OFFICE OF COLLECTIVE BARGAINING
CITY OF NEW YORK

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In the Matter of the Impasse Between
the CITY OF NEW YORK (PROBATION DEPARTMENT), IMPASSE PANEL'S

Public Employer, REPORT
- And - AND
RECOMMENDATIONS

UNITED PROBATION OFFICERS ASSOCIATION, DOCKET NO.
Union. I 175-84

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BEFORE: DAVID N. STEIN, ESQ., Impasse Panel BCB-787-85

APPEARANCES:

FOR THE CITY OF NEW YORK:
Frances Milberg, Esq.
General Counsel, Mayor's office of Municipal Labor Relations, By:
Marc Z. Kramer, Esq., Deputy General Counsel
Ian Davies, Esq., Assistant General Counsel

FOR THE UNITED PROBATION OFFICERS ASSOCIATION:
O'Donnell & Schwartz, Esqs.
By: Joel C. Glanstein, Esq.

TIMES, DATES AND PLACE OF HEARING: NEW YORK CITY OFFICE OF COLLECTIVE BARGAINING, 110 Church St. New York, New York 10007
April 23, 1986, 10 A.M.
May 14, 1986, 11:40 A.M.

I M P A S S E P A N E L ' S R E P 0 R T

On February 3,1986, the Deputy Chairman of the office of Collective Bargaining, Alan R. Viani, wrote to Mr. Michael Davies, an Assistant Director of the Mayor's Office of Municipal Labor Relations (OMLR), and to Mr. Wallace Cheatham, President of the United Probation officers Association (UPOA), confirming their agreement to submit the instant dispute to an impasse proceeding. In pertinent part, that letter stated:

> As you are both aware, two issues relating to the Impasse Panel report and recommendation (1 175 85) have arisen. They are:
>
> 1. How shall sick and annual leave balances which were earned and accrued prior to January 1, 1986 be treated with respect

to charging these accruals for sick and annual leave which may be taken by affected employees on January 1,1986 and thereafter. (See note below and,

2. What adjustments to current work schedules can be made to either the lunch hour or the daily work schedules to ameliorate the impact of the increased number of"hours in work week upon employees.

The City has agreed that issue number (1) above may be submitted to an impartial for a clarification and determination as to how pre 1/1/86 leave accruals should be treated with respect to utilization of these accruals on January 1,1986 and thereafter. The City has NOT agreed to submit issue number (2) above to an impartial on the basis that this matter is managerial prerogative and that the Crowley report and recommendation specifically gave the City and the agency the authority to schedule the new working hours according to their needs.

Accordingly, pursuant to my conversation with both of you, this office will proceed as follows:

1. Case No. 1 175 85 will be reopened for the specific purpose of clarifying the Crowley report and recommendation and to issue a determination on issue number (1) above. A one member panel will be selected for this issue pursuant to OCB procedures.

NOTE: Employees earned leave balances prior to January 1, 1986 while working a thirty-five hour work week. The work week was increased to 37 1/2 hours effective January 1, 1986. The agency requires employees to charge current leave utilization drawn against pre January 1,1986 accruals on an hourly basis. (E.G., 10 days of pre 1/1/86 accruals convert to 70 hours of leave balances).

The Impasse Panel report and recommendation referred to in Mr. Viani's letter was issued by the late Dean and distinguished Professor of Labor Law at the Fordham University School of Law, Joseph R. Crowley. The Impasse report was the product of a Herculean effort on his part to bring these parties together. On December 9, 1985, the City and UPOA accepted the report.

One of the key components to his report provided, as follows:

> 2. Effective January 1,1986, the work week of Unit employees shall be increased from 35 hours to 37.5 hours per week and the annual salary rate adjusted accordingly. The scheduling of the increased hours shall be a managerial prerogative.

Subsequent to the implementation of the Crowley report, the parties discovered they were unable to agree on how leave accrued prior to 1/1/86 should be administered, and Mr. Viani's letter outlining the parties agreement to resolve their dispute ensued.

Pursuant to the parties' agreement and the rules of the New York City Office of Collective Bargaining, OMLR and the UPOA designated me as a one member Impasse Panel in accordance with the New York City Collective bargaining law to issue a report and recommendation on this interest dispute, which they stipulated to submit, as follows:

> How shall sick and annual leave balances, which were earned and accrued prior to January 1, 1986, be treated with respect to charging these accruals for sick and annual leave, which may be taken by affected employees on January 1, 1986 and thereafter?

The submission agreement was the identical statement of issue which appeared in Mr. Viani's February 3 letter summarizing the parties' agreement to dispose of this controversy.

At the Impasse proceedings on April 23, both parties were represented by counsel, presented documentary and oral evidence and submitted argument in support of t heir respective positions. Subsequent to the close of the hearing on April 23, and during the

pendency of the submission of post - hearing briefs by the parties, the City requested, by letter dated April 24, 1986 to reopen these proceedings so that it could present new evidence to rebut that which had been submitted by the UPOA, and, in addition, to object to the Panel's jurisdiction to entertain the instant dispute. Over the strenuous objection of the Union, I agreed to grant the City's request because of the investigative nature of an impasse proceeding, as compared to a grievance arbitration which is quasi judicial in nature. At the second hearing, on May 14, both parties were again represented by counsel, and submitted more evidence and material in support of their respective positions. In addition, the City moved to dismiss the proceedings on jurisdictional grounds. By an opinion accompanying the release of this Report and Recommendations, I have denied the City's motion in all respects.

In addition to the second paragraph of Professor Crowley's report, the following provision appears to be at the root of the parties' differences:

5. These Recommendations resolve all of the demands presently before the Impasse Panel.

In paragraph four of the Report, the parties agreed to be bound, other than for the general wage increase, longevity increment, and study of certain salaries provisions, by the Coalition Economic Agreement. The Coalition Agreement prohibits its signatories from making additional economic demands during its term.

Each of the parties has urged that the other's position in this matter represents a new demand for economic concessions from it in violation of the CEA and paragraph 5 of Dean Crowley's award.

Thus, Dominic Colucci, the Union's Vice President, testified about a conversation he had with Harry Karetzky, the First Deputy Director of OMLR, during the course of the mediation conducted by Dean Crowley. Colucci summarized a commitment he stated was made to him by Mr. Karetzky in which Karetzky advised him that the employees represented by UPOA would not suffer any loss of benefits enjoyed by them as a result of the increased workweek. The purpose of this testimony was to establish that the officers' accrued annual and sick leave days would not be diminished. The UPOA also believed, without sharing its assumption with the City, that leave accruals prior to January 1, 1986 would be carried forward on a day for day basis in conformity with the practice of the District Attorney's offices in the City with respect to District Attorneys Investigators whose workweek was similarly increased from 35 to forty hours in a June, 1984 Impasse Report by Professor Crowley which did not address the treatment of accruals.

Under cross - examination, Mr. Coluccio conceded that the question of the accruals had never been specifically raised by either party to this dispute. In fact, it was apparent that when the City indicated to the Union that t here would be no loss of benefits, it believed, without sharing its assumption with UPOA,

that by crediting probation officers for the seven hours per day of accrued leave, it indeed was providing them with the leave they had earned, on an hour for hour basis. Each party was looking at the same proverbial glass of water which had been fifty percent filled, and found the glass either half empty or half full, depending upon its perspective. One conclusion was apparent, there had never been any meeting of the minds on the issue of accruals.

In a similar vein, the City attempted to show that the Citywide Agreement on Leave, which regulated the conversion of accruals when employees working a normal work week were assigned to a staggered workweek in which some workdays were longer than others controlled the instant controversy. This is because the City, in the exercise of its management prerogative under paragraph two of Professor Crowley's report, had assigned about 700 of the 750 or so bargaining unit members to a staggered work week consisting of four seven hour days, and one 9 1/2 hour day. However, the provision of the Citywide, Article VI, is entitled "TIME AND LEAVE VARIATIONS", and, the Union argues, was never intended to govern a unique situation, like the instant one, where there had been an increase in the work week, through the collective bargaining process.

Despite the fact that these parties had opted for the Impasse procedures of the New York City Collective Bargaining Law (NYCCBL) to resolve their differences over this accruals issue, they were raising arguments more appropriate for a rights forum, i.e.: they were asserting that agreements already in place supported their respective positions. However, under the NYCCBL, I

am required to consider the criteria set forth in the New York City Collective Bargaining Law at Section 1173 - 7.0(b), which provides as follows:

> (1) 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 in New York City or comparable communities;
>
> (2)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;
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> (3) changes in the average consumer prices for goods and services, commonly known as the cost of living;
>
> (4) the interest and welfare of the public;
>
> (5)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.

In addition, the laws of 1978, Ch.210, Section 7 mandate that I consider, as a primary factor, the financial ability of the City to pay the cost of the increase in wages or fringe benefits sought by the UPOA.

Pursuant to Section 1173 - 7.0c(3)a.of the NYCCBL, as part of my responsibilities as Impasse Panel, I conducted a mediation session between these parties, and although they were not able to completely resolve their differences, I was able to learn the acceptability of certain compromises which also played a role in the formulation of this Report and Recommendations.

Finally, the contents of the Viani letter of February 3 and the submission agreement reached on April 23 also governed the outcome of this matter.

Upon the record of evidence and arguments submitted to me, I find that the following facts are relevant to the statutory and other considerations before me.

The Department of Probation has a budget of $34 million, forty six percent of which is funded by the State of New York. If the UPOA's position is accepted by the Panel, the value of accrued vacation and sick leave accumulated prior to January 1, 1986 will be seven percent greater than the value currently attributed to such accumulations by the City. Of that seven percent, the parties agree, somewhere between forty and forty - six percent will be borne by the State. The City allocates $105000 to the value of pre-1986 vacation accruals and $200,000 to sick leave accruals for the same period. Bargaining unit members had banked about 15000 days of annual leave and 30000 days of sick leave before January 1,1986. The record reveals that the average employee had accumulated 21 vacation days and 42 sick days prior to the effective date of the increased workweek.

The majority of employees in the bargaining unit are either in the Tier II or Tier III/IV Plans of the New York City Employees Retirement System. This means the majority cannot become eligible to receive retirement benefits, under the ordinary course of events, until age 62. The average age of employees in the Unit is less than 45, and retirements of Probation Officers

have averaged about twelve per year for the past fifteen years. While some of the employees in the bargaining unit have the option of "cashing in" accumulated sick time upon retirement on a two for one basis i.e.: each two days of sick leave generates one day of pay, these employees frequently elect to have terminal pay calculated on total months of services, so that the outcome of this controversy would have little or no impact on such employees or the City. Only employees hired prior to 1973 retain the right to convert accrued sick leave.

In addition, the Department does not hire substitute or temporary employees to cover for probation officers who are absent on annual leave or due to illness. Thus, based on the information contained in this and the preceding paragraph, the Hon. Joseph Wightman, Acting Deputy Commissioner of the Department of Probation, agreed that the actual cost to the Department of the Union's position on the annual and sick leave accrued before January 1, 1986 by unit employees might fall short, in fact, well short, of the City's estimates.

The Union's evidence that investigators in the District Attorney's office who achieved increased compensation for a longer work week by virtue of an Impasse Award similar to the one in dispute here which was issued by Dean Crowley in 1984 did not suffer the "reductions" in accruals proposed by the City here was not contested. However, it was noted that the District Attorneys are not Mayoral agencies, or agencies which by law must come under the aegis of the New York City Board and office of Collective Bargaining. Instead,

the District Attorneys, as autonomous elected officials of the State of New York, freely elected to be covered by the New York City Collective Bargaining Law in accordance with Section 1173-4.0(c) of that statute. As such, the Deputy Director of Labor Relations of OMLR, James Hanley stated the District Attorneys designate OMLR to negotiate on their behalf. However, once the agreement is reached, he stated, the District Attorneys assume responsibility for contract administration, and , consequently, OMLR no longer possesses control over what may occur during that process. Thus, Hanley explained, while the Impasse Report governing the DA Investigators might well have been administered in the way described by the UPOA's witness, the City did not approve of the manner in which the District Attorneys dealt with annual and sick leave accrued by employees before the effective date of the increased workweek. Moreover, he testified, he spoke with the office of each District Attorney subsequent to the promulgation of the 1984 Report covering the investigators and stressed that accruals accumulated prior to the increased work week were to be calculated by the same methodology advanced by the City in this proceeding. Hanley indicated that he had no indication, before these hearings, that his instructions had been disregarded.

By way of comparison, there are about 130 employees in the District Attorneys PBA Unit, while there are 750 in the Probation

Unit. About 700 of the Probation Officers work a staggered work week of four seven hour days and one 9 1/2 hour day. The DA Investigators do not generally work a staggered work week.

The City has asserted that because most of the Unit employees were shifted to a staggered work, week upon implementation of the Crowley Report herein, that Article VI, Section 8 of the Citywide Agreement governs the instant situation, and therefore, that the position advanced by the Union must fall to this already existing agreement, which provides, in pertinent part, as follows:

> ...all existing leave balances shall be converted from daily to hourly balances ... based on the number of hours in the work week as follows:
>
> | WORK WEEK | CONVERSION RATE |
> |---|---|
> | 35 HOURS | 7 HOURS PER DAY |

The record shows that prior to Professor Crowley's Report, in conformity with Departmental Regulations individual employee leave records were maintained in days or parts thereof, and only in hours when part days could not accurately reflect the accumulated leave. Unit members who worked summer hours (six hour days) still earned vacation credit for seven hour days.

On these facts, the UPOA maintains that the standards contained in Section 1173-7.0(c)(3)(b) of the NYCCBL clearly warrant a finding that the current leave utilization of unit employees of annual and sick leave accrued prior to January 1, 1986 should be treated the same as time accrued after January 1, 1986, i.e. on a day for day basis. This the Union contends, would reflect the practice in the Department for the period before January 1,1986.

The UPOA argues that the record demonstrates that in the Department of Probation, as well as in other City agencies, notably, in the District Attorneys offices, similarly situated employees did not suffer a reduction in accrued days of sick and annual leave after a increased workweek with a consequent increase in compensation, was implemented as a result of an Impasse report and recommendations.

The Union stresses that its position , if it is accepted, has a minimal economic cost to the City given the budget of the Department, given the fact that the budget is almost fifty percent funded by the State and the non-recurring nature of the problem(leave days accrued after January 1, 1986 are not in dispute, both parties agree.).

The UPOA points out that if the City's position is sustained, the intent and thrust of the Crowley Report will be undermined. The Report, the Union notes, provides that no further economic demands and concessions above and beyond those contained within could be extracted by either party from the other. Since, the UPOA concludes, the City's position requires the surrender of earned leave time by bargaining unit employees by 7.14 percent,_it violates the Crowley Report and therefore, must be rejected.

The UPOA asserts, that it has clearly established the provisions of the Citywide Agreement relied upon by OMLR to justify its argument are inapplicable to the instant case since those provisions apply only where employees working a regular week are

shifted to a staggered workweek. The Union stresses that the City has reduced the pre-1986 accruals of those unit employees who still work a regular workweek, thereby demonstrating that the section of the Citywide agreement relied upon by the employer is being employed as a smokescreen.

The UPOA concludes its argument by noting that in the consideration of interests disputes, equity and justice are factors that must be given weight., citing Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th ed., p. 806, fn. 9. The Union goes on to assert that since the Crowley Report was the result of extensive mediation, and ultimately, a consensus of the parties, there should be no loss of rights employees would reasonably believe they possessed prior to reaching agreement. The UPOA reinforces this stand by pointing out that it conducted its negotiations with the knowledge of how Dean Crowley's 1984 Report covering the District Attorneys' Investigators had been implemented. To permit the City to depart from this practice solely in the Department of Probation, it contends, would be highly inequitable.

For its part, the City stresses that reference to Mr. Viani's letter of February , 1986 reveals that it agreed only to the present review on the condition that it constitute a clarification of the Crowley Report, and not a DE NOVO Impasse proceeding. Thus, the City argues, any recommendation emanating from the Panel must not stray from the confines of Professor Crowley's recommendations. In this regard, the City mirrors the Union's position when it refers me to those

provisions of the Report and the CEA prohibiting further economic demands by the parties, noting that if the Union's position is sustained, it will reap an economic windfall of increased leave time for which it did not bargain.

The City goes on to contend that since the Crowley Report is silent on how accrued leave time should be treated, and since the Panel lacks authority to disturb in any way the terms of the Crowley Report, the Panel has no choice but to reject the Union's position.

The City stresses that Commissioner Wightman's uncontradicted testimony proved that there would be an economic impact if the Panel sustained the Union's position, i.e.: an additional cost of $105000 for annual leave accrued prior to January 1, 1986, and an additional cost of $200000 for accumulated sick leave. Since the cost of these items would exceed the cost of the Crowley Report, the City asserts, it constitutes an additional economic demand in violation of the parties' settlement, and is barred under the terms under which the City says the issue was brought before this Impasse Panel.

The City again raises the question of this Panel's authority to entertain the accrued leave issue, on the grounds that the UPOA lacked the power to negotiate it before either Professor Crowley or me. The basis of the City's argument, as noted more fully in my opinion on Jurisdiction issued herewith, is that since the issue of accruals involves the application of the Citywide Time and Leave rules, and, consequently it was for the Citywide majority representa-

tive to negotiate on a Citywide basis, and not for the UPOA to bargain on a Unit basis. Since, the City concludes, the UPOA could not have negotiated that which it claims to have already achieved before Professor Crowley, it cannot fall within the parameters of this Panel's jurisdiction.

The City closes out its argument by adding that assuming, ARGUENDO, that the Panel possesses authority to render a determination on the issue voluntarily submitted to it by both parties, the City's approach is the only reasonable outcome. It notes that the leave balances which are at issue were accrued at a time when employees were working regularly scheduled work weeks of seven hour days. These accruals, the City notes, were earned pursuant to Article V of the Citywide Agreement and the "Leave Regulations". The balances, admittedly in terms of days, were, it claims, provided to employees based on the fact that such days consisted of seven hours. The City stresses that after the implementation of the Crowley Report, it assigned the overwhelming majority of employees in the Unit to a staggered work week, necessitating the application, it asserts, of Article VI, Section 8 of the Citywide Agreement, quoted earlier in this Report, and which, by its operation, achieves the result sought by the City in this Impasse proceeding.

The application of the Citywide Agreement was in consonance, the City contends, with the policy established by Deputy Director Hanley when he informed the District Attorneys' offices that accrued leave time should be converted to hourly

banks at a rate of seven hours per leave day which each employee had accumulated prior to the implementation of the increased workweek of, in that case, forty hours.

The City characterizes the efforts of the UPOA to thwart its conversion of pre-1986 accruals to seven hours per leave day as an attempt to impose a retroactive increase on a benefit, i.e., paid leave, already earned. The City claims there is no basis in the Crowley Report for this Panel to reach such a conclusion.

Before turning to my recommendations for the resolution of this matter, I must dispose of certain issues before me. First as I noted throughout these proceedings and in both of the opinions which I issued, the parties, by stipulating to submit this issue to Impasse waived their rights, whatever they may have been, to have it decided by the application of principles of contract law as to what may or may not have been stated by the parties' representatives during negotiations, or to the language of the Time and Leave provisions of the Citywide Agreement. The Citywide is relevant to the extent that I conclude, if I do so at all, that it covers similarly situated City employees.

Additionally, as I have noted at far greater depth in my accompanying Opinion on jurisdiction, the question of whether the UPOA was the appropriate employee organization to take the issue of the accruals to impasse is not mine to make, and since there is no order outstanding directing me to

refrain from issuing this Report and Recommendations, I shall carry out my responsibility to go forward.

There is no question that the City possesses the ability to incur the small cost of the Union's proposal for crediting annual and sick leave time accumulated before January 1, 1986. The budget of the Department of Probation is about $34 million, 46 percent of which is funded by the State of New York. Assuming that each employee eligible to do so cashes in his leave accrued before January 11 1986, the projected cost to the City would be approximately $100000, *consisting of one hundred cents on the dollar for annual leave, and fifty cents on the dollar for sick leave. However, as Commissioner Wightman testified, it would be impossible for the City to incur even this relatively small expense, because many of the employees who have earned sick leave accruals are not eligible to cash them in when they leave the service, and others who are eligible could elect an alternate method for the computation for terminal leave payments. Furthermore, given the relatively young average age of the bargaining unit when compared to retirement age, it is likely that the annual leave accruals of 21 days per employee will have been exhausted before most employees leave the City service. Since employees who take time off are not replaced by substitutes, there is no dollar cost to the City when an employee is absent. Of course, there is may be a consequent decrease in productivity which cannot be quantified.

Other than the Investigators in the District Attorneys'

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*The value of $200000 is approximately halved, in terms of cost to the City, by the State's contribution. The budgetary impact of the cost is spread over the years in which leave days are cashed in, and the cost may only be attributed to the current fiscal year if the

offices, there is no evidence that other City or public employees have exchanged longer workweeks for increased compensation. The City's assertion that its directions to the DAs' offices about how to calculate accruals after the implementation of the 1984 Impasse Report set a precedent in how to apply Article VI, Section 8 of the Time and Leave Rules to the Probation Officers' Unit cannot be accurate, since the cited section of the Time and Leave Rules applies to the assignment of employees who formerly worked a normal work week, to a staggered work week. The District Attorney Investigators worked a regular work week both prior and subsequent to the increase in hours from 35 to forty per week.

Similarly, Article VI, Section 8 does not justify the City's position with respect to Probation Officers, since some of them, ALBEIT a minority, were not assigned to a staggered work week after the increase in hours from thirty - five to 37 1/2. There is no basis for the application of the provision to them, and, yet, if this reasoning were followed, some employees in the Unit would suffer the reduction in pre-1986 accruals, while others would not. The absence of a uniform rule governing this situation would clearly be the source of morale problems, and could not have been the goal of either of these parties when they achieved a consensus on their overall settlement, as memorialized in Dean Crowley's Report.

It appears, therefore, that I must take advantage of the broad submission agreement stipulated to by the parties, in

light of the Crowley Report, to fashion a practical resolution to this problem, where, indeed, there was no previous meeting of the minds, as evidenced most eloquently by Mr. Colucci's testimony.

There is a public interest , as well as the Union's interest, in bringing a good measure of finality to the negotiating process which is sufficiently lengthy as it is. Moreover, the Union is a signatory to the Coalition Agreement which has represented a consensus among its signatories that the same basic economic package should apply to all, with some minor variation permitted for problems with individual bargaining units. In this case, the parties provided for an additional award of compensation for increased productivity of employees in the bargaining unit in the form of a longer work week. The City's stand that the cost of the Impasse award not rise above the agreed upon level, no matter in how minuscule a fashion, represents a justifiable concern that any relaxation in its posture could lead to a stampede for similar adjustments from employees in the one hundred or so other bargaining units with which the City negotiates.

On the other hand, there is an important public interest in preserving the morale of the Probation Officers, who have been, assuming a more significant role in the administration of the over-burdened criminal justice system in preparing sentencing reports, and overseeing the conduct of convicted criminals who are not

incarcerated or who enjoy early release as a result of overcrowded jails. To tell such an employee, who has voluntarily agreed to a longer work week, that his accrued sick and vacation days are no longer worth a full day off is clearly the wrong message, and not one which finds its roots anywhere in the Crowley Report.

While imputing the extra value associated with the new seven and one half hour workday to leave time which was earned when the day had a value associated with a length of seven hours is a cost to the City when time is cashed in upon retirement, there is no cost when the days are used for time off, since the City does not employ replacements. Thus, a system which permits employees to enjoy a full day's leave for a day earned, and which does not add to the cost of the Crowley Report would appear to meet the public interest, as well as the interest of the parties.

I will therefore recommend that the Probation Department identify the number of accrued annual and sick leave days accumulated by each employee before January 1, 1986. Those days will be drawn down and eliminated when employees are ill or take time off. As a result, the problem created by these pre-1986 days will be liquidated as the days are utilized.

If these days are cashed in, however, then they will be multiplied by a factor of 7/7.5 so that the City will not disburse sums not contemplated by the Crowley Report.

The average age of Unit employees leads me to infer that most will not retire for some time. Few, if any, will suffer a loss when annual leave is cashed in upon retirement, since the pre-1986 days will have been liquidated when employees took vacation time. Similarly, only employees hired before 1973, and who elect to cash in sick time as their terminal leave benefit, will be prejudiced by this result. Since this group is extremely small, and because many of these sick days will have been drawn down, even these bargaining unit members are unlikely to incur much unfavorable impact from this compromise method of calculating the pre-1986 accruals.

The reason that I do not find the mode of administration of the DA Investigators controlling here is that the City was not aware, prior to agreeing to the Crowley Report that the accumulations before implementation of the longer work week for that bargaining unit were being honored on a day for day basis. Thus, I cannot bind the City to a practice of offices of autonomous public officials which it cannot control and to which it provided advice consistent with its position here which, nevertheless, went unheeded.

In administering my recommendations, there is a possibility of abuse, since most unit members work four seven hour days, and one 9 1/2 hour day - the danger being the disproportionate use of the 9 1/2 day. Employees who take what would be more than a random (one in five) number of days off on their scheduled 9 1/2 hour day should be

docked to the extent that such absences exceed twenty percent of their pre-1986 accruals, pursuant to the following formula:

> If absences on 9.5 hour days are non-random, i.e. exceed 20.999 percent of days off, then the number of 9.5 hour days exceeding 20.000 percent will be identified and multiplied by 2.5, the difference between a seven hour day accrued before 1986 and the 9.5 hour day. The resulting number of hours will be divided by 7.0. The resulting number of days will be deducted from" the employee's annual or sick leave bank of pre-1986 accruals.

This Report and Recommendations should not be viewed, in any way, as departing from any practice between the City and other employee organizations as to how a day off is calculated

This case is SUI GENERIS because the impact of the increased work week was never discussed by these parties, there was no meeting of minds of the parties on the issue, and the person who played the pivotal role in bringing about the resolution of the parties' difficult and protracted negotiations, has, unfortunately, died.

Therefore, in accordance with the authority vested in me by the New York City Collective Bargaining Law, and the stipulation of submission of the parties, I issue the following

R E C 0 M M E N D A T 1 0 N S :

1. The City of New York, Department of Probation, shall identify the number of accrued days of annual leave and sick leave earned by each employee in the bargaining unit before January 1, 1986.

2. The City of New York shall establish a separate sick leave, and annual leave bank of such pre-1986 accruals, and shall notify each employee of same.

3. When a bargaining unit member uses a sick or annual leave day, that day shall be subtracted first from the pre-1986

of sick or annual leave accruals, as the case may be, until the pre-1986 bank is completely liquidated. When time is taken in the manner, employees shall receive day for day credit for leave days earned before 1986.

4. When an employee leaves the service of the City of New York, and is eligible to cash in accrued annual and/or sick leave, his entitlement for reimbursement for the days accrued in the pre-1986 annual and sick leave bank shall be calculated by multiplying said accumulations by seven hours and dividing the result by seven and one-half hours. The resulting days shall be multiplied by the appropriate salary and other adjustments, if any, to obtain the sum of money due said employee.

5. Employees in the bargaining unit may not enjoy day for day credit for pre-1986 accruals to the extent that they take more than 20.999 percent of their sick days or 20.999 percent of their annual leave days on days they are scheduled o work 9.5 hours during a single calendar year. Employees who do so shall be docked the time taken as follows: multiply the number of 9.5 hour days in excess of 20.000 percent by 2.5 hours. The resulting number of hours shall be divided by 7.0. The days accrued in the pre-1986 annual or sick leave bank, as the case may be, shall be reduced by the number of days resulting from the calculation describe in the preceding two sentences.

Dated: Maplewood, New Jersey
July 22, 1986

DAVID N. STEIN, ESQ.
IMPASSE PANEL

DAVID N. STEIN, ESQ, affirms in accordance with Article 75, CPLR, as follows: He is an arbitrator duly appointed by the New York City Office of Collective Bargaining to sit as a one person Impasse Panel pursuant to the New York City Collective Bargaining Law and the Rules of the Office of Collective Bargaining. The above Report, Recommendations and signature are his.

Dated: Maplewood, New Jersey
July 22, 1986

DAVID N. STEIN, ESQ.
IMPASSE PANEL

DAVID N. STEIN, ESQ.
IMPASSE PANEL