination of wages, hours and working conditions prescribed by NYCCBL § 12-311(c)(3)(b)” and shall consider any issues “of conformity of the recommendation with any law or regulation properly governing the conduct of collective bargaining between the City and its employees.” *UFA*, 51 OCB 19, at 10 (BCB 1993).

NYCCBL § 12-311(c)(3)(b) sets forth the factors that an impasse panel shall consider, and provides that it:

[S]hall consider wherever relevant the following standards in making its recommendations for terms of settlement:

- (i) 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;
- (ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;
- (iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;
- (iv) the interest and welfare of the public;
- (v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

“[N]o fixed value or weight, [however] is prescribed for any of these criteria to be applied equally in all cases.” *DC 37, 4 OCB2d 29, at 9* (BCB 2011) (quoting *CSBA, 11 OCB 4, at 7-8* (BCB 1973)) (internal quotations omitted). Further, an impasse panel “is free to apply the criteria as circumstances require to the exigencies of each particular case.” *DC 37, 4 OCB2d 29, at 9* (quoting *PBA, 17 OCB 12, at 6* (BCB 1976)) (internal quotations omitted). Therefore, the Board’s function in this proceeding is limited to deciding “whether the parties have been afforded a

fair hearing and whether the record provides substantial support for the result reached by the impasse panel.” *DC 37, 4 OCB2d 29*, at 9 (quoting *PBA*, 17 OCB 12, at 6) (internal quotations omitted). The Board’s review shall not substitute its own judgment in determining the facts or adjudicating the merits for that of the impasse panel. *DC 37, 4 OCB2d 29*, at 9-10, quoting *UFA*, 37 OCB 11, at 6 (BCB 1986) (“[I]t need only appear from the decision of the arbitrators that the criteria specified in the statute were ‘considered’ in good faith and that the resulting award has a ‘plausible basis.’”) (citations omitted). Thus, an impasse report and recommendations shall be upheld “unless it can be shown that the Report and Recommendations were not based on objective and impartial consideration of the entire record, and unless clear evidence is presented on appeal either that the proceedings have been tainted by fraud or bias or that the Report and Recommendations are patently inconsistent with the evidence or that on its face it is flawed by material and essential errors of fact and/or law.” *UFA*, 51 OCB 19 at 11-12 (quoting *Podiatry Soc. of NYS*, 9 OCB 23, at 8 (BCB 1972)); *see also Caso*, 41 N.Y.3d at 158 (Because the “essential function of compulsory arbitration panels is to ‘write collective bargaining agreements for the parties,’ [i]t follows that such awards, on judicial review, are to be measured according to whether they are rational or arbitrary and capricious.”) (citing *Mount St. Mary’s Hosp. v. Catherwood*, 26 N.Y.2d 493, 503 (1970)).

Here, the Union alleges several grounds on which the Board should modify the Report to find that the titles of Executive Director and SMME Level III should have 40-hour work weeks and remand the Report to the Panel to increase the recommended salary range accordingly. Notably, the appeal does not allege that the proceedings were tainted by fraud or bias.

Therefore, our review is confined to determining if the finding of a 35-hour work week is patently inconsistent with the evidence or flawed by material and essential errors of fact and/or law. *See UFA*, 51 OCB at 19, 11-12. Using the above standards of review, we now consider each of the Union's objections to the Report.

The Union's first claim alleges that the Panel erred when it did not find that titles at issue are in fact 40-hour work week titles because the undisputed testimony of the incumbents concerning their job duties shows that they routinely work more than 40 hours per week. However, the record reflects that the Panel considered this evidence and rejected the Union's argument that 40 hours was the appropriate length of the work week for either title. The Panel duly considered this claim by evaluating the testimony of the relevant witnesses and exhibits concerning job duties and work week of the titles both before and after union representation. The Report makes clear that the evidence cited by the Union in support of its position was considered. Specifically, the Panel noted that "[b]oth Mr. Dorcean and Mr. Aronberg successfully served in their critical roles as 35-hour managerial employees before union representation." (Report at 25) Further, the Panel recognized that despite being 35-hour positions, "both employees perform important work that often extends beyond a 35-hour schedule." (*Id.*) After weighing the evidence in the record, the Panel observed that "[f]urthermore, as both parties point out, a change to the length of a work week is, of course, subject to future collective bargaining." (Report at 27) In evaluating the duties of each title, the Panel also examined evidence in support of the Union's claim that both incumbents had accumulated new job duties in the light of the COVID pandemic. The Panel concluded that "[w]ith the exception of various compliance and staffing issues due to the Covid pandemic, the record does not establish any significant change to the duties of either [title]." (*Id.* at 25) The Panel further noted,

“[w]hile the titles may be new, the positions to which they are applied are not.” (*Id.* at 24) Therefore, “although the Union disagrees with the Panel’s conclusions, we find that the Report reflects an objective and impartial consideration of the record and that there was no essential error of law or fact.” *DC 37*, 4 OCB2d 29, at 11 (citations omitted). The Panel rationally concluded with a sufficient degree of specificity that the work week for the titles should remain 35 hours, and we affirm that this conclusion was neither arbitrary nor capricious. *See Mount St. Mary’s Hosp.*, 26 N.Y.2d 493, 503.

Second, the Union argues that the Panel failed to accord proper weight to the history of the SMME title in its determination of the length of the work week. The Union notes that all other levels of the SMME title work 40 hours per week dating back to the time the title was created and, further, that the “overwhelming majority of the employees supervised by SMMEs are 40-hour employees in trades’ titles.” (Union Memo at 12-13) Moreover, since Level III is responsible for supervising a much larger group of employees and equipment than other SMMEs, “if a 40-hour employee is needed to oversee small fleets, it would be ridiculous to have larger fleets overseen by 35-hour employees.” (*Id.* at 14) Again, the record reflects that the Union raised these same facts and arguments before the Panel. The Panel considered the evidence in light of Civil Service Law § 201.7(a), including the incumbents’ respective job duties and histories, the job specification of SMME Level III, and a list of formerly managerial titles that retained a 35-hour work week post-accretion while still supervising 40-hour subordinates.<sup>6</sup> The Panel found “[t]he persuasive testimony and evidence in the record indicates,

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<sup>6</sup> Civil Service Law Section 201.7(a) states, in relevant part: “Employees may be designated as

however, that many City employees with 35-hour schedules, both managerial and represented, are supervisors for subordinates with 40-hour schedules.” (Report at 26-27) Thus, we find there was substantial support for the Panel’s conclusion.

The Union further contends that the Panel disregarded the history of how the Deputy Director and ADFM titles accreted to Local 621’s bargaining unit were converted to 40-hour work weeks. However, the Panel expressly considered the two titles in the light of other cases of formerly managerial titles post-accretion that were raised by both parties. The Union claims that the Panel erred in according precedential value to the impasse report and recommendations in I-262-14, because the titles at issue in that case were long-standing and bear little similarity to those at issue here. After considering the facts and circumstances of the cases cited by either party, the Panel credited “the evidence showing that both employees competently performed their substantially unchanged executive duties with a 35-hour workweek both before and after union representation.” (Report at 27-28) The Union argued that the titles at issue here can be distinguished from those in I-262-14 because those titles had long been deemed to be 35-hours. The Panel rejected the Union’s argument and found that despite the novel nature of the titles at issue here, the jobs performed by those titles were not new. As a result, the record shows that the Panel reasonably considered and evaluated the evidence of formerly managerial titles post-accretion. While the Panel may have found the facts in the instances cited by the City to be more applicable to the

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managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.”

titles in issue than those cited by the Union, we do not find this conclusion to be erroneous as a matter of law. *See UFA*, 51 OCB 19, at 11 (Board will not substitute its own judgment for that of the impasse panel).

Last, the Union argues that the Panel incorrectly relied upon the ability of both these positions to accrue compensatory time because compensatory time provides no meaningful compensations for either incumbent. In examining the relevance of the availability of compensatory time, the Panel noted that “[a]lthough the Union argues that compensatory time insufficiently compensates the employees here, this contractual term nevertheless provides an additional negotiated benefit post-accretion for the same duties that they previously had performed as managers outside of collective bargaining.” (Report at 26) The Report demonstrates that the Panel heard and considered the Union’s argument on this fact, and thus we cannot find that the Panel’s conclusion that compensatory time provides an additional benefit for the titles was irrational.<sup>7</sup>

Finally, we also note that the Report duly considers the standards for determination of wages, hours, and working conditions prescribed by NYCCBL § 12-311(c)(3)(b). Thus, the Report discusses and evaluates fully the proposals and contentions of both parties and gives a

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<sup>7</sup> Our Union colleagues dissent, arguing that the Panel accorded too much weight to the at-issue titles' compensatory time accrual in light of their practical inability to use it, and the lack of a “focused discussion” of the impact on public safety were these employees to use compensatory time at the rate it was earned. (Dissent at 9) The Panel acknowledged and considered these arguments, and recognized the “critical nature” of these positions, and we find the Panel's determination was not flawed by material errors of fact or law. (Award at 24, 25) The dissent's view that the Award lacks a focused discussion is not a basis to vacate. Moreover, we note that the issue of compensatory time usage or remuneration was not presented to the Panel as matter for determination at impasse, only the designation of the number of hours in the workweek.

detailed rationale for each finding made, including a discussion of the weight given to the arguments of the parties on each point in dispute. *See PBA*, 17 OCB 12. The Union's appeal does not raise any facts or argument that were not put before and considered by the Panel in reaching its report and recommendations. Accordingly, we find that the Panel met the standard set forth in NYCCBL § 12-311(c)(3)(b) and that the Report conforms with any law or regulation properly governing the conduct of collective bargaining between the City and its employees. *See UFA*, 51 OCB 19, at 10.



**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 appeal of Local 621 Service Employees International Union be, and the same hereby is, denied; and it is further

ORDERED, that the Report and Recommendation of the Impasse Panel, a copy of which is annexed hereto and made a part hereof, and the same hereby is, affirmed.

Dated: August 3, 2022  
New York, New York

SUSAN J. PANEPENTO  
CHAIR

ALAN R. VIANI  
MEMBER

M. DAVID ZURNDORFER  
MEMBER

CAROLE O'BLENES  
MEMBER

I dissent (see attached dissent)

CHARLES MOERDLER  
MEMBER

I dissent (see attached dissent)

PETER PEPPER  
MEMBER

***Local 621 SEIU, 15 OCB2d 23 (BCB 2022)***

(Docket No. I-275-22)

**Dissenting Opinion of Charles G. Moerdler and Peter Pepper****Introduction**

This proceeding provides one answer to a question posed from time to time by New York City taxpayers: “Why do some civil servants occasionally show less initiative or willingness to work overtime than those in the private sector?” As this proceeding aptly demonstrates, one answer is that City government all too often takes undue advantage of those who show initiative and generously give of their time and labors, thereby discouraging those very attributes. And the irony here is that this proceeding does not involve the usual victims-- laborers and clerks. (the backbone Civil Service) -- but, to cite the Majority Opinion, persons who “... perform highly complex jobs and must regularly work more than 40 hours per week to perform their duties.” (Majority Op. p. 4)<sup>1</sup>

Mark Aronberg provides a stark illustration. He is the New York City Fire Department's Executive Director of Fleet Operations.<sup>2</sup> Mr. Aronberg is responsible for all aspects of FDNY fleet management, including (since 1996) the Emergency Medical Services division.<sup>3</sup> As the Impasse Panel report summarizes:

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<sup>1</sup> This dissent is drawn from the Record, as noted herein, and pertinent factual matter stated in the Report of the of the Impasse Panel, dated January 31, 2022 ("Panel Report"). While this dissent takes issue with the conclusions drawn by the majority from the Record, it does not disagree with many of the pertinent factual recitation summarized in the majority opinion. However, as noted herein, the Impasse Panel Report (and the majority opinion) omitted to consider, at least in focused context, material facts, a fatal error in our view. We will herein focus thereon since, in our view, that omission and error makes unnecessary further discussion, for, in and of themselves, the errors discussed herein mandate reversal.

<sup>2</sup> Prior to the Civil Service reclassification discussed in the majority opinion, Mr. Aronberg was an Assistant Commissioner of the FDNY, apparently having essentially similar responsibilities.

<sup>3</sup> The other individual directly involved herein is Eric Dorcean, the Supervisor of Mechanics (Mechanical Equipment)("SMME"), Level III at the Department of Transportation, whose claims are essentially the same as Mr. Aronberg. For convenience and in the interests of comparative brevity, this dissent and the conclusions here drawn

“He directs the maintenance and repair of all FDNY vehicles [including every piece of equipment that responds to every fire alarm in the City and every municipal ambulance that rushes to save the lives of New Yorkers], manages a capital budget of \$150,000,000 to \$200,000,000, and leads the Department's response at all major emergencies. [Un. Ex. 9] With the exception of a small number of administrative employees, Mr. Aronberg's subordinates are 40-hour employees, including all of the of the SMMEW Level I and Level II employees he supervises. In contrast to the City's claim that his job is a 35-hour position, *Alr. Aronberg averages 62 to 63 hours per week.* [Tr. 228-229].” Panel Report 7.<sup>4</sup>

The above italicized conclusion, which was confirmed on audit, aptly frames the issue-the Respondent City wants to pay Mr. Aronberg for a 35 hour work week when audit and un rebutted testimony shows he on average works 62-63 hours per week. He thus receives no cash payment for some 44% of his labors. Instead, the City merely holds out the promise of compensatory time for the balance. However, because of inevitable accumulation and attendant requirements for or limitations upon use (while in service and on retirement), that illusion is deceptive, as shown in quoted testimony by present and former knowledgeable City officials.<sup>5</sup>

One searches in vain the Report of the Impasse Panelist for focused discussion of what should have been an obvious touchstone consideration in fairly determining the

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focus on Mr. Aronberg individually and as illustrative of the issues here presented. However, the discussion herein and the conclusions presented apply with equal force to Mr. Dorcean. The Impasse Panel found that “[t]he salary for the FDNY Executive Director civil title [here, Mark Aronberg] and the Supervisor of Mechanics (Mechanical Equipment) Level III [here held by Eric Dorcean] shall have a minimum salary of \$171,137 and a maximum salary of \$198,472” Panel Report at 33.

<sup>4</sup> Union Exhibit 9, cited in the above quotation from the Impasse Panel Report, is an Appendix hereto. It is, significantly, Mr. Aronberg's job description, as subsequently more fully discussed.

<sup>5</sup> While the additional 5-hours per week of paid time explicitly at issue will only partially solve the problem of diminished value, it is, at least, some tangible recognition of important and compensable labors and in accord with the record and applicable law.

compensation to be received under a new contract.<sup>6</sup> The record is crystal clear through the testimony not just of Mr. Aronberg but relevant past and present City officials (Howard Green and Commissioner Pollack) that the vast compensable time accumulated and to be accrued in the discharge of Mr. Aronberg's duties does not equate fairly and such time simply cannot be taken during Mr. Aronberg's service without crippling emergency services. And where that concern pertains to the efficiency and delivery of emergency services, where life and limb are constantly at stake, the failure to seriously consider the subject is incomprehensible. That void in consideration and determination of itself renders the Report irrational, arbitrary and capricious, inconsistent with the evidence and fatally flawed by material and essential error.<sup>7</sup> Accordingly, we need not address (though merited) the numerous other challenges to the Report and Impasse award here presented; for, reversal is mandated simply on the grounds herein stated.<sup>8</sup> We therefor dissent from the Majority Opinion, which, like the Impasse Panel Report fails, to appropriately address the touchstone compensatory time issue.<sup>9</sup>

### **Jurisdiction-Standard of Review**

Jurisdiction to review and reverse was aptly noted by the majority's observation that the Panel Report and Recommendation may be upheld "... unless it can be shown [and that is the case here] that the Report and Recommendations are patently inconsistent with the

<sup>6</sup> The Impasse Report in its summary of the testimony given acknowledges Mr. Aronberg's testimony concerning hours worked but leaves the issue at that. Impasse Report, pp. 12-13.

<sup>7</sup> NYCCBL § 12-311 (c)(3)(b) commands that among other considerations an Impasse Panel shall consider "(ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct compensation, overtime ... pay ... and all other benefits received." Subdivision (iv) also mandates consideration of the "the interest and welfare of the public." In the final analysis, that is what the cited critical omission fails to adequately address.

<sup>8</sup> It is troublesome that in setting the terms of a *new contract*, the Impact Panelist implies that because Messrs. Aronberg and Dorcean "competently performed" their tasks under previous contractual arrangements that suffered payment at a reduced rate (i.e. payment in cash for 62 hours of actual work but based on a presumed and artificially capped 35-hour work week) that inequity should be perpetuated. See Impact Report. 27-28. Similarly unacceptable is the notion that, because such inequity (presumably including the reduction in actual value of compensable time (as confirmed by the testimony of past and present City officials and discussed at *infra pp.* 7-8) has existed for some time and is spread across other civil service titles, it should be continued. E.g., Impasse Report at 28-29; see also the opening paragraph of this dissent.

<sup>9</sup> The majority declined Petitioners' request for oral argument, though the calendar was moderate.

evidence...,” or “it is flawed by material and essential errors of fact and/or law”, citing *UFA*, 51 OCB 19 at 11-12 (quoting *Podiatry Soc. Of NYS*, 9 OCB 23 at 8 (BCB 1972) and referencing *Mount St. Mary's Hosp. v. Catherwood*, 26 N.Y. 2d 493,503 (1970) and its invocation of the time-tested standard as to whether the decision was “rational or arbitrary and capricious.”

In the opinion of the undersigned, application of any of the foregoing standards mandates reversal and we therefor dissent and urge judicial reversal as a matter of law and fact and in the public interest.

Parenthetically, this proceeding calls into question a policy issue beyond our authority to fully resolve: the essential fairness of compensatory time when left, as here, without a fairly measured opportunity to elect full monetization or other meaningful redemption facility prior to or upon retirement.

#### DISCUSSION

At least at the time of the hearing herein, the City had not issued a job description for the Title of FDNY Executive Director. The title appears to have been created in 2020 (Tr. 19) and Mr. Aronberg is the only person to have held that position. (Tr. 22). Mr. Aronberg thus was asked to create the title's job description and, hence, responsibilities (Tr 23. See, Appendix A). In brief outline, the following summarizes pertinent record facts:

- Because the FDNY is necessarily a 24-hour 7-day a week, year-round operation, both as to the emergency services provided by traditional FDNY fire and rescue services and by Ambulances, Mr. Aronberg's duties can necessitate around-the clock attention (see, Tr.202, 221-222, 2270233);
- Over 90% of Mr. Aronberg's subordinate employees are 40-hour employees (see, Tr. 227);
- Mr. Aronberg's job includes on-site attendance at least at significant fires or other emergencies where large numbers of equipment are required (see Tr. 332-222);
- Mr. Aronberg is on the scene for all three-alarm or greater fires, building collapses, and/or mass-casualty incidents. (See Tr. 222);
- Since he has assumed his current title, Mr. Aronberg has continued to work 62-63 hours per week. (See Tr. 228-229);
- If the *unit* under Mr. Aronberg's jurisdiction does not maintain an adequate fleet at major emergencies, people will die. (See Tr. 230-

231);

- Mr. Aronberg's FDNY superiors did their own study which confirmed that Aronberg works 62-63 hours per week. (*See* Tr. 232-233). They do not think that it makes sense that Aronberg is not a 40-hour employee. *See* Tr. 233.
- The City called no FDNY or other witnesses to respond to or contradict Mr. Aronberg's above-cited testimony.

The principle witness for the City, was Daniel Pollack, the First Deputy Commissioner of the Mayor's Office of Labor Relations and a primary “negotiator with municipal unions,” including Petitioner, Local 621. He testified that “from everything I understand” Mr. Aronberg (and Mr. Dorcean) are “great employees.” He further agreed that “they perform extremely important work for the City, for the Fire Department and the Department of Transportation.” (Tr. 417). Commissioner Pollack testified as follows with respect to Mr. Aronberg's work:

Q. Now, with regard to Mr. Aronberg, are you familiar with the kind of work he does?

**A. Yes. I understand he oversees the entire fleet operation at the fire Department.**

Q. That includes both the entire fire Fighting fleet, fire prevention and extinguishment, as well as the EMS fleet?

**A. Yes.**

Q. Very important fleets for the City right now, right?

**A. Yes, unbelievably important as are our emergency services[; they ... ] obviously are very important at all times, especially during the pandemic. . . (Tr. 468).<sup>10</sup>**

Howard Green, the former Senior Budget Bureau official for labor matters. He testified that as of over a year ago, June 2021, Mr. Aronberg had already accumulated in excess of 1300 hours of compensatory time based on his 62-63 week average work schedule (Tr. 356). There is nothing in this record to suggest that that work schedule lessened in the ensuing year. Mr. Green added that it was “very, highly unlikely that he [Mr. Aronberg] could get-receive his [accrued] compensation.” (Tr. 333). Indeed, as a practical matter, Mr. Green saw little chance that Mr. Aronberg could even use much of it during his pre-retirement career:

A. There is nothing to prevent him from using his time, assuming A. the agency gives him the time off; and B, the point I was making in this thing, he has so much - he earns so much

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<sup>10</sup> The forgoing corrections address an obvious typographical error.

comp time a week, is like he would be there for work five days, earn 28 hours of overtime, then would get four days off. I never saw a city employee, especially in a responsible position, the life-saving position, that could work five and get four days off. So I don't know practically how it's done. Theoretically, yes, you're right; practically, no, I don't agree. (Tr. 356)

First Deputy Office of Labor Relations Commissioner Pollack then made essentially the same diminished value point with respect to the use of compensatory time on retirement. Thus, he testified on cross-examination concerning the compensatory time accumulated by Mr. Aronberg (and its lessened cash value on retirement -- which Mr. Aronberg had testified (in 2021) could occur in three years) - stating that much of its value would likely be lost:

Q. I want to move to a different topic, if I may. Mr. Pollak, you referred to the compensatory time that would now be available to Mr. Aronberg and to Mr. Dorcean now that they are in a represented title, correct?

A. Yes.

Q. Now, and there's a formula that is used in which you determine what you're able to get, and there are certain maximums, at one point there was a one-to-two rule at one point there was a one-to-three rule than you talked about in your --

A. You are talking about upon retirement.

Q. I'm sorry. Yes, upon retirement.

A. Yes.

Q. And it would be fair to say, would it not, that in the case of Mr. Aronberg or Mr. Dorcean or anyone else in their circumstances, upon retirement, they may not get credit for all that time; they may not be able to take all that time, correct?

**A. They can accrue it for up to one year. If you have more than year accrued leave, whether it's annual leave, sick leave traded in, comp time or a combination, you can only take a year.** (Tr. 465-466) (Emphasis added).<sup>11</sup>

As noted at the outset, one searches the Impasse Panel Report in vain for any focused discussion of what should have been an obvious consideration in determining

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<sup>11</sup> By definition, compensatory time off does not comprehend monetary redemption in the ordinary course.

compensation, either on an aggregate basis or by setting the compensable hours fairly. And where that concern pertains to the efficiency and delivery of emergency service the failure even to consider the subject is incomprehensible. That void renders the Report irrational, arbitrary and capricious, inconsistent with the evidence and fatally flawed by material and essential errors, thereby according jurisdiction, although no jurisdictional challenge was timely or appropriately presented<sup>12</sup>

The above testimony buttresses the foregoing and compels the following intertwined conclusions.

### Conclusions

1. Mr. Aronberg is a prized City employee, doing an important, if not critical job, and doing it diligently, with the result that, on average he *works a 62-63 hour week* for which, in framing his contract in Impasse Proceedings, the City and the Impasse Panelist propose and the Majority of this Board agree, *to pay him as though he was only working a 35-hour week*. As for any added compensatory time he might be legally eligible to earn (i) its existence reflects the admission that he is entitled to compensation for his extra labors, (ii) he already had accumulated 1300 hours in the little over 1 year that he was in that title (i.e., by June of 2021), (iii) indisputably, there is no practical way he could currently (i.e., while in service) use a meaningful portion of that time, and (iv) on retirement much-if not most of it- would be lost. The testimony of the relevant past and present City officials (Commissioner Pollack and Howard Green) confirmed that conclusion in their testimony.
2. If Mr. Aronberg chose now to use whatever compensatory time he would be permitted to use, the public would be at considerable risk in that the critical supervisory work he concededly performs well in the most extreme emergencies, could not be accomplished on the basis of (a) 35 hours supervising people working well beyond that constraint or (b) working 5 days on and 4 days off. If he was required to defer such utilization until retirement, much of that illusory compensation for services rendered would be lost and that materially diminishes any value attributable thereto (but without any stated offset being provided).
3. The function of the proceedings below was to frame a contract that not just made sense to the City but was fair to its dedicated work force. Yet, there is no indication that the above undisputed testimony was factored into the Impasse Panel award. The public interest - the health, safety and welfare of New York City-may be (indeed, it

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<sup>12</sup> See fn. 7, *supra*. If a denigration of the efficiency and delivery of emergency services - which could, at least in theory result, if employees were to limit their service to that for which they are paid - this City would be in extremis. Hence the cited statutory mandate.

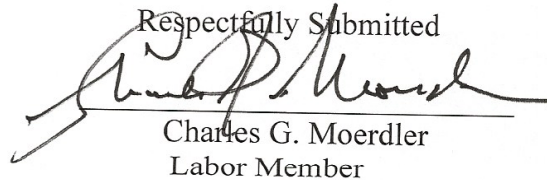


likely would be) adversely impacted by the evident denigration of the initiative and labors of employees that are implicated by the unjust circumstances here cited and which the Impasse Report omits to correct.

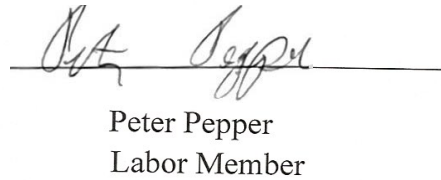
4. Thus posited, reversal and remand to appropriately increase the contract award is mandated.
5. This determination is intended by the undersigned to be retroactive and applicable to both Messrs. Aronberg and Dorcean as well as those similarly situated.

July 11, 2022

Respectfully Submitted



Charles G. Moerdler  
Labor Member



Peter Pepper  
Labor Member

## FDNY Executive Director of Fleet Operations – Responsibilities

Executive staff member of the largest and busiest fire department in the nation.

Responsible for all aspects of fleet management for the FDNY, which includes the following:

- Supervision of approximately 325 uniformed and civilian employees at eight facilities.
- Chairman of the FDNY Apparatus Specification Committee, which is responsible for developing specifications for all Department vehicles.
- Direct the design and purchase of all FDNY vehicles, automotive equipment, off road equipment, repair components and equipment.
- Direct the maintenance and repair of the Department's approximately 2,636 vehicles, comprised of fire apparatus, ambulances, specialty vehicles, chief's vehicles and support vehicles. The Fire Department's five repair shops are staffed by 275 automotive skilled trades and administrative members.
- Manage a Capital Budget of more than \$150-200 million and an Expense Budget of more than \$18 million annually.
- Represent the FDNY at the NYC-DCAS Fleet Federation.
- Initiate right-size vehicle fleet and manage fleet growth and reductions.
- Develop and maintain "Green Fleet" initiatives, including idle reduction and alternate fuel vehicles.
- Maintain Compliance regulations with DCAS and Mayoral Executive orders.
- Maintain the operation of the Agencies Fleet Facilities by ensuring that they are up to date and compliant with OSHA guidelines. Ensure that all facilities are up to date with the latest vehicle maintenance tools, scanners and computer hardware. Institute training and safety protocols for all staff.
- Lead the Agency's response to the Covid pandemic, with regards to vehicle disinfection and Fleet personnel PPE. Managed the full-time, in-person vehicle maintenance program as FDNY responded to 7,000+ EMS calls per day.
- Lead the Bureau's response at major emergencies/incidents, including multiple alarm fires, building collapses, manmade and natural disasters.

- **Represent the Fire Commissioner and Deputy Fire Commissioner as required. Meet with Agency leadership to ensure that the Fleet Services Division is ready to support the mission needs of the Uniformed members of the service in their Life Saving Response.**

NEW YORK CITY  
OFFICE OF COLLECTIVE BARGAINING  
BOARD OF COLLECTIVE BARGAINING

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In the Matter of the Impasse Proceeding

- between -

LOCAL 621, SERVICE EMPLOYEES  
INTERNATIONAL UNION,

Petitioner

OCB DOCKET #  
I-275-20

- and -

CITY OF NEW YORK,

Respondent

IMPASSE PANEL  
REPORT AND  
RECOMMENDATIONS

-----X

IMPASSE PANEL: Sandra J. Meckler, Esq.

APPEARANCES: FOR LOCAL 621, SERVICE EMPLOYEES INTERNATIONAL UNION:

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FOR THE CITY OF NEW YORK:

Les Morsillo, Esq.  
Senior Assistant General Counsel  
Office of the Mayor  
Office of Labor Relations

## **IMPASSE PANEL REPORT**

### **Procedural History**

On July 26, 2019, Local 621, Service Employees International Union (“Local 621” or “the Union”) filed a petition for Amendment of Certification with the Office of Collective Bargaining (“OCB”) seeking to add the title of Executive Program Specialist (“EPS”) at the New York City Department of Transportation (“DOT”) to its existing certification. On that same day, the Union also filed a petition for Amendment of Certification with OCB seeking to add the title of Assistant Commissioner at the Fire Department of New York (“FDNY”) to its certification.

Pursuant to a Stipulation of Settlement on February 14, 2020 with the City of New York (“the City”), the Union agreed to withdraw its petition and the City agreed to establish a new Level III in the existing title of Supervisor of Mechanics (Mechanical Equipment) (“SMME Level III”). The EPS at issue in the petition, Eric Dorcean, would be placed in the new title with no diminution in salary, with the ongoing salary rate for Level III employees to be addressed in collective bargaining.

On June 8, 2020, the parties entered into a similar settlement agreement stipulating that FDNY Assistant Commissioner Mark Aronberg would be placed in the newly created title of Executive Director of Fleet Operations with no reduction in salary. The salary rate for this title would also be the subject of bargaining with Local 621.

The parties held six collective bargaining sessions between August and November 2020, but were unable to agree on the salary rates for the SMME Level III and Executive Director titles. On November 19, 2020, the Union filed with OCB a Request for Appointment of Impasse Panel. On March 1, 2021, I was appointed as the Impasse Panel arbitrator to make a report and recommendations on the disputed issues. The parties on May 5, 2021 submitted a Joint Stipulation of Fact and pre-hearing memoranda to the Panel.

The parties appeared before me by videoconferencing on June 8, June 17, July 13, and August 17, 2021 to present evidence and offer witness testimony, with full opportunity for cross-examination. On December 8, 2021, the parties submitted legal memoranda in support of their positions. At the request of the Panel, the parties supplied supplemental information and evidence on January 14, 21, and 24, 2022, at which time the record was closed.

### **Background**

Since its formation in 1970, Local 621 has been the collective bargaining representative primarily for four supervisory titles involved in the repair and maintenance of motor vehicles and other mechanical equipment. In 1989, the City consolidated the four titles into the new title of SMME. This title initially had only one civil service level, with four assignment grades: Base pay SMME, Assistant Supervising Supervisor Class II (also known as Senior Supervisor), Assistant Supervising Supervisor Class I (also known as Assistant Chief), and Supervising Supervisor (also known as Chief). Until 1999, SMMEs had been prevailing rate employees covered by New York State Labor Law Section 220,

when the SMME title was reclassified as a Rule XI Career and Salary Plan title with coverage by the Citywide Collective Bargaining Agreement. The City currently employs approximately 180 employees in the SMME Level I title.

Over the course of the next few decades, several other civil service titles accreted to Local 621. In 1992, the Union filed petitions to represent the titles of Director of Motor Equipment Maintenance and Deputy Director of Motor Equipment Maintenance at the Department of Sanitation (“DOS”). The New York City Board of Certification (“BOC”) determined that the Deputy Director position did not qualify as a managerial title within the meaning of Section 201.7 (a) of the Taylor Law and Section 12-305 of the New York City Collective Bargaining Law and added the title to the Union’s certification of representation. The BOC, however, decided that the Director title met the statutory definition of a managerial employee and ruled that this title was ineligible for collective bargaining. [Local 621, SEIU, 50 OCB 7 (BOC 1992)] In 2015, citing changed circumstances, the Union again filed a petition to represent the DOS title of Director of Motor Equipment Maintenance. The BOC held at this time that the title was eligible for collective bargaining with the exception of the Deputy Commissioner for Support Services position, which the parties agreed was managerial. [Local 621, SEIU, 8 OCB2d 32 (BOC 2015)]

In response to Local 621’s representation petition, the BOC in 2006 also added the title of Administrative Director of Fleet Maintenance (“ADFM”) to the Union’s certification, with the exception of one employee who both parties agreed was managerial. [Local 621, SEIU, 78 OCB 2 (BOC 2006)] In December 2006, the City created the title of SMME Level II and began to phase out the ADFM title. There are currently approximately

ten SMME Level II employees working at the New York Police Department (“NYPD”), the Department of Environmental Protection (“DEP”), the DOT, and the FDNY. [Tr. 114]

In 2011, the BOC further amended Local 621’s certification to include the NYPD title of Director of Motor Transport (“DMT NYPD”). [Local 621, SEIU, 4 OCB2d 57 (BOC 2011)] One employee at NYPD currently holds this title.

The Union filed petitions in 2019 with the BOC seeking to represent the titles of Executive Program Specialist (DOT) and Assistant Commissioner (FDNY). The City and the Union entered into stipulations of settlement in 2020 that led to the creation of the titles of SMME Level III and Executive Director of Fleet Operations (FDNY). As a result of the settlements, Eric Dorcean became an SMME Level III at DOT and Mark Aronberg assumed the Executive Director title, with neither employee subject to any reduction in salary. The settlements provided for the titles’ salary ranges to be determined through collective bargaining, which led to the instant impasse proceeding after the parties’ unsuccessful negotiations. The parties agree, however, that a single salary range should apply to both titles.

### **New York City Collective Bargaining Law**

Pursuant to Section 12-311.c.(3)(b) of the New York City Collective Bargaining Law (“NYCCBL”), the Impasse Panel is required to consider wherever relevant the following standards in making its recommendations for the terms of settlement:

(i) 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;



(ii) the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

(iii) changes in the average consumer prices for goods and services, commonly known as the cost of living;

(iv) the interest and welfare of the public;

(v) such other factors as are normally and customarily considered in the determination of wages, hours, fringe benefits, and other working conditions in collective bargaining or in impasse panel proceedings.

### **The Union's Position**

Local 621 contends that based upon the statutory criteria set forth in NYCCBL Section 12-311, the salary ranges for the new titles of SMME Level III and Executive Director (FDNY) should be a minimum of \$204,210 and a maximum of \$226,825. This proposed range is based on a 40-hour workweek, in contrast to the 35-hour workweek advocated by the City.

Until the recent dispute with the creation of Level III, the SMME title had always been recognized as a 40-hour title. According to the Union, the City understood that the SMMEs' overall supervision of complex agency fleet operations was a 40-hour job because of the high level of monitoring required to oversee subordinates who also work 40-hour schedules. The City's attempt to now carve out an exception for Mr. Dorcean as a Level III with a 35-hour schedule not only defies logic since SMME II employees with fewer

subordinates are 40-hour employees, but it fails to fairly account for the highly complex nature of the duties performed.

In the Union's view, the Executive Director title held by Mr. Aronberg must also be considered a 40-hour position. Mr. Aronberg is responsible for all aspects of FDNY fleet management, which as of 1996 includes the division of Emergency Medical Services ("EMS"). He directs the maintenance and repair of all FDNY vehicles, manages a capital budget of \$150,000,000 to \$200,000,000, and leads the Department's response at all major emergencies. [Un. Ex. 9] With the exception of a small number of administrative employees, Mr. Aronberg's subordinates are 40-hour employees, including all of the SMME Level I and Level II employees he supervises. In contrast to the City's claim that his job is a 35-hour position, Mr. Aronberg averages 62 to 63 hours per week. [Tr. 228-229]

The Union also draws a comparison with Joseph Mastropietro who, like Mr. Aronberg, had been an FDNY Assistant Director. Mr. Mastropietro, until his retirement, supervised the work at facilities relating to the Department's fleet and received a salary of \$208,578. [City's Supplemental Information, 1/14/2022 ("CSI 1/14/22")]

The Union disputes the City's claim that the duties and responsibilities of Mr. Dorcean and Mr. Aronberg have not changed since the time that they had served in 35-hour managerial positions. In their testimony, Mr. Dorcean and Mr. Aronberg detailed the drastic changes in their jobs because of the pandemic response and staff reductions.

Furthermore, the fact that City managerial positions have a 35-hour workweek in no way addresses whether they should be 40-hour positions once they become eligible for collective bargaining. When the BOC determined in 1992 that the DOS Deputy Director

title was eligible for collective bargaining, the City initially wanted to retain the title as a 35-hour position. The title, however, was recognized as a 40-hour position after mediation.

Similarly, the ADFM title had been a 35-hour managerial title until the BOC in 2006 ruled that the title was eligible for collective bargaining. The City created a new SMME Level II with a 40-hour workweek to replace the ADFM title going forward. In the Union's view, the history of the Deputy Director and ADFM titles confirms that the status of Mr. Dorcean and Mr. Aronberg as 35-hour managerial employees in no way dictates that they should be 35-hour employees in their new non-managerial titles. To the contrary, the history of the Deputy Director and ADFM titles is decisive precedent for the outcome that the Union seeks here; i.e., the recognition of the SMME Level III and Executive Director titles as 40-hour positions.

The Union contends that the City's reliance on the Report and Recommendations in Impasse Proceeding I-262-14 is misplaced. In that case, the Panel considered the appropriate salary ranges and hours for two long-existing titles, the DOS Director of Motor Equipment Maintenance and the NYPD Director of Motor Transport. The Panel recommended salary raises that adhered to the municipal pattern settlement and that retained the long history of the titles as 35-hour positions. In contrast, the titles at issue here are newly created, with no history of a specified workweek.

In the Union's view, basic fairness demands that the workweek for the titles here more accurately reflect the actual number of hours required for the positions. Contrary to the City's suggestion, the availability of compensatory time is not a solution, since the evidence shows that Mr. Aronberg has accumulated over 1000 hours of compensatory time that he will almost certainly never be able to use. [Tr. 244-245]

The Union says that it is seeking a salary range for the SMME Level III and Executive Director titles that is consistent with the amount Mr. Dorcean and Mr. Aronberg are being paid as alleged 35-hour employees, but that is adjusted to reflect their actual 40-hour status. Mr. Aronberg's current annual pay is \$178,684 and Mr. Dorcean's is \$198,472 which, according to the Union, reflects the City's assessment of fair rates of pay for these employees as 35-hour employees. Because the positions should be 40 hours per week, the proper adjustment is to employ a 40/35 multiplier, as was applied in the case of the DOS Deputy Directors. For the 40-hour positions, this would yield a salary range with a minimum of \$204,210 and a maximum of \$226,825. The Union points out that this a proposed range and does not presume that either employee here would be paid at the top of the range.

In contrast, according to the Union, the City's proposed salary range of \$160,058 to \$198,472 is plainly inadequate and inconsistent with the salaries of other high-level supervisors. While the nominal range for a DOS Director is \$155,872 to \$179,712, the City itself has allegedly recognized that the range is inadequate. In 2018, Edward Rasmussen, who at that time was a DOS Director at the Bureau of Motor Equipment ("BME"), received a salary increase of 23%, raising his pay to \$178,702. Though now serving in a lower assignment level at the Cioffe Boro shop, Mr. Rasmussen has retained the Director title and through coalition raises receives a current salary of \$188,205, which is above the contractual maximum for the DOS Director title. [Tr. 396-397] Giovanni Ianniello is currently responsible for the field operations previously performed by Mr. Rasmussen, as well as some of the duties performed by Director William Wehner prior to his retirement.

The Union's proposed salary range also favorably compares with the salaries at DOT. Mr. Dorcean, considered by DOT to be at the level of an Associate Deputy Commissioner, receives annual pay of \$198,472, while the Assistant Commissioner of Permit Management and Construction Control receives annual pay of \$204,086 for a 35-hour workweek. [Tr. 373-374, City Exs. 1 and 2] The DOT Chief Technology Officer receives annual pay of \$208,667 for a 35-hour job below the level of Commissioner. [Tr. 374, City Exs. 1 and 2] Both employees supervise far fewer subordinates than Mr. Dorcean. [City Ex. 2] The Union's proposed range of \$204,210 to \$226,825 is allegedly far more consistent with the salaries of even lower-ranking top supervisors at the DOT than the City's proposed range of \$160,058 to \$198,472.

The Union's proposal also fairly reflects the circumstances at FDNY. Mr. Aronberg testified that his supervisors believe that he is entitled to a pay increase. [Tr. 237] As previously noted, Mr. Aronberg's closest equivalent at FDNY was Joseph Mastropietro, who also had been an Assistant Commissioner with an annual salary of \$208,578 before his recent retirement. [CSI 1/14/22]

The Union points out that the City's proposed minimum of \$160,058 is an 8% increase over the minimum salary of \$148,202 for the SMME Level II title. The Union argues that this is inconsistent with existing differentials between SMME Levels I and II. Since the minimum salary for the SMME I title is \$121,196, the differential between the two Levels is 22.28%. [Un. Ex. 17] Even if only this 22.28% differential were applied, the Level III minimum of \$181,221 (i.e., \$148,202 multiplied by 22.28%) would still be inadequate here.

The Union offered the testimony of several witnesses in support of its position:

Joseph Giattino

Mr. Giattino had been a DOS employee in various positions since 1971 and served as the President of Local 621 from 1996 until his retirement in 2021. As President, Mr. Giattino attended labor negotiations, grievance proceedings, and labor management meetings on behalf of Local 621 members who work at various agencies throughout the City, including DOS, NYPD, FDNY, DEP, Parks and Recreation, the Department of Correction (“DOC”), and the Department of Citywide Administrative Services (“DCAS”). During his tenure, Local 621 represented the titles of SMME Levels I and II, DOS Director and Deputy Director of Motor Equipment Maintenance, NYPD Director of Motor Transport, and Supervisor of Ironworks. [Tr. 92-93] The SMMEs at Level I and Level II are 40-hour employees who predominately supervise other 40-hour titles. [Tr. 96-98] When the Deputy Director title accreted to the Union in 1992, it converted through mediation from a 35-hour title to a 40-hour title, with a raise in the minimum and maximum salary ranges commensurate with the longer workweek. [Tr. 102-103] When the ADFM title accreted to the Union in 2006 and the position began to transition to the new title of SMME Level II, it also converted from a 35-hour to a 40-hour title. [Tr. 112-113] The DOS Director title remained a 35-hour title after its accretion to the Union in 2015. [Tr. 115]

Eric Dorcean

Mr. Dorcean testified that he had worked at NYPD for 25 years before assuming the position of DOT Executive Program Specialist. [Tr. 141-142] Pursuant to the representation petition filed by Local 621, Mr. Dorcean in July 2020 became a SMME Level III, with responsibility for the repair and maintenance of the DOT fleet and the

supervision of 130 to 140 subordinates. [Tr. 142,146, Joint Stipulation at par. 18] Mr. Dorcean said that in 2020 his title changed to SSME III and his duties increased due to pandemic-related compliance issues and staff shortages. [Tr. 168-169, 175-176]

Mark Aronberg

Mr. Aronberg testified that he began work for the City as a paramedic at EMS in 1982. When EMS and the FDNY merged in 1996, Mr. Aronberg transferred to FDNY fleet services. Rising through the ranks, Mr. Aronberg became the Assistant Commissioner of Fleet Services in 2012, with responsibility for the repair and maintenance of various FDNY and EMS fleets. [Tr. 182-183, 190] As a result of the settlement between the City and the Union regarding the representation petition, Mr. Aronberg's title changed in June 2020 to Executive Director of Fleet Operations. [Joint Stipulation at par. 26] Mr. Aronberg is responsible for approximately 325 subordinates, including about 50 to 55 uniformed firefighters and fire officers. [Tr. 193-193] He oversees an annual capital budget of \$120,000,000 to \$200,000,000 and is responsible for administering DCAS policies regarding the Department's fleet. [Tr. 210-213] Mr. Aronberg also personally responds in his supervisory capacity to multiple alarm fires and major incidents, such as building collapses or hazardous material issues. [Tr. 221-223] While he performed these same duties as Assistant Commissioner, Mr. Aronberg had additional responsibilities as the Covid crisis emerged with its concomitant operational and fiscal restraints, [Tr. 225-227]

Mr. Aronberg further testified that all of the SMMEs he supervises are 40-hour employees, along with about 90% of the total staff. In February and March 2020, while he was still a managerial employee, Mr. Aronberg averaged 62 hours a week; in 2021, he averaged 63 hours a week. [Tr. 227-229] Mr. Aronberg has accrued over 1000 hours of

compensatory time that he will probably never get to use. [Tr. 232, 245] Mr. Aronberg further testified that his supervisor had advised him that he was interested in giving Mr. Aronberg a salary increase and agreed that his workweek should be forty hours. [Tr. 232-233, 247]

Carl Chiaramonte

After serving in NYPD and DOC fleet maintenance titles and Union positions as shop steward, treasurer, and trustee, Mr. Chiaramonte became the President of Local 621 in January 2021. In his various Union roles, Mr. Chiaramonte attended executive and general membership meetings, disciplinary hearings, and collective bargaining sessions. [Tr. 257-258]

In Mr. Chiaramonte's view, the new SMME Level III must be recognized as 40-hour position, since every SMME Level I and II employee from the inception of the title over 30 years ago has had a 40-hour schedule. Similarly, the new FDNY Executive Director must be recognized as a 40-hour title, since the position involves a 24/7 operation that includes the supervision of primarily 40-hour employees. Both new titles require critical decision-making skills based on ever-changing information, often in emergencies and highly complex circumstances. The titles are responsible for the maintenance and review of vast fleets and the supervision of large units. [Tr. 259-260] Unlike the titles at issue in the I-262-14 Impasse Panel Report, which had operated as 35-hour positions for decades, the titles before this Panel are newly created in agencies where the lower level employees have 40-hour workweeks. [Tr. 265-266] The relevant precedents here are the cases in which the Deputy Director title changed upon accretion in 1992 from a 35-hour to



a 40-hour title and the ADFM title in 2006 converted to the new title of SMME Level II with a 40-hour workweek instead of 35 hours. [Tr. 272]

Howard Green

Mr. Green worked for the New York City Office of Management and Budget for over 25 years, retiring in 1994 as the Associate Deputy Director of the Budget. [Un. Ex. 16] Mr. Green had responsibility for the City's labor budget and participated in all negotiations concerning salaries and benefits. [Tr. 280] Mr. Green now serves as a consultant on a variety of labor relations issues. In this impasse proceeding, Mr. Green multiplied by 40 the current salaries of \$178,684 and \$198,472 paid to Mr. Aronberg and Mr. Dorcean, respectively. He then divided by 35, to arrive at a minimum and maximum salary range of \$204,210 to \$226,825, to reflect a 40-hour workweek. [Tr. 287, Un. Ex. 8A] The cost to the City for the Union's proposed salary range for both incumbents would be .20% of the total salary cost of the Local 621 bargaining unit. On an hourly rate, however, the City's true cost is zero since they are receiving 5 more hours of work for 5 more hours of pay. [Tr. 288-296, Un. Ex. 12]

The City's proposed range is 8% above the minimum for SMME Level II and the maximum is Mr. Dorcean's current salary. The Union's proposed range is the two incumbents' salaries adjusted for a 40-hour week. [Tr. 301] Although DOS Director Edward Rasmussen is in a lower position, his salary is approximately \$10,000 above that of Mr. Aronberg and \$10,000 below that of Mr. Dorcean. If the Impasse Panel determines that a 35-hour workweek is correct, the Union alternatively proposes: (1) an 8% increase over Mr. Rasmussen's salary with an 8% range, i.e, a minimum of \$203,261 and a maximum of \$219,522 or (2) an 8% increase over the maximum salary for DOS Director

of \$179,712, i.e. a minimum of \$194,089 and a maximum of \$209,616. [Tr. 301-317, Un. Ex. 8B]

Based upon the foregoing evidence and testimony, the Union argues that the Impasse Panel should deem the SMME Level III and Executive Director titles to be 40-hour titles with salaries paid in accordance with the Union's suggested range.

### **The City's Position**

The City maintains that the record fails to support any justification for the 14.3% salary increase advocated by the Union for the two former managerial positions recently accreted to the Union with the titles of Executive Director and SMME Level III. The evidence reflects no change to the duties and responsibilities of the positions since certification that would warrant such a windfall. In contrast to the Union's stance, the City's proposal conforms to the existing salary structure for similar high-level supervisory positions in the City and offers an 8% increase in the minimum incumbent salary over employees in the immediate subordinate title of SMME Level II. This 8% premium is allegedly consistent with the salary ranges determined by other impasse panels in similar circumstances in which formerly managerial titles were added to a union's certification and placed in a new level within the title. The City's proposed range maintains Mr. Dorcean and Mr. Aronberg at their already substantial salaries, while providing a fair range to those who may be appointed to the titles in the future. This result would also be consistent with the long history between the City and its unions that a mere change from non-represented managerial status to union membership does not confer unfunded economic benefits.

According to the City, the Union's claim that the workweek of the two positions must be increased from 35 to 40 hours has no support in the record and is simply an attempt to construct a rationale for an unwarranted wage increase. The Union makes this argument on the basis that the two employees have been placed into completely new titles, with responsibility for primarily supervising other 40-hour titles. In the City's view, the evidence shows that these positions are new in name only, requiring the exercise of the same duties both before and after certification. Both positions require the performance of high-level executive functions, which in similar cases throughout the City are almost universally assigned 35-hour workweeks. Neither position requires the direct operational supervision of vehicle repairs that lower level employees of the title perform. In the case of the SMME title, the job specification for Level III details that the assignment involves the supervision and administration of fleet services overseeing at least 100 employees, with wide latitude for the exercise of independent judgment and decision-making. Level I employees are responsible for the direction and supervision of assigned personnel in connection with mechanical repairs. Level II employees perform work of greater complexity or span of control involving the direction of maintenance and repair operations and may incidentally perform the duties of Level I. [Jt. Ex. 2] The City argues that it is logical for SMME Level II employees to be assigned a 40-hour work schedule that conforms to the workweek of those they supervise and whose duties they may incidentally perform. The Level III assignment, in contrast, involves an executive-level oversight of fleet operations that is qualitatively distinct from lower-level supervisory positions in the title.

Furthermore, both Mr. Dorcean and Mr. Aronberg have successfully operated within a 35-hour framework throughout their tenure in their respective positions. To the extent that it becomes necessary for them to work beyond their 35-hour schedule, they are now entitled under the terms of the collective bargaining agreement to additional pay in the form of compensatory time. According to the City, the precise question of the expansion of the workweek for newly accreted titles was decided in a prior impasse award, which declined to mandate a change from a 35-hour to a 40-hour workweek since “the length of the workweek involves the exercise of management discretion concerning the level of service it should supply.” [I-262-14 at p. 66-67]

The City maintains that its proposed salary range is consistent with the salaries paid to positions with comparable levels of responsibility at other large City agencies with substantial and complex fleet operations. The NYPD Director of Motor Transport, Vartan Khachadurian, is paid a salary of \$167,614, with responsibility for overseeing a fleet of over 9,000 vehicles and supervising over 300 employees. [ City Ex. 4, Un. Ex. 7] The DOS Director of Motor Equipment Maintenance, Edward Rasmussen, receives a salary of \$188,205. Although he currently serves in a reduced role at DOS, it is clear that his salary was based upon his prior position in overseeing the entire fleet operation. [Tr. 391-393, 389, 402; Un. Exs. 6A and 6B] On December 9, 2020, Mr. Ianniello became the DOS Director of Motor Equipment, with a salary of \$168,219. [CSI 1/14/22]

According to the Union’s own evidence, both the DOS Director and the NYPD Director of Motor Transport oversee larger fleets and supervise more employees than either Mr. Dorcean at DOT or Mr. Aronberg at FDNY. [Un. Ex. 7] Yet, without producing evidence to justify such a pay differential, the Union proposes that both Mr. Dorcean and

Mr. Aronberg should receive substantially higher pay than either of their counterparts at DOS or NYPD. Furthermore, the Union's proposal is contrary to the fundamental principles of municipal pattern bargaining in promoting fairness and stability throughout the City and to the specific criteria in the NYCCBL providing for the consideration of the terms of employment for similarly situated employees when making impasse recommendations.

In support of its position, the City presented the testimony of three witnesses:

Margaret Forgione

Ms. Forgione is the DOT First Deputy Commissioner, with responsibility for overseeing all six of the DOT's operational divisions: Bridges, Ferries, Traffic Operations, Roadway Repair and Maintenance, Transportation Planning and Management, and Sidewalks and Inspection Management. In addition, Ms. Forgione oversees Fleet Services and the operations of the five Borough Commissioners' offices. [Tr. 367-368]

Because fleet services are part of her operational responsibilities, Ms. Forgione hired Mr. Dorcean in 2017 and oversees his work. In her view, the Union's proposal to increase Mr. Dorcean's workweek by five hours and to provide a 14.3% pay raise would be unwarranted and highly disruptive to the overall salary structure of the DOT executive staff. The Union's proposal would result in a salary of \$226,825 for the same duties that Mr. Dorcean had prior to representation. With the exception of the DOT Commissioner, this would make him the fourth highest paid employee in the agency, with a higher salary than Deputy Commissioners with a greater scope of responsibility; e.g., the Deputy Commissioner of Roadways with 1200 employees and responsibility for overseeing the

resurfacing of 1,000 miles of roads and highways each year, and the Deputy Commissioner of the Staten Island Ferry, who oversees the safe transit of over 25,000,000 passengers each year. Under the Union's proposal, Mr. Dorcean would also be paid more than the DOT's General Counsel. [Tr. 369-370, City Ex. 2] This wage disparity would be further amplified by the compensatory time he would receive for additional hours as a represented employee.

Ms. Forgone also testified that she considers the proposed increase to a 40-hour workweek to be unjustified since Mr. Dorcean successfully worked a 35-hour week in his prior managerial position and his duties have not changed since representation. The 35-hour workweek has proven effective for many managers who, like Mr. Dorcean, are exercising high-level executive duties and not performing shop-level supervision. In the event he needs to work additional hours, Mr. Dorcean is entitled to request compensatory time. [Tr. 370-371]

Rocco DiRico

As the DOS Deputy Commissioner for Support Services, Mr. DiRico is responsible for both the Bureau of Motor Equipment ("BME") and the Bureau of Building Maintenance, with a combined capital budget of almost \$200,000,000. With an annual salary of approximately \$221,000 and the typical 35-hour managerial workweek, Mr. DiRico oversees the sanitation fleet, participates in vehicle procurement, and manages approximately 1100 employees. [Tr. 387-388, 390] Mr. DiRico testified that the DOS organizational chart from 2016 accurately reflected Edward Rasmussen as the Executive Director of Support Services Operations. In that position, he oversaw the training, budget, and field operations for five boro vehicle repair shops. [Tr. 389, Un. Ex. 6A] In 2018, Mr. Rasmussen moved to a lower position on the organizational chart with responsibility for

the Cioffe Boro Repair Shop. Despite his new position, Mr. Rasmussen retained his existing salary and civil service title and is currently paid a salary of \$188,205. [Tr. 389, 397; Un. Ex. 6B]

Daniel Pollak

As the Associate Commissioner of the Office of Labor Relations (“OLR”), Mr. Pollak is responsible for negotiating collective bargaining agreements with municipal unions, advising City agencies on labor-management issues, and serving as an aide to the OLR Commissioner and First Deputy Commissioner. [Tr. 413]

Prior to representation, both Mr. Dorcean and Mr. Aronberg were managers with salaries falling within the broad range of the City’s managerial pay plan. Although both employees had the typical municipal managerial workweek of 35 hours, many managers throughout the City routinely work additional hours beyond this schedule without any increase in compensation. While acknowledging the important roles fulfilled by Mr. Dorcean and Mr. Aronberg, the City’s position in this proceeding reflects its fundamental view that a change in representation status alone does not entitle an employee to a pay increase. Both employees received a high level of compensation as managers because of their critical work, and they knowingly accepted their salaries with the understanding that managers often work additional hours beyond their schedules without additional compensation. The City’s proposed salary range of \$160,058 to \$198,472 encompasses the current salaries of both incumbents. The minimum of the range is 8% above the salary for

the incumbent minimum rate for SMME Level II\* and the maximum is Mr. Dorcean's current salary. To the extent that they work additional hours beyond their 35-hour workweek, Mr. Dorcean and Mr. Aronberg are now entitled under the collective bargaining agreement to compensatory time. [Tr. 414-416, City Ex. 3] The Union's proposed 14.3% increase along with a longer workweek would, in Mr. Dorcean's case, result in a salary of about \$226,000. That salary would be close to or above the salaries of some Commissioners. It would be above the salary of DCAS Commissioner Keith Kerman, who is the City's chief fleet officer, and that of DOS Deputy Commissioner DiRico. In contrast, the City's proposal maintains reasonable salary relationships to other high-level executive positions, such as the NYPD Director of Motor Transport and the DOS Director. [Tr. 420-423, City Ex. 3]

Most titles in the City, whether managerial or represented have either a 35-hour or a 40-hour scheduled workweek that may require additional hours. If the title is represented, the Citywide agreement provides for compensatory time. If the compensatory time is not used by retirement, an employee can run out his or her combined annual leave, compensatory time, and sick leave for up to one year. For employees hired after 2004, sick leave is converted to terminal leave at a rate of one day of terminal leave for each three days of sick leave. [Tr. 424-426]

\*The salary range for the SMME Level II is \$148,202 to \$164,555. Four DOS SMME Level II employees currently earn \$152,926, and DOS SMME Level II employee Frank DePalo earns \$164,555. Five NYPD SMME Level II employees earn between \$152,648 and \$164,555. Four other SMME Level II employees at agencies throughout the City are paid at the minimum of the range, with the opportunity to earn cash overtime. [Tr. 418-419; City Ex. 3, CSI 1/14/22, Union's Supplemental Information 1/14/22 ("USI 1/14/22")]



Furthermore, 35-hour managers in the City often supervise 40-hour employees, up to and including Commissioners who indirectly supervise 40-hour titles. This includes many instances in which formerly managerial titles acquired union representation and maintained their 35-hour schedule while supervising 40-hour employees. [Tr. 428-429] As examples of 35-hour titles supervising 40-hour employees, Mr. Pollak listed the following positions: Supervisor of Traffic Device Maintainers Levels II and III, Administrative Traffic Enforcement Agent, Associate Supervisor of School Security, Parks Enforcement Captain (not formerly managerial), and Supervising Deputy Sheriff Level II. [Amended City Ex. 3, Tr. 515, CSI 1/14/22]

Mr. Pollak testified that the history of the ADFM title does not provide a precedent for moving the titles here from a 35-hour to a 40-hour workweek. In 1994, the DOS Deputy Director of Motor Equipment Maintenance title with a 40-hour workweek accreted to Local 621. In 2006, the BOC found that the duties of the ADFM title were similar to those of the Deputy Director title and added the title to the Union's certification. In negotiation, the Union sought and the parties eventually agreed to increase the weekly hours to 40 and to set the minimum salary at the same rate as the Deputy Director minimum because of the similarity of the titles. In this case, however, the titles at issue are more similar to the NYPD Director of Motor Transport and the DOS Director of Motor Equipment Maintenance, which are both 35-hour titles and which a prior impasse panel declined to convert to a 40-hour title.

Mr. Pollak said that approximately 85% of represented employees, including those represented by Local 621, have settled on voluntary agreements with the City for the civilian pattern of bargaining in the 2017-2021 round. If the Union's proposal were granted

in this case, the Union would have achieved an additional benefit beyond what was funded in the municipal pattern and would potentially encourage other unions to seek impasse in the hope of achieving an award that exceeds the pattern. If a union seeks an additional benefit such as monetary compensation instead of compensatory time, the union typically negotiates to fund the benefit within the pattern agreement. For example, both the NYPD Captains and the DOC Deputy Wardens obtained this benefit by agreeing to an increase in the length of the workweek to fund it within the pattern settlement. A departure from this practice has the potential to undermine the stability of municipal labor relations. [Tr. 433-434]

In summary, the City argues that the Union's proposed adjustments, if adopted, would create a dangerous precedent for employees to receive large salary increases after union certification despite unchanged duties and responsibilities. The City's proposal, in contrast, maintains a stable salary relationship between these titles and the positions they supervise as well as between these titles and comparable titles in other City agencies. The salary range offered by the City is inherently reasonable in that it encompasses the salaries of both incumbents, comports with the historical precedent of retaining salary structures with unchanged duties after union accretion, and provides flexibility in future hiring for the titles.

### **Discussion**

In considering the appropriate salary range for the new titles of SMME Level III and Executive Director of Fleet Services, I have reviewed the evidence and testimony, the

Joint Stipulation of Fact, the prior impasse reports cited by both parties, and the pre-hearing and post-hearing legal memoranda. In so doing, I have analyzed the standards set forth in NYCCBL Section 12-311 regarding the issuance of recommendations for the terms of settlement in impasse procedures. I have given due consideration both to the Union's legal and equitable arguments in support of its proposed salary range and the City's expressed interests in fiscal responsibility, overall pay equity, and stability in municipal labor relations. The transcript and evidence citations are intended as references and do not imply that other evidence was excluded in making this Report.

The Union's proposed range of \$204,210 to \$226,825 is largely predicated on the concept that the two titles must be compensated as 40-hour positions, rather than as 35-hour positions. According to the Union, in the case of the new SMME Level III title, the proposed 40-hour workweek would simply reflect the three-decade history of the SMME title as a 40-hour position. Regarding Mr. Aronberg's position at FDNY, the Executive Director is a new title with no workweek history as either a 35-hour or 40-hour title. The Union argues that in both instances, a range based on a 40-hour schedule more accurately reflects the actual length of the employees' workweek, the critical nature of the jobs, and the supervisory roles they perform with respect to "trades" titles with 40-hour workweeks.

I do not find these arguments to be persuasive. While the titles may be new, the positions to which they are applied are not. The DOT hired Mr. Dorcean in 2017 as Associate Deputy Commissioner of Fleet Services with the civil service title of Executive Program Specialist to oversee the supervision of the repair and maintenance of the DOT fleet. [Tr. 141-143, Jt. Ex. 4A] The FDNY promoted Mr. Aronberg in April 2012 to FDNY Assistant Commissioner of Fleet Services with responsibility for all aspects of fleet

management, including vehicle purchase, repair, and maintenance. [Tr. 183, 242-243, Un. Ex. 9] With the exception of various compliance and staffing issues due to the Covid pandemic, the record does not establish any significant change to the duties of either Mr. Dorcean upon becoming an SMME Level III or to Mr. Aronberg upon becoming the Executive Director of Fleet Operations. [Tr. 168, 175, 212-221, 242-243] It bears noting that Mr. Dorcean became an SMME Level III on July 15, 2020, and Mr. Aronberg became the Executive Director on June 8, 2020. [Jt. Stipulation, paragraphs 18 and 26, Un. Ex. 5] At the time they assumed their new titles, both employees had been experiencing coronavirus-related work disruptions for several months due to the state-wide stay-at-home order instituted in mid-March 2020. Therefore, the workplace changes did not occur because of the placement in new titles, but because of the pandemic-related exigencies faced by untold numbers of City employees.

Nor am I convinced that the titles must be converted to 40-hour workweeks because SMMEs have a long history as 40-hour titles who supervise subordinates in trades positions, such as auto mechanics, electricians, and machinists, or because the new titles primarily supervise subordinates with a 40-hour workweek. Both Mr. Dorcean and Mr. Aronberg successfully served in their critical roles as 35-hour managerial employees before union representation. As is the case with many managers throughout the City, they provide effective high-level supervisory oversight without the necessity of a workweek identical to their subordinates. I understand that both employees perform important work that often extends beyond a 35-hour schedule. As managerial employees, both Mr. Dorcean and Mr. Aronberg accepted salaries with the understanding that City managerial titles do not receive overtime pay. With union representation, both are entitled under the Citywide

collective bargaining agreement to receive overtime remuneration in the form of compensatory time for work over 35 hours per week. Although the Union argues that compensatory time insufficiently compensates the employees here, this contractual term nevertheless provides an additional negotiated benefit post-accretion for the same duties they previously had performed as managers outside of collective bargaining.

In this regard, I note that the term “managerial” under Civil Service Law Section 201.7(a) differs from the common usage of the term by referring specifically to employees who are ineligible for collective bargaining as “persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment.” Thus, a recognition by the BOC or the particular agency that an employee is entitled to union representation does not imply that the employee performs no managerial duties in the colloquial sense of the term.

The Union points out that SMME Level I and II employees with a 40-hour workweek are responsible for the repair and maintenance of City fleets in agencies with fewer than 100 direct or indirect subordinates. The SMME job specification defines SMME Level III as employees responsible for the supervision and administration of fleet services with at least 100 employees. [Jt. Ex. 2] The Union argues that it defies logic that smaller fleets would be supervised by 40-hour employees at Levels I and II, while larger fleets involving greater responsibilities, such as those in the FDNY and DOT, would be supervised by 35-hour employees. The persuasive testimony and evidence in the record

indicates, however, that many City employees with 35-hour schedules, both managerial and represented, are supervisors for subordinates with 40-hour schedules.

The Union also disputes the relevance of the City's evidence regarding employees in formerly managerial titles who retained a 35-hour workweek post-accretion while supervising 40-hour subordinates. [City Ex. 3] The Union points out that the titles, unlike those here, do not supervise employees in the trades. Furthermore, the cited titles have not yet been the subject of collective bargaining over the length of the workweek. I am not persuaded, however, that the nature of the work performed by subordinates is material to a consideration of the appropriate length of a high-level supervisor's workweek. Furthermore, as both parties point out, a change to the length of a workweek is, of course, subject to future collective bargaining.

In a prior impasse, Local 621 also argued that the two newly accreted positions of NYPD Director of Motor Transport and DOS Director of Motor Equipment Maintenance should be compensated as 40-hour employees rather than as 35-hour employees. The Panel declined, in the context of an interest proceeding, to mandate an increase in the length of either Director's workweek, which it believed to be a matter of management discretion in the level of service it wished to provide. [I-262-14, p. 66] The Union maintains that the Panel's determination to adhere to the municipal pattern settlement and retain the 35-hour workweek is inapposite to this matter since, unlike here, the two existing titles in that case had long been deemed 35-hour jobs. As noted earlier, I do not find that the assignment of new titles to Mr. Dorcean and Mr. Aronberg is the salient point of consideration. I attach weight, however, to the evidence showing that both employees competently performed

their substantively unchanged executive duties with a 35-hour workweek both before and after union representation.

For the above reasons, I do not believe that the salary range for the new titles should be based on a conversion of the current pay of Mr. Dorcean and Mr. Aronberg to a 40-hour workweek. The question thus turns to the appropriate basis for setting the salary range for the SMME Level III and Executive Director titles. The City argues that its proposed range of \$160,058 to \$198,472 is consistent with the salaries paid to comparable employees in other City agencies with large and complex fleet operations; i.e., the DOS Director of Motor Equipment Maintenance (\$188,205) and the NYPD Director of Motor Transport (\$167,614). Both positions report to Deputy Commissioners and, according to Union Exhibit 7, oversee fleet operations with more vehicles and total personnel than the operations overseen by either Mr. Dorcean or Mr. Aronberg.

The Union argues, however, that neither the DOS Director nor the NYPD DMT offer an appropriate basis for comparison, since both positions had long operated as 35-hour titles. In the case of DOS, the Director title has a tangled history with varying degrees of supervision and responsibilities. In 2016, the DOS had two directors: William Wehner, in charge of Vehicle Acquisition and Warranty, Materials Management, and Administrative Services, and Edward Rasmussen, in charge of the Central Repair Shop and all of the boro shops. When Mr. Wehner retired in May 2020 at a salary of \$171,156, the only nominal Director at that time was Mr. Rasmussen, who had moved into a position at the Deputy Director level supervising only the Cioffe Boro shop, but who nevertheless retained his prior salary and civil service title. [Tr. 394-396, Un. Exs. 6A and 6B, CSI 1/14/22] In contrast, the titles at issue here are responsible for large fleets with at least

100 subordinates and are therefore materially distinct from the single-boro shop responsibilities of Director Rasmussen. In the Union's view, the inadequacy of the City's proposal is demonstrated by the comparison of Mr. Rasmussen's salary of \$188,205 with Mr. Aronberg's salary of \$178,684 for a position of far greater responsibility.

The Union also disputes the City's contention that the DMT title at NYPD is analogous to the two titles here. The Fleet Services Division is a para-military organization headed by the DMT and a full uniformed Inspector, with 52 uniformed employees. The civilian and uniformed employees, with the possible exception of the DMT, all report directly or indirectly to the Inspector. In contrast, the DOT fleet workforce is civilian, and the FDNY has no uniformed officers above the rank of lieutenant. Furthermore, the City itself has allegedly recognized the differences between the DMT and the titles here, since the DMT salary range of \$152,648 to \$168,293 is below the City's proposed range for the titles of SMME Level III and FDNY Executive Director.

I see no persuasive basis for tying the range of the SMME Level III and FDNY Executive Director titles to the standard of Mr. Rasmussen's salary or to the maximum salary of the DOS Director, as the Union has offered as alternatives. For reasons that are unclear in the record, in February 2018 the DOS increased Mr. Rasmussen's salary to a level above the contractual maximum for the DOS Director title.\* As noted above, Mr. Rasmussen's current salary with coalition percentage raises is \$188,205, although he no longer is in charge of BME field operations. I do not believe that a salary rate that exceeds

\*Associate Commissioner Pollak testified that OLR was not involved in the process by which Mr. Rasmussen's salary was increased "because we would not have approved a salary above the maximum for the title." [Tr. 447]



the terms of the parties' collective bargaining agreement is a reasonable basis for evaluating the appropriate salary range for the Executive Director and SMME Level III titles. Furthermore, the evidence shows no convincing reason for setting the salary range based upon an 8% increase to the maximum salary for the DOS Director title.

In my view, a fair benchmark is the collectively-bargained pay range for the titles which are in the line of promotion or which could reasonably be reclassified into the new titles in the future. Since the SMME Level III job specification limits the title to employees supervising large fleet services divisions with at least 100 employees, both parties agree that at least at the current time, only supervisors at DOT, DOS, NYPD, and FDNY would qualify.\* Clearly, SMME Level II employees with a current salary range of \$148,202 to \$164,555 are in the line of promotion to the Level III title. As Mr. Pollak testified, the title of DOS Director, with a current salary range of \$155,872 to \$179,712, and the title of NYPD DMT, with a range of \$152,648 to \$168,293, could also potentially fit within the SMME Level III title. [Tr. 419-420]

In light of the above salary ranges for employees who may be promoted from SMME Level II or otherwise re-classified into the SMME Level III title, the issue then turns to the proper range for the two new titles. The Union posits that the DOS Director and DMT titles are below the supervisory responsibilities of the new titles and that the salary range for the new titles must be higher than the pay currently received by these titles. In the Union's view, even an 8% increase applied to the top range of the DOS Director title (\$179,712) would result in an unjustifiably low range for the incumbent titles here

\*Although a job specification for the FDNY Executive Director title has not been implemented at this time, both parties agree that similar analyses apply for the two titles in issue.

(\$194,089 to \$209,616). The City, on the other hand, argues that the DOS Director and DMT titles are comparable positions to the new titles and must take into account their established pay ranges to provide consistency across agency fleet operations.

The proposed ranges are as follows:

City's proposed range based on 8% increase to the SMME Level II minimum and Dorcean's current salary:

\$160,058 to \$198,472

Union's proposed range based on 40 hours and 8% increase to Rasmussen's salary:

\$204,210\* to \$226,825

Union's alternate proposed range – 35 hours and 8% increase to Rasmussen's salary:

\$203,261 to \$219,522

Union's alternate proposed range – 35 hours and 8% increase to the maximum salary for DOS Director:

\$194,089 to \$209,616\*

The current salary ranges for the titles relevant here are as follows:

NYPD Director of Motor Transport:

\$152,648 to \$168,293 -- currently held by Vartan Khachadurian at \$167,614

DOS Director:

\$155,872 to \$179,712 -- currently held by Edward Rasmussen at \$188,205 and Giovanni Ianniello at \$168,219

DOS Deputy Director:

\$152,926 to \$164,555

SMME Level II:

\$148,202 to \$164,555

SMME Level I (Supervisory Assignments):

\$126,671 to \$131,449

SMME I: \$121,196

\*The Union has at times referenced slightly different numbers, but those cited here appear to correctly reflect the math.

For the previously discussed reasons, I have considered both the salary range of the lower level employees in the direct line of promotion, i.e., Level II SMMEs, and the salary ranges of related titles in the administration of fleet operations, i.e., the DOS Director and the NYPD DMT. Whether either the DOS or the NYPD has employees who currently meet the terms of the SMME Level III job specification is not the issue before me. Nevertheless, both parties agree that the Level III SMME job specification is broad enough to one day include employees at these agencies and potentially at other agencies as well. Therefore, the salary range here needs to maintain a reasonable relationship to the salary structures of lower levels of the SMME title as well as to the similarly situated employees performing similar duties. As NYCCBL Section 12-311 provides, the Panel's analysis involves, *inter alia*, a consideration of the wages, hours, conditions, and characteristics of the public employees at issue with those of other employees performing similar work.

In my view, the City's proposal of an 8% increase to the minimum incumbent salary of the SMME Level II title, resulting in a SMME Level III minimum salary of \$160,058, provides an insufficient increase to reflect the substantial scope of responsibility at the highest level of the title and to provide adequate inducement for promotion. The job specification for Level II describes the title as performing "work of greater complexity and/or scope of control" than the highest assignment differential for Level I and includes the oversight and coordination of the activities of a segment or bureau performing fleet repairs and maintenance. The Level III job specification defines the title as involving wide latitude for the exercise of independent judgment with responsibility for the supervision

and administration of a fleet services division of a large agency with at least 100 employees. The duties include the development of safety, training, and operational programs, as well as providing technical advice and expertise on equipment and related matters. [Jt. Ex. 2] Unlike employees at SMME Level II, SMME Level III does not include the incidental performance of duties at the lower level of the title. The job specification thus contemplates a substantially greater scope of administrative authority, responsibility, and expertise than employees at lower levels of the title.

I likewise believe that the City's proposed minimum for the SMME Level III title is an insufficient increase from the salary ranges of the DMT and DOS Director titles. Despite some contrary testimony and legal argument, the City at least tacitly appears to recognize that the duties of the SMME Level III and Executive Director titles are broader in scope and responsibility since its proposed minimum for the new titles (\$160,058) is above that of the minimum for employees in the DMT or Director titles (\$152,648 and \$155,872) who may in the future be re-classified as Level III SMMEs. Similarly, the City's proposed maximum (\$198,472) exceeds the maximum for either the DMT or Director titles (\$168,293 and \$179,712). Furthermore, unlike the job specifications for the titles of DOS Director and NYPD DMT, the job specification for SMME Level III clearly limits the title to employees who are responsible for a fleet services division overseeing at least 100 employees.

I believe that a 4% increase to the maximum salary of a Level II SMME would provide a reasonable incentive for those in the line of promotion, while still maintaining a rational relationship to salary ranges of employees in other agencies who are performing similar duties. The resulting SMME Level III minimum of \$171,137 is slightly higher than

the current maximum for the DMT title and falls within the existing range of the DOS Director title. The percentage difference between a salary minimum of \$171,137 and a maximum of \$198,472 is 15%.

I further find that the City's proposed maximum of \$198,472 based upon Mr. Dorcean's current salary appropriately compensates for the high-level executive work intrinsic to the SMME Level III and Executive Director titles. The salary maximum of \$198,472 maintains a reasonable relationship between the two new titles and the related titles in fleet operations, providing a 21% increase over the maximum salary of the SMME Level II title and a 10% increase over the maximum salary for the DOS Director title. It also rationally comports with the salaries of high level managers in the City, including those in positions with greater scope of authority and responsibility. For example, the DOT Deputy Commissioner of Roadway Repair and Maintenance who is responsible for emergency response and for the re-surfacing of 1000 miles of roadways each year earns an annual salary of \$207,552, and the DOT Deputy Commissioner of the Staten Island Ferry who is responsible for the annual transit of 25,000,000 passengers earns \$210,000. [Tr. 369, City Ex. 2] The DCAS Deputy Commissioner who serves as the City's chief fleet officer earns \$213,783. [Tr. 417, CSI 1/14/22] The Commissioner of Cultural Affairs, the Executive Director of FDNY Pension Fund, the President of the Tax Commission, among other top agency heads, all earn \$227,786. [CSI 1/14/22]

In conclusion, I find that the City's proposed minimum for the new titles is an insufficient increase from the related titles in fleet operations and from the lower levels of the SMME title. I recommend a 4% salary increase to the contractual salary maximum for the SMME II title for a salary minimum for the two new titles of \$171,137. I also

conclude that a salary maximum of \$198,472 meets the statutory standards of NYCCBL Section 12-311.c.(3)(b) and fairly compensates for the responsibilities of the SMME Level III and Executive Director titles. I recommend a minimum and maximum salary range for the SMME Level III and FDNY Executive Director titles of \$171,137 to \$198,472.

### **Recommendations**

1. The salary for the FDNY Executive Director civil service title and the Supervisor of Mechanics (Mechanical Equipment) Level III civil service title shall have a minimum salary of \$171,137 and a maximum salary of \$198,472.
2. The aforementioned titles and salaries will be deemed a part of the collective bargaining agreement between the City of New York and SEIU, Local 621 with a term of March 13, 2017 to October 12, 2020 and included in negotiations for the successor agreement.



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Sandra J. Meckler

Dated: January 31, 2022

**AFFIRMATION**

STATE OF NEW JERSEY )

COUNTY OF MORRIS )

I, Sandra J. Meckler, Esq., do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed the foregoing instrument, which is the Impasse Panel Report and Recommendations.



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Sandra J. Meckler

Dated: January 31, 2022