OFFICE OF COLLECTIVE BARGAINING
of THE CITY OF NEW YORK

In the Matter of the Impasse Proceeding

between

NEW YORK CITY OFFICE OF LABOR RELATIONS

AND

DISTRICT COUNCIL 37 AFSCME, AFL-CIO
(PARKS AND PUBLIC WORKS)

REPORT
AND
RECOMMENDATIONS

OCB NO. I-128-77

Before:

Louis Yagoda, The Impasse Panel

BACKGROUND

A Collective Negotiations Agreement expired, by its terms, on June 30, 1976 between the City of New York (hereafter referred to as City) and the Parks and Public Works bargaining unit of District Council 37 (hereafter referred to as Union) on June 30, 1976. Said bargaining unit consists of approximately 1041 employees in the following titles:

Foreman (Including Specialties)
District Foreman (Including Spec.)
Borough Foreman Including Spec.)
Superintendent of Sewer Service
Superintendent of Repairs to Distribution
General Supervisor of Repairs to Distribution
Assistant Monument Restorer
Monument Restorer
Assistant Park Director
Climber and Pruner

Gardener
Foreman of Gardener
Horticulturist
Menagerie Keeper
Supervisor of Menagerie
Park Foreman
General Park Foreman
Senior Supervisor of Park Operations
Swimming Pool Operator
Sr. Menagerie Keeper
Waterplant Operators
Watershed Inspectors

Negotiations commenced on June 8, 1976 with the Union submitting twenty-three demands for inclusion in the successor Agreement. After a number of bargaining sessions the parties resolved all issues except one: "Premium pay for working on Saturday and Sunday".

Pursuant to Chapter 54, 1173-7.0. c (2) of the New York City Collective Bargaining Law, I was notified by the New York City Office of Collective Bargaining by letter dated January 11, 1977 that I had been designated at the joint request of the parties, as a one-member impasse panel to hear and make report and recommendations on the outstanding issue between the parties.

Hearings were held before me on this controversy on February 7, 1977, May 11, 1977 and May 24, 1977. The City

represented by Elaine Mills, Esq., of the New York City Office of Labor Relations. The Union was represented by Reuben Rosenberg, Associate Director of Research and Negotiations, District 37 AFSCME.

POSITIONS OF THE PARTIES

The demand arises from the fact that the week-day components of weekly schedules for these employees varies with some of them being required to work five successive days which include Saturdays or Sundays# sometimes both. These individuals are paid their regular hourly, daily, weekly rates for such days with no extra premium payments for the Saturday and/or Sunday work. (If, however, their scheduled hours of work - as in some instances is true - comes within the Monday through Friday workweek, and if called in to work on Saturday and/or Sunday, they become subject to premium pay for said days at time and one-half of their regular rate of pay)*.

Inasmuch as many of these employees occupy foreman positions and a substantial number of the individuals have supervisory responsibilities for such activities as recreational or park facilities or water supply and sewer maintenance, their schedule often includes weekends as part of seven-day operations continuously manned by rotating shifts and alternating schedules.

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*However, one witness - Superintendent of Repairs to Distribution, Department of Water Supply, Borough of the Bronx, indicated that, although entitled to compensatory time for work done on Saturdays and Sundays, his claims for such pay had been so closely queried that he had gotten "disgust and works on those days without any compensation therefor.

Aside from arguing for and entering support for its demand on an equitable and comparative basis, the Union makes a point of the fact that "this demand has been on the table at various negotiations for a matter of eight or ten years" and in the further words of the Union spokesman "Have been shunted from one forum to another" without success.

There was put into evidence by the Union, a Summary of Recommendations of an Impasse Panel concerning demands of various units represented in City-wide negotiations by District 37 for the 1973-76 contracts between the parties. This states, in pertinent part:

UNION DEMAND NO. 53.

We do not recommend acceptance of this demand. However, we discern an inequity insofar as certain employees work without premium pay on week-ends along with "Prevailing rate" employer, who by virtue of their statutory comparability to private sector employees, receive premium pay. We are not, unfortunate in a position to delineate exactly which employees are so affected, or to determine the scope of any relief to be accorded them. We believe, therefore, that this particular matter should be referred to and resolved in the next "unit negotiations."

The most emphatic point made by the Union is that, as indicated in the foregoing statement of the earlier impasse panel, the subject supervisors often supervise employees on

Saturdays and Sundays who are paid at time-and-one-half regular rates for the former and at double time their regular rates for the latter. This is because many of such individuals come under the Public Works Prevailing Wages Law (Article 1, Sect. 17 N.Y. State Constitution and Chapter 31, Sect. 220 of New York State Laws). Section 220 provides in part, that "each employee on public work contracts shall be paid not less than the wages prevailing in the community for such work and includes also "fringes" and "supplements" (Chapter 31, Sect. 220, Subd. 3, as amended by Ch. 976 L. 1966).

As examples of the payments made to other employees for Saturday and Sunday work "as such" (that is, even though falling within a five-day schedule) the Union submitted as examples: Section 220 Determinations for Plumbers, Thermostat Repairers and Tappers (March 25,:1976) which provide double time for work done on Saturdays,,Sundays and holidays; Steam-fitters (May 19, 1975) which provide for time and one-half rates for work done on Saturdays and Sundays and double-time for holiday work; Auto Mechanics and Machinists (July 28, 1975) which stipulate time and one-half rates for work done on Saturdays, Sundays and holidays; Welders (July 11, 1974), time and one-half of regular rate for Saturdays, Sundays and holiday work; Pipefitters, (March 25, 1976), double-time their regular rate for work done on Saturdays, Sundays and holidays; Bulldozers; Laborers (April 18, 1975), Saturday work at time and one-quarter, Sunday work at time and one-half.

The Union submitted computations which showed that in some instances, employees coming under Prevailing Wage Determinations worked under the subject employees acting as their Foremen and (in spite of the higher hourly rate of the

Foremen) received total gross compensation for the same number of hours (if the workweek included Saturday and Sunday) higher than the Foreman (although , in some cases, this was brought about by the fact that the Section 220 employee earned a higher hourly rate than the subject foreman),

The Union also made comparisons between the subject supervisors and other foremen coming under Prevailing Wage Law Determinations. One such comparison follows:

TITLES	PREMIUM PAY HOURLY RATE	PREMIUM PAY DAILY RATE
Foreman	No premium pay (Hourly rate: $8.877)	No premium pay (Daily rate: $71.916)
District Foreman General Park Foreman	No premium pay (Hourly rate: $9.758)	No premium pay (Daily rate: $78.06)
Borough Foreman	No premium pay (Hourly rate: $10.919)	No premium pay (Daily rate: $87.36)

Foreman Asphalt Worker	(1 1/2x) $12.87 Sat. (1 1/2x) $12.87 Sun.	$ 102.96 $ 102.96
Foreman Crane Engineman (A.M.P.E.S.) 40	(2x) $27.12 Sun.	$ 217.00
Foreman of Steamfitters (35 hours)	(1 1/2x) $14.11 Sat. (1 1/2x) $14.11 Sun.	$ 98.77 (7 hrs.) $ 119.93 (8 hrs.)
Foreman Auto Mechanics	(1 1/2x) $16.095 Sat. (1 1/2x) $16.095 Sun	$ 128.76 $ 128.76
Foreman Mechanics Motor Vehicle	(1 1/2x) $16.455 Sat. (1 1/2x) $16.455 Sun.	$ 131.64 $ 131.64

Argument and testimony by the Union was also addressed to other aspects of the jobs in question which in the Union's view impose additional hardships, unpaid for here, paid for when done by others. As one example, because of the supervisory nature of the work, some employees are compelled to be at work substantially before the start of the scheduled and paid for day and leave after their official day is ended. A particular instance of such requirement is for supervisors who control City-run golf facilities. Others who work beyond the scheduled day receive premium pay but according to the testimony, the foremen ask for none and get none. (When the subject employees have, on occasion, however, been required to work a set period of overtime - because of an emergency water-pipe breakdown, for instance - they are subject to compensatory time off or premium pay.)

The Union concludes that, taking into consideration the various routine amounts of unpaid overtime already contributed by these supervisors (roughly estimated by the Union to be typically three hours in pre- and post-standard day overtime per week) the cost to the City would be less than if these employees were paid premium pay for Saturday and Sunday work at the same rates as paid for prevailing-rate employees who work directly or indirectly under them and for periods varying from ad hoc brief emergencies to full side-by-side schedules for entire weeks.

The Union spokesman makes a particularly emphatic point of the fact that veteran employees who have satisfied civil service requirements in both highly specialized craft skills and administrative talents ate denied payment for depri-

vation of weekends conventionally expected and enjoyed by working men and at the same time those working alongside them (and at a subordinate level of responsibility) are granted extra compensation for such deprivation, sometimes yielding the latter higher per-hour rates or total compensation than the per annums listed for the latter in the announcements, postings and official career and salary schedules of the City of New York.

Specifically, the Union is not asking that all employees receive the premium pay for Saturday and Sunday work. The Union demand is that all employees who work with and who supervise "Prevailing-rate employees" who receive premium pay be given the same premium pay rate.

At the outset of these hearings, the City interposed a threshold position that apart and aside from the "equities" and comparisons conventionally resorted to in making interest determination in contract disputes (and within the framework of those criteria on which impasse panels are mandated to act in Chapter 52 of the New York City Labor Law) this Panel is obligated to conclude that it has no legal authority to act on the subject put before it as a Union demand in these proceedings.

Casting its posture in terms of the standards enunciated by the New York City Collective Bargaining Law - comparisons of benefits of like employees in comparable public and private employment; the context of overall benefits received; change in the cost of living; "the interest and welfare of the public": such factors as are "normally considered" - the City's stance is that the fourth of the foregoing criteria has now been so firmly fixed as a determinative factual force by economic reality, statutory finality and contractual dispositiveness as

to overwhelm all the other criteria stated and, indeed, prevent access of the Union to them.

As the City presented it, "the interest and welfare of the public" criterion received controlling definition when in 1975, the New York State Legislature, reacting to a state of drastically critical City financial distress, met in Extraordinary Session and enacted the Now York City Financial Emergency Act signed into law by the Governor (Chapter 868 of the Laws of New York,1975).

Section 1 thereof states, in part: "It is hereby found and declared that a financial emergency and an emergency period exists in the City of New York, The City is unable to obtain the funds needed by the City to continue to provide essential services to its inhabitants or to meet its obligations to the holders of outstanding securities..."

The statement continues by declaring that failures and defaults loomed which would be "devastating" in their effect on the City and its inhabitants, concluding, in part, that "this situation is a disaster and creates a state of emergency" and going on to state in further part:,

"To end this disaster, to bring the emergency under control and to respond to the overriding state concern described above, the state must undertake an extraordinary exercise of its police and emergency powers under the state constitution, and exercise controls and supervision over the financial affairs of the city of New York, but in a manner intended to preserve the ability of city officials to determine programs and expenditure priorities within available financial resources."

Chapter 868 proceeds thereafter to set up certain monitoring and approval functions of a newly created New York State Emergency Financial 'Control Board. Among these is the statement that "all contracts entered into by the City or any covered organization must be consistent with the provisions of this act and must comply with the requirements of the financial plan as approved by the board" (Sect. 7, c.). In further support of this power, the Act provides prior submission to the board of contracts or other obligations, and the right of the board “by order” to "disapprove any Contract or other obligation reviewed by it, only upon a determination that, in its judgment, the performance of such Contract or other obligation would be inconsistent with the financial plan an~ the City or covered organization shall not enter. into such contract or other obligation" (Section 7, c, iii).

For the purpose of showing how the foregoing enactment had been implemented and administered by the mechanisms mandated by Chapter 668, the City presented testimony by Eugene Keilin, Executive Director of the Municipal Assistance Corporation for the City of New York, a joint City-State emergency financial body arising out of the current City fiscal crisis*. Mr. Keilin testified that he was also formerly counsel for the Deputy Mayor for the City of New York for Finance.

Mr. Keilin testified that his responsibilities as counsel to the Deputy Mayor (from September 1975 to September l976) included preparation and administration of the

*Created by State legislation to exchange its notes for the City's outstanding short-term obligation which the City was unable to redeem.

City's three-year financial plan and liaison with the Emergency Financial Contract Board created by the New York State legislature.

As part of his testimony, Mr. Keilin identified a resolution adopted by the Emergency Financial Control Board on October 20, 1975, approving the financial plan which had been submitted by the City of New York to comply with the requirements of the Financial Emergency Act. This financial plan, approved on October 20, 1175, is a year-by-year program in summary of the City's expenditure and revenue projections, designed to meet the requirements of the Financial Emergency Act culminating in the City's operating with a balanced budget in the fiscal year l978.

As introduced in evidence, this financial plan makes certain "assumptions" concerning "Revenues" and "Expenses"; Item 2-A, thereof made an assumption as one of the bases of the plan that the City would incur no additional cost caused by collective bargaining agreements in fiscal years 1977 and 1978 above the levels in force during fiscal year 1976. In short, no money is to be provided- or expended for increase of benefits through collective bargaining - including fringe benefits of any kind - for 1976, 1977 and 1978.

The witness pointed out that the figures for 1976-77 and 1977-78 are actually lower on this plan than the figures for 1975-76. He explained this by pointing out that in the first fiscal year, the City was running a deficit of approximately a billion dollars for that year and the need and purpose was to close this deficit by a combination of expenditure reductions and revenue increases. There is therefore, actually less

money in the financial plan for personal service in fiscal year 1977 and 1978 than there was in fiscal year 1976.

Mr. Keilin also identified as another exhibit, a memorandum dated May 18, from Stephen Berger, Executive Director of the Emergency Financial Control Board, to the members of the E.F.C.B. It contains in part, a resolution passed by that Board. This resolution contains the following statements to which attention is directed by the City:

RESOLVED, that the Board adopts the following general wage and salary policies which shall be, applicable, during the emergency period or until such earlier time as Board shall determine, to collective bargaining agreements of the City or covered organizations:

1.) No agreement shall provide for general wage or salary increases or increases in fringe benefits.

2.) No agreement shall provide for increases or adjustments to salaries or wages, including those based upon increases in the cost of living, unless such increases or adjustment are funded by independently measured savings realized, without reduction in services, through gains in productivity, reductions of fringe benefits or through other savings approved by the Board, all of which savings shall be in addition, to those provided for in the financial plan.

3.) Each agreement shall provide for a mechanism to permit savings in pension costs or other fringe benefits during the term of agreement.

Mr. Keilin's further testimony was that, pursuant to its powers under the Financial Emergency Act, it is part of the function of the E.F.C.B. to review and approve or disapprove City contracts, including collective bargaining agreements. The witness stated that at the time of his testimony, the E.F.C.B. had rejected at least two collective bargaining agreements which had not conformed to its enunciated criteria.

In support of the upholding of the wage increase and/or fringe benefits freeze (absent reciprocal productivity savings or other countervailing considerations embodied in the "crisis rules") the City cites Impasse Awards I-110-74, I-113-44 and I-22-75 denying the Union's demands.

On the basis of the foregoing, the City moved that the issue be dismissed without consideration of other criterion enunciated in the Labor Law raised by the Union.

Note on Procedure

The Impasse Panel held hearings in abeyance while he took under advisement the City9s.preliminary motion. He thereafter decided to hear the parties on other aspects of the controversy without prejudice to the possibility that final recommendation might be to accept the City's motion. Accordingly the parties were so informed and the Union was given opportunity to put in its full position and the City to respond thereto without relinquishing its right to have its threshold posture acted on and to be given dispositive weight, if so concluded by this Impasse Panel.

CONCLUSIONS AND RECOMMENDATIONS

On full and careful consideration of the positions of the parties, I conclude that neither an Impasse Panel

nor the Board of Collective Bargaining has authority grant the demand sought by the Union at this time.

This conclusion is based on the Financial Emergency Act for the City of New York and the contract review powers of the EFCB and its resolution of October 20, 1975, which approves the City's three year financial plan and precludes increases in fringe benefits for all City Employees through June, 1978. Additionally, it is based upon the EFCB memorandum of May 18, 1976, which likewise prohibits increases in fringe benefits. Accordingly, the claim will be dismissed and denied without evaluation of the arguments of equity put forth by the Union and the countervailing arguments advanced by the City inasmuch as such evaluation would be futile and academic.

RECOMMENDATION

I recommend that the Union' s demand for inclusion in its July 1, 1976 Collective Bargaining Agreement with the City of New York of "Premium pay for working on Saturday and Sunday" be dismissed and denied.

DATED: August 8, 1977

Louis Yagoda, Impasse Panel

State of: New York)
SS:
County of: Westchester)

On this 8 day of August, 1977, before me personally came and appeared Louis Yagoda to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.